

Information No. 210723391P1

IN THE PROVINCIAL COURT OF ALBERTA
Sitting at Edmonton

BETWEEN:

HER MAJESTY THE QUEEN

- and -

CHURCH IN THE VINE OF EDMONTON and TRACY FORTIN

(Accused/Applicants)

NOTICE OF INTENTION TO RAISE CONSTITUTIONAL ARGUMENT
Pursuant to *Constitutional Notice Regulation*, Alta Reg 102/1999

RE: *R v Church in the Vine and R v Fortin*;
Public Health Act, sections 71 and 73(1);
Trial: April 19-21, 2022; Courtroom No. 355; Edmonton, Alberta

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	James S. M. Kitchen Barrister & Solicitor 203-304 Main St S Suite 224 Airdrie, AB T4B 3C3 Phone: 403-667-8575 Email: james@jsmklaw.ca
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This is an application to be brought at trial.

WHEREAS THE ACCUSED STANDS CHARGED THAT:

COUNT 1: On or about the 7th day of March, 2021 at or near Edmonton, Alberta, did obstruct, molest, hinder or interfere with a person in the execution of any duty imposed or in the exercise of any power conferred on the person by the Public Health Act or its regulations contrary to section 71 of the Public Health Act and did thereby commit an offence contrary to section 73(1) of the Public Health Act;

COUNT 2: On or about the 14th day of March, 2021 at or near Edmonton, Alberta, did obstruct, molest, hinder or interfere with a person in the execution of any duty imposed or in the exercise of any power conferred on the person by the Public Health Act or its regulations contrary to section 71 of the Public Health Act and did thereby commit an offence contrary to section 73(1) of the Public Health Act; and

COUNT 3: On or about the 6th day of June, 2021 at or near Edmonton, Alberta, did obstruct, molest, hinder or interfere with a person in the execution of any duty imposed or in the exercise of any power conferred on the person by the Public Health Act or its regulations contrary to section 71 of the Public Health Act and did thereby commit an offence contrary to section 73(1) of the Public Health Act (Collectively, the “Charges”).

TAKE NOTICE THAT counsel for the Accused will apply to the Court for the following orders:

1. A declaration pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) that the Charges were issued in breach of sections 2(a) of the *Charter*;
2. A declaration pursuant to section 24(1) of the *Charter* that the Charges were issued in breach of sections 2(c) of the *Charter*;
3. A declaration pursuant to section 24(1) of the *Charter* that the Charges were issued in breach of sections 2(d) of the *Charter*;
4. An order pursuant to section 24(1) of the *Charter* dismissing the Charges, or, in the alternative, entering absolute discharges for all the Charges; and

5. In the further alternative, an order pursuant to section 24(1) of the *Charter* granting the accused a stay of proceedings to all the Charges due to irreparable prejudice to the integrity of the judicial system.

AND FURTHER TAKE NOTICE THAT the grounds for the application are as follows:

6. Tracy Fortin (“Pastor Fortin”) is a local Christian minister and pastor at Church in the Vine (“Church in the Vine”), located in Edmonton, Alberta. She Pastors alongside her husband, pastor Rodney Fortin.
7. Church in the Vine is an Evangelical Protestant Church located in northwest Edmonton, Alberta. It currently consists of approximately 600 congregants.

SECTION 2(a) – FREEDOM OF RELIGION

8. An infringement of section 2(a) of the *Charter* will be made out where a claimant has a sincerely-held religious belief that has a nexus with religion and where the impugned government action interferes with the claimant’s ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial.¹ Freedom of religion is both an individual and collective right and religious institutions such as churches hold 2(a) rights in addition to the individual congregants and pastors of churches.²

9. According to the Supreme Court of Canada:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, **the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.**³

10. Pastor Fortin has dedicated her life to obeying the Lord Jesus Christ, not merely by being a follower of Christ, but also by being in the ministry. Pastor Fortin has served in various ministry capacities for over 28 years, her entire marriage to husband and fellow pastor,

¹ [*Alberta v Hutterian Brethren of Wilson Colony*](#), 2009 SCC 37, 2 SCR 567 at para 32; [*Ktunaxa Nation v British Columbia \(Forests, Lands and Natural Resource Operations\)*](#), 2017 SCC 54, [2017] 2 SCR 386 at para 122

² See [*Loyola High School v. Quebec \(Attorney General\)*](#), 2015 SCC 12.

