

In the Provincial Court of Alberta

Citation: R v Stephens, 2022 ABPC 220

Date: 20221101
Docket: A77251930R;
A77250460R
Registry: Calgary

Between:

His Majesty the King

- and -

Timothy Paul Stephens



Reasons for Judgment of the Honourable Judge A.A. Fradsham

Introduction of Charges

[1] Mr. Timothy Stephens (for reasons which will become evident when I recite the facts, I will hereafter refer to Timothy Stephens as Pastor Stephens) is charged, by way of two separate violation tickets (A77250460R and A77251930R, respectively) with having committed the offence, at Calgary, Alberta, on each of February 28, 2021 and March 7, 2021, of failing to comply with an order of a medical officer of health issued under Part 3 of the *Public Health Act*, R.S.A. 2000, c. P-37. To violate such an order is an offence under section 73(1) of the *Public Health Act*.

[2] By agreement, and for reasons of judicial efficiency, the two charges were tried together before me.

[3] These charges arose out of alleged infractions of public health measures implemented by the Government of Alberta in response to what I will generally describe as the Covid pandemic which had been declared by public health authorities to exist in Alberta for a significant period of time in 2020 and 2021, and certainly on the two dates set forth in the violation tickets before me.

[4] The responses of various levels of government to the Covid pandemic resulted in the imposition of restrictions on several freedoms hitherto taken for granted by the Canadian public, and those restrictions caused much heated debate between those who, for a variety of reasons, supported the measures, and those who, for a variety of reasons, did not.

[5] The existence, and intensity, of that debate, which continues to this day, makes it important to state clearly, at the outset, both what this judgment addresses, and what it does not address.

[6] Frankly, the task before me is a relatively straightforward one: to determine whether the Crown has proven beyond a reasonable doubt that the accused violated section 73(1) of the *Public Health Act, supra*, by failing to comply with an order issued by the Chief Medical Officer of Health (CMOH). As no constitutional issues were raised by the accused, that task does not include a determination of whether the CMOH's order was authorised by law.

[7] Also, the task before me does not include a determination of any of the various philosophical issues which might be raised by either the declaration of the pandemic, or the measures implemented to address it. The task before me most certainly does not include the Court (through this judgment) engaging in, or expressing support for or opposition to, the many passionate responses engendered by the various political and philosophical issues raised either in relation to the declaration of the pandemic, or the steps taken as a consequence of the declaration. The passions, and instances of enmity between individuals, which have subsequently arisen have no place in a courtroom which is to be a safe forum in which the relevant questions of law are to be determined objectively and impartially, and in a calm and respectful manner.

[8] With that understanding made clear, I will now address the issues which are before me.

Relevant Statutes and Orders

[9] The following sections are found under Part 3 of the *Public Health Act, supra*, (which I will sometimes refer to as "the PHA").

[10] Section 29(1) of the *Public Health Act, supra*, states:

"A medical officer of health who knows of or has reason to suspect the existence of a communicable disease or a public health emergency within the boundaries of the health region in which the medical officer of health has jurisdiction may initiate an investigation to determine whether any action is necessary to protect the public health."

[11] Section 29(2) of the PHA states:

"where the investigation confirms the presence of a communicable disease, the medical officer of health...(b) may do any or all of the following:

take whatever steps the medical officer of health considers necessary

to suppress the disease in those who may already have been infected with it,

to protect those who have not already been exposed to the disease,

to break the chain of transmission and prevent the spread of the disease, and

to remove the source of infection".

[12] Section 73(1) of the PHA states:

“A person who contravenes this Act, the regulations, an order under section 62 or an order of a medical officer of health or physician under Part 3 is guilty of an offence.”

[13] On June 26, 2020, the Chief Medical Officer of Health, utilizing the powers granted by section 29(2), issued CMOH Order 26-2020. That order read, in part, as follows:

1. Effective immediately, all persons in the Province of Alberta must comply with the following requirements.
 - 2(1) Subject to sections 2(2) and 2(3) of this Order, every person attending an indoor or an outdoor location must maintain a minimum of 2 metres distance from every other person.
 - (2) Persons attending an indoor or an outdoor location who are all members of the same household or cohort group are excepted from the requirements in section 2(1) of this Order.
 - (3) A person does not contravene section 2(1) of this Order if the person acts in compliance with any guidance established by Alberta Health, regarding physical distancing as set out in an applicable guidance document (which may be found at <https://www.alberta.ca/biz-connect.aspx>.)
3. If the circumstances require it, this Order can be amended to add, remove or modify any step the Chief Medical Officer of Health considers necessary to take to address the presence of COVID-19 within Alberta.
4. Notwithstanding anything in this Order, the Chief Medical Officer of Health may exempt a person or a class of persons from the application of this Order.
5. This Order remains in effect until rescinded by the Chief Medical Officer of Health.

[14] It is CMOH Order 26-2020 which Mr. Stevens is alleged to have contravened.

Facts

[15] The following is a summary of the evidence called in the trial. There are no material contradictions within the evidence, and I accept it on matters of fact. As for the opinions expressed by Pastor Stephens, I accept that they are honestly held by him.

Peace Officer Katherine Thorpe

[16] Officer Thorpe is a Peace Officer employed with the City of Calgary. On February 28, 2021, she worked with the “covid team” to enforce the *Public Health Act* rules relating to the Chief Medical Officer of Health’s orders. This included inspecting complaints of organizations or people not abiding by the public health orders.

[17] On February 28, 2021, Officer Thorpe, with her partner (Officer Taylor), responded to a complaint regarding the Fairview Baptist Church in Calgary, Alberta. Upon arrival at the church, she spoke with the accused who was the Pastor of the Church. She was in uniform, and informed Pastor Stephens that she and her partner were Peace Officers investigating a complaint. Pastor Stephens advised her that she and her partner would be allowed into the Church to observe the service.

[18] Before meeting Pastor Stephens, Officer Thorpe observed “individuals and families” entering the church, and cars parked in the parking lot. Only the “odd person” was wearing a mask. Pastor Stephens was not wearing a mask.

[19] Once inside the Church, Officer Thorpe walked to the “upper... sanctuary” and observed the services from the back of the sanctuary. She observed an open aisle down the middle of the Church with seating on both sides. Pastor Stephens was standing in front of a pulpit conducting the service. Pastor Stephens was not wearing a mask. Most of the people in the congregation attending the service were also not wearing masks.

[20] Officer Thorpe described the seating as “close together... like [what] you’d see on an airplane... row upon row on both sides.” No seating areas were blocked off, nor was there signage directing pedestrian traffic as commonly seen during the pandemic. During the service, Pastor Stephens did not discuss the seating arrangements. The Officer also did not observe anyone “screening” the people coming in, such as asking if they had recently been exposed to somebody with covid.

[21] Officer Thorpe said the Church was “full” of people standing beside each other “shoulder to shoulder” with Pastor Stephens at the front. The Officer said no one else was at the front with Pastor Stephens. The Officer and her partner proceeded to inspect the basement of the Church. There were no concerns. She estimated that she was inside the Church for about five minutes.

[22] Officer Thorpe again attended the Church on March 7, 2021. The same scenario unfolded – she arrived at the Church, spoke with Pastor Stephens about why she was there, and he permitted her into the building when the service started. She observed people parking vehicles and entering the building. Very few people were wearing masks. As on the first occasion, Officer Thorpe was inside the Church for just a “few minutes”, observing the congregation from upstairs. She checked the basement of the Church and then left.

[23] Officer Thorpe took photos of the service on both occasions. After visiting the Church on two occasions, Officer Thorpe discussed what she observed with her supervisors to determine what tickets she should issue. A week after March 7, 2021, she visited Pastor Stephens at his home. She issued him two tickets for contravening section 2(1) of the Chief Medical Officer of Health’s Order 26-2020 dealing with social distancing rules. The violation tickets she issued on that occasion form the subject matter of this trial.