³ [*R v Big M Drug Mart Ltd.*](#), [1985] 1 SCR 295 at para 94.

Rodney Fortin. Pastor Fortin has pastored Church in the Vine by preaching the gospel and ministering to her congregants through, among other things:

- 1) in-person preaching and teaching;
- 2) leading worship in-person;
- 3) praying in-person;
- 4) counselling in-person;
- 5) physically presiding over the sacraments of baptism and communion; and
- 6) through fellowshiping and encouraging her congregants in-person.

11. Pastor Fortin sincerely believes the above manifestations of religious belief must be done physically, in-person and without Church in the Vine congregants being artificially and arbitrary divided, separated, and their faces concealed by government. Pastor Fortin further believes that to limit the worship gatherings of Church in the Vine congregants is an act of disobedience to Christ, the Head of the Christian Church. She believes she is called as a pastor to care for the whole health of her congregants: physical, spiritual, mental, emotional, and relational. She believes that the CMOH Orders generally, but especially the restrictions on the number of congregants that can attend, the distancing restrictions, and the masking restrictions, hurt her congregants far more than COVID-19 ever did or ever could. She is compelled by her conscience to minister to her flock through worship services that are not restricted to a small number that divides and separates her congregants, or that are interfered with by compelled masking and compelled avoidance of physical interaction. Her conscience precludes her from turning away part of her congregation or enforcing distancing and masking amongst her congregants. In short, she must obey God, not men, as the apostles did when faced with directives from the Sanhedrin that opposed the will of God.

12. Pastor Fortin and the congregants of Church in the Vine sincerely believe in the spiritual and theological necessity of physically gathering together with as much of the whole church family at a time as possible. This is for many religious purposes, such as for edifying each other, listening to the preaching of the Word of God together, praising the Lord together through corporate singing, praying together, together partaking in the Lord's Supper, and witnessing baptisms in-person. They further believe in the spiritual and theological necessity of physical touch with each other, such as the laying on of hands for prayer and physically

and emotionally comforting and ministering to each other through handshakes, hugs and other expressions of brotherly and sisterly affection. Further still, they believe all of this ought to be done with an open, uncovered face and without compulsion or coercion of any form. Church in the Vine congregants believe this physical gathering is distinct from and pre-eminent among every other gathering in the life of a church community and this corporate in-person gathering consists of both structured and unstructured elements that require active participation and the mutual religious edification and encouragement of each other.

13. Pastor Fortin and the congregants of Church in the Vine further believe that a Sunday morning worship service involves coming into the presence of the Lord and communing with the Lord in a uniquely special way. Although Christians like Pastor Fortin and Church in the Vine congregants believe Jesus is always with them and God is everywhere at all times, they also believe that the sanctuary on Sunday morning is a sacred, holy, and consecrated place and time. It is something to be especially revered and guarded. Those genuinely seeking the truth and grace of Jesus are welcome, at least during normal times, but those who seek to enter the sanctuary for other purposes, such as to inspect and observe for the sake or inspecting or observing, or to use the observations gathered to sanction, penalize, or otherwise hinder future worship gatherings are not welcome. Not only is the presence of such a person a tangible source of material disruption, distraction, and intimidation for congregants, it is also a spiritual disruption that should not be tolerated. Attending a worship service is not only an intensely personal time that requires vulnerability and assurances of privacy if it is to be of benefit for the attendee, it is also a spiritual encounter with the King of the universe that demands the upmost reverence of and surrender to the Lordship of Christ.
14. Pastor Fortin is a shepherd of her people, called to guide them, but also to protect them and jealously guard their spiritual serenity in the sanctuary of the Lord. There is a reason, after all, the large room where the worship service takes place is referred to as the “sanctuary”. It is a consecrated space, intended to be a place of refuge, protection, and peace—a place where God’s people come to be with Him and Him alone, away from the world. They come to be comforted, encouraged, and filled with the Holy Spirit as they worship God and cast their cares upon Him. They cannot fully do that if they know they are effectively being spied on by government officials that disapprove of what they are doing and desire to restrict it.