[24] Officer Thorpe explained that the social distancing rules required an individual to stay two metres apart from another person unless that person was a member of his or her household. When she visited the Church, she did not observe people staying two metres apart. It was “obvious” to her that people were under a metre apart because people were sitting “shoulder to shoulder” in rows. She could not recall if she observed people touching shoulders. She further explained that the number of people in attendance at the Church made it extremely unlikely that people were in the same family or cohort.

[25] The Crown showed Officer Thorpe three photos. The photos were taken on February 28, 2021, from the upper sanctuary of the Fairview Baptist Church, and depicted the inside of the Church. Officer Thorpe described one photo as showing people sitting on each side of the aisle, with Pastor Stephens standing at the front pulpit. She further described people sitting in chairs side-by-side and front to back. Officer Thorpe testified that there was a maximum of “8 inches” between the knee of one woman sitting and the occupied seat in front of her.

[26] The Crown showed Officer Thorpe four other photos. These photos were taken on March 7, 2021, from the upper sanctuary of the Fairview Baptist Church, and depicted the inside of the Church. The seating was the same as it was on February 28, 2021. Officer Thorpe described the people in the photo standing side-by-side and front to back. She believed the people were within two meters of each other. She explained that the people in the pictures did not appear to be from one household because they wore different clothes and were of “varying groups”.

[27] The photos and a copy of the CMOH Order were marked as Exhibit 1.

[28] On cross-examination, defence counsel asked Officer Thorpe whether she asked Pastor Stephens about any social distancing measures he had in place. She could not recall. She agreed that she issued Pastor Stephens violation tickets based on the public health order that people must socially distance themselves.

Peace Officer Jace Taylor

[29] Officer Taylor is a Peace Officer employed with the City of Calgary. In early Spring 2021, he was working as a Peace Officer assigned to enforcing covid rules. He attended the Fairview Baptist Church two times. He recalled visiting the Church on March 7, 2021 and a “couple of weeks before or after that date”. I find that his other visit was on February 28, 2021 with Officer Thorpe.

[30] On March 7, 2021, Officer Taylor arrived at the Church with Officer Thorpe and was greeted by Pastor Stephens. A representative of the Church explained to both of them that they would allow them to enter to inspect the building. Once the service started, they were permitted into the Church along with an Alberta Health Service Inspector. Officer Thorpe was taking pictures.

[31] While inside, he observed that the “main gathering space” was “fairly full, like, packed shoulder to shoulder with people, tightly spaced rows”. He “guessed” the rows were 6 inches apart. He noticed that each row was full of people, and that some were not wearing masks. When asked whether the people appeared to be from the same household, he said that it looked like a “diverse” crowd and that people were not from the same family. Officer Taylor also went into the basement as part of his inspection, but it was empty. He did not observe any one-way signage directing people in and out of the building, nor any blocked-off seating in the Church.

[32] The Crown showed Officer Taylor the series of photos contained in Exhibit 1. He described the photos as depicting a “worship area” with tightly packed people.

[33] On cross-examination, Officer Taylor admitted that he did not discuss with Pastor Stephens any social distancing measures he had implemented. He could not recall whether there was any signage outside of the Church about the pandemic.

Pastor Timothy Stephens

[34] Pastor Stephens testified in his defence. He has been a Pastor since January 2014. He described his duties as including “preaching the word of God” to a congregation at the Fairview Baptist Church.

[35] Pastor Stephens explained that due to the pandemic and the changing health orders, he would send an email and/or verbally inform his congregation of the latest public health rules, requirements, and regulations put in force by the Alberta government. He posted signage on the

Church's front door, and believed there were signs inside the Church at the top of the stairs where people entered the auditorium. He said these signs were required by the City of Calgary, and they outlined the covid-19 rules.

[36] He also "streamed" his sermons to provide members of his congregation the opportunity to attend Church from their homes, or in the basement of the Church where a TV was set up. He did this to ensure people could attend church in a way that was comfortable for them.