15. To a secular government official, the above has no meaning. To the modern administrative state, these beliefs and spiritual experiences have no significance worth recognizing. But to a society that is highly religious, as the nation of Canada once was, it has immense meaning. This is precisely why “[e]veryone who, at or near a meeting [of persons met for religious worship] wilfully does anything that disturbs the order or solemnity of the meeting” commits a criminal offence in this country.⁴ This seemingly archaic law speaks of a time when the majority easily understood why a government official standing at the back of the sanctuary, looking around, taking photos or notes, is disturbing to the solemnity, and an affliction upon the sacredness, of a Sunday morning worship service. That the official did not “intend” to interfere, interrupt, disturb, or distract from the worship service from their secular, non-spiritual point of view is religiously irrelevant. That Ms. Allen did not and did not intend to walk up and down the aisles asking people questions while they prayed, sang praises to the Lord, or tried to listen to the preaching does not mean that her presence does not have a negative practical and spiritual impact on the congregants.
16. The Charges penalize Pastor Fortin and Church in the Vine congregants for manifesting their religious beliefs to gather in-person for the purposes of worship and therefore interferes with the exercise and protecting the exercise of their freedom of religion in a manner that is more than trivial or insubstantial. Physically entering the sanctuary during or immediately before a Sunday morning worship service, without the consent of Church in the Vine and with the resulting harm to the rights of Church in the Vine congregants, was not reasonably required for enforcement purposes. The use of obstruction charges as a means to gain entry, which will itself result in further *Charter* rights breaches, is a breach of the rights guaranteed by section 2(a) of the *Charter*.

SECTION 2(c) – FREEDOM OF PEACEFUL ASSEMBLY

17. Freedom of peaceful assembly is largely undeveloped. However, an identified purpose of freedom of peaceful assembly is to protect the physical gathering together of people.⁵ Further, the right of peaceful assembly is, by definition, a collectively held right: it cannot be

⁴ *Criminal Code*, R.S.C., 1985, c. C-46, section 176(2) and (3).

⁵ *Roach v Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 1994 CanLII 3453 (FCA) at para 69

exercised by an individual and requires a literal coming together of people.⁶ The scope of what collective activities section 2(c) of the *Charter* guarantees is not yet fully defined, but there can be no doubt that assembling for religious purposes goes to the core of what 2(c) protects, on the same level of importance as assembling for political purposes. We can again look to section 176(2) and (3) for why and how this must be so. That disturbing the “solemnity” of an in-person religious gathering is considered such a socially intolerable activity that it has been criminalized is instructive.

18. The right to peacefully assemble is separate and distinct from the other section 2 *Charter* rights, and it requires the state to refrain from interfering in such assembly. It may even require the state to facilitate such assembly.⁷ Although freedom of assembly cases have typically been determined on other *Charter* grounds, most notably freedom of expression,⁸ freedom of peaceful assembly is an independent constitutionally-protected right that is directly engaged by the Charges.
19. The Charges penalize Pastor Fortin and Church in the Vine congregants for exercising and protecting the exercise of their fundamental constitutional freedom to peacefully gather together in-person for the purposes of worship, unmolested by government officials, and therefore interferes with their freedom of peaceful assembly. Physically entering the sanctuary during or immediately before a Sunday morning worship service, without the consent of Church in the Vine and with the resulting harm to the rights of Church in the Vine congregants, was not reasonably required for enforcement purposes. The use of obstruction charges as a means to gain entry, which will itself result in further *Charter* rights breaches, is a breach of the rights guaranteed by section 2(c) of the *Charter*.

SECTION 2(d) – FREEDOM OF ASSOCIATION

20. A purposive approach to freedom of association defines the content of this right by reference to its purpose: “to recognize the profoundly social nature of human endeavors and to protect the individual from state-enforced isolation in the pursuit of his or her ends”.⁹ Freedom of

⁶ *Mounted Police Assn. of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 64 [MPAO]

⁷ See e.g. *Garbeau c Montreal (Ville de)*, 2015 QCCS 5246 at paras 120-156

⁸ Basil S. Alexander, “Exploring a More Independent Freedom of Peaceful Assembly in Canada” (2018) 8: I, UWO J Leg Stud 4 online: <https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5715/4809>

⁹ MPAO at para 54, citing from *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, 1987 CanLII 88 (SCC) at 365 [*Re Public Service*] [Emphasis added].

association allows the achievement of individual potential through interpersonal relationships and collective action.¹⁰