[37] Pastor Stephens explained that he kept up-to-date with the changing covid measures. Pastor Stephens testified that he provided to members of his congregation a document published on June 23, 2020, by the Government of Alberta, titled "Covid-19 Information and Risk Mitigation".

[38] Pastor Stephens explained that his congregation is smaller than many other churches in the city. His congregation's demographics include many "homeschool families, very large families". Using himself as an example, he said he has a wife and eight children creating a family of ten. However, his family is not the largest in the congregation. Other members of his congregation include individuals from "addiction houses, like from the Dream Centre," all of whom live together but do not look like a typical family household.

[39] On cross-examination, Pastor Stephens admitted that he had a Twitter account. He agreed that he posted a tweet that read: "some pastors maintain there is no religious objection to taking the covid-19 vaccination. I offer four reasons." He agreed that he attached to this tweet a link to an article about how there are religious grounds to say "no" to the covid-19 vaccination. He further agreed that on the Fairview Baptist Church website he provided a record of past sermons of his and other pastors. One of the sermons was titled "Resisting Tyrants". Pastor Stephens explained that this sermon is about how there is a "Biblical foundation for what doing is righteous in the face of evil".

[40] The Crown suggested to Pastor Stephens that he believed the covid-19 rules were a form of tyranny. Pastor Stephens explained that he did not think the Alberta Government had the jurisdiction to direct churches on how to operate or distribute ordinances, such as communion or baptism. He explained that tyranny meant "someone stepping beyond their jurisdiction".

[41] He agreed that the Alberta government could regulate parts of a church, such as requiring fire extinguishers, or the washing of hands before serving food. However, if the government were to direct how churches were to pray, and from which books, this, in his view, would interfere with the "essential nature of religious gathering", and the government would have no jurisdiction in such matters.

[42] The Crown suggested that Pastor Stephens believed the limits on social distancing impacted religious gatherings. Pastor Stephens replied, "not necessarily". He explained that he did not feel it was his place to enforce covid rules among his congregation; instead, he believed his role was to inform people of the rules, and allow people to make their own choices. He did not view his role as forcing people to comply with rules. He considered himself a messenger of the ongoing rules.

[43] Pastor Stephens explained that many of the side-by-side rows at his Church are occupied by one family households. He agreed, however, that the separate rows are less than two metres apart. When it was suggested that the people sitting in different rows were not in the same household, Pastor Stephens disagreed, saying that people who do not look like family may sit

together side-by-side or front to back as part of, for example, a “safe house” group. When directed to photographs contained in Exhibit 1, Pastor Stephens agreed that, in one photo, two people he recognized were seated next to each other within arms reach and were not related by blood, and did not live in the same household.

[44] Pastor Stephens agreed he took no steps to rope off any of the aisles at the Church. He agreed that he did not ban people from sitting within two metres of each other. He agreed that people did not “routinely” wear masks at the Church. He agreed that he was not wearing a mask in the photos taken by Officer Thorpe. He agreed that he did not discourage people from making physical contact inside his congregation.

Law and Analysis

[45] The offence created by section 73(1) of the PHA is a strict liability offence. I respectfully adopt the following comments of Judge Olsen in *R. v. Hoffman* 2021 ABPC 289:

[8] Section 73(1) is part of the *Public Health Act*, the provisions of which constitute public welfare legislation (*R. v. Canonaco*, 2010 ABPC 67 at para 5)(*Canonaco*).

[9] The Alleged offence is a strict liability offence. It is different from a *mens rea*, usually criminal, offence. These categories of offences (as well as a third category, which isn’t at issue here) were explained by the Supreme Court of Canada in *R. v. Sault Ste Marie*, [1978] 2 SCR 1299 at 1325-1326 (*Sault Ste Marie*):

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey C.J.H.C. so referred to them in [*R. v. Hickey* (1976), 12 O.R. (2d) 578j (H.C.), reversed 13 O.R. (2d) 228 (C.A.)].

... Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as “wilfully”, “with intent”, “knowingly” or

“intentionally” are contained in the statutory provision creating the offence.

[10] In this type of case, therefore, the Crown must prove the *actus reus* beyond a reasonable doubt. As a strict liability offence, it is subject to the defence of due diligence (see, for example, *Canonaco*, at para 6 and *R. v. George*, 2018 ABPC 20 at para 12). The defence of due diligence must be established on a balance of probabilities (*Sault Ste Marie*, at 1325). The defence bears this persuasive burden.

[46] In the case at bar, it is alleged that Pastor Stephens committed an offence under section 73(1) of the PHA by contravening Chief Medical Officer of Health Order 26-2020 which states that “every person attending an indoor or an outdoor location must maintain a minimum of 2 metres distance from every other person” (paragraph 2(1) of the Order).

[47] Consequently, in the case at bar, the Crown must prove beyond a reasonable doubt that:

- (1) Pastor Stephens,
- (2) on one or both of the dates alleged,
- (3) attended at an indoor or outdoor location within Alberta, and
- (4) failed to maintain a distance of at least 2 metres from every other person at that location.

[48] It must be noted that much of the evidence called at this trial, by both the Crown and the defence, seemed to be directed at the following question: did Pastor Stephens take steps to ensure that those people who attended the religious services he was conducting on February 28, and March 7, 2021, complied with the “2 metre” requirement set out in numbered paragraph 2(1) of CMOH Order 26-2020 dated June 26, 2020?

[49] With respect, that question is not legally relevant to the issues before me. Pastor Stephens is charged with contravening section 2(1) of CMOH Order 26-2020. I see nothing in the provisions of that particular order of the Chief Medical Officer of Health which imposed any legal obligation on Pastor Stephens to ensure, compel, or encourage compliance, by those attending the religious services he was conducting, with paragraph 2(1) of CMOH Order 26-2020.

[50] On the evidence before me, I am satisfied beyond a reasonable doubt that Pastor Stephens, on both February 28, and March 7, 2021, at Calgary, Alberta, attended an indoor location. However, I am not satisfied beyond a reasonable doubt, or at all, that Pastor Stephens, on either of those two dates, failed to “maintain a minimum of 2 metres distance from every other person.” The evidence before me is that while congregants within the Church did not “maintain a minimum of 2 metres distance from every other person”, on both dates Pastor Stephens was alone at the front of the Church. There was no evidence in respect of either of the dates as to the distance between Pastor Stephens and other people. None of the photographic evidence allows one to draw any reliable inference as to the distance, on either date, between Pastor Stephens and other people.

[51] During submissions, when this issue was raised with Counsel, the Crown noted that Pastor Stephens did not claim to be 2 metres or more distant from other people. With respect, the onus is on the Crown to prove beyond a reasonable doubt that Pastor Stephens did not factually

comply with the distancing requirements of paragraph 2(1) of the Order; there is no onus on Pastor Stephens to prove that he was in factual compliance with the Order. Only if the Crown proves beyond a reasonable doubt that Pastor Stephens was in actual non-compliance with the Order does a burden then shift to Pastor Stephens to prove on a balance of probabilities that he exercised due diligence in his efforts to comply.

[52] Since the Crown has failed to prove beyond a reasonable doubt that Pastor Stephens, on either of the dates alleged in the Violation Tickets, failed to “maintain a minimum of 2 metres distance from every other person”, there is no factual contravention which would cause one to have to consider the question of due diligence.

[53] The Crown has failed to prove beyond a reasonable doubt an essential element of the two alleged offences being tried before me.

Verdicts

[54] I find the accused not guilty of the charges set forth in both Violation Tickets.

Dated at the City of Calgary, Alberta this 1st day of November, 2022.



A.A. Fradsham
A Judge of the Provincial Court of Alberta

Appearances:

Steve Johnson
for the Crown

Stephen Whitehead
For the Accused