21. The purposes of the right to freedom of association include the protection of individuals joining with others to form associations (the constitutive approach) and of collective activity in support of other constitutional rights (the derivative approach).¹¹ These purposes are highly relevant for religious associations like Church in the Vine, who, during a Sunday morning service, exercise all of the other three fundamental freedoms of religion, peaceful assembly and expression. In the sanctuary on a Sunday morning, the individual attendees and the congregation as a whole, on both an individual and collective level, exercise their rights to manifest their religious beliefs, to express themselves and receive expression in the form of prayer, song, and preaching, and to peacefully gather together to do these things as a community and spiritual family.
22. The Charges penalize Pastor Fortin and Church in the Vine congregants for exercising and protecting the exercise of their fundamental constitutional freedom to maintain their religious association through meeting together, unmolested by government officials, and collectively engage in activities protected by their other constitutional rights. The Charges therefore interfere with their freedom of association. Physically entering the sanctuary during or immediately before a Sunday morning worship service, without the consent of Church in the Vine and with the resulting harm to the rights of Church in the Vine congregants, was not reasonably required for enforcement purposes. The use of obstruction charges as a means to gain entry, which will itself result in further *Charter* rights breaches, is a breach of the rights guaranteed by section 2(d) of the *Charter*.

REMEDY ANALYSIS – SECTION 24(1) OF THE CHARTER

23. Pastor Fortin seeks declarations pursuant to section 24(1) of the *Charter* that the Charges breach sections 2(a), 2(c), and 2(d) of the *Charter*.
24. As a result of the above *Charter* breaches, Pastor Fortin seeks a dismissal of the Charge, or, in the alternative, an absolute discharge, or, in the further alternative, a stay of proceedings.

¹⁰ [*Dunmore v Ontario \(Attorney General\)*](#), 2001 SCC 94 at para 17

¹¹ [*MPAO*](#), at para 54, citing from *Re Public Service*, at 366.

25. *Charter* rights were breached in the threatening to charge and ticketing of Pastor Fortin in response to her actions to assert the *Charter* rights of herself and the congregants that she shepherds. Both the purpose and the effect of issuing the Charges is to penalize Ms. Fortin and deter her and her congregation from exercising their *Charter* section 2 rights to gather for worship on Sunday mornings in a manner consistent with Scripture instead of in a manner consistent with government restrictions.
26. Had Ms. Fortin complied with the unnecessary demand of Ms. Allen to physically enter the sanctuary of Church in the Vine immediately before or during the Sunday morning worship service, she and the congregants she is duty bound to protect would have suffered the infringement of their *Charter* section 2 rights. This is precisely what had occurred earlier in 2021 and 2020 when police and AHS officers had gained entry. Those instances revealed the extent to which the unwanted presence of such officials disrupted and threatened the emotional and spiritual wellbeing of the congregants in attendance. Individuals have the fundamental right to attend and participate in a religious worship service without the interference and disruption caused by the presence of a government official who is inside the sanctuary in the midst of worshipers for the purpose of collecting evidence that will likely be used to sanction such worship services or the individuals participating in such services.
27. Where a *Charter* violation occurs as a result of government action, section 24(1) of the *Charter* permits this Court to provide an appropriate and just remedy.¹² The Supreme Court of Canada has stated:
- Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. ... A superior court may craft any remedy that it considers appropriate and just in the circumstances.¹³
28. This Court has stated, “by application of s. 24(1), a court of competent jurisdiction may issue a judicial stay (or other *Charter* remedies) in respect of the criminal proceedings.”¹⁴

¹² [*R v 974649 Ontario Inc*](#), 2001 SCC 81 at para 14.

¹³ [*Doucet-Boudreau v Nova Scotia \(Department of Education\)*](#), 2003 SCC 62 at para 87.

¹⁴ [*R v Pringle*](#), 2003 ABPC 7 at para 95.

29. In *R v Elliot*¹⁵, this Court found that a just and appropriate remedy under s 24(1) of the *Charter* was to grant the accused an absolute discharge, due to a violation of the accused's right not to be arbitrarily detained, despite the fact that the accused was found guilty of the charge.¹⁶ In addition, the Ontario Court of Appeal restored a trial judge's decision to dismiss charges against the accused because of an unlawful strip search that violated the accused's *Charter* section 8 rights, even though it had no bearing on the driving offence for which the accused was charged.¹⁷
30. The Supreme Court of Canada has stated that a stay of proceedings can be entered "where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued."¹⁸ In *R v Pringle*¹⁹, this Court held that an appropriate remedy for a *Charter* section 9 violation includes a stay even if there is no nexus or temporal connection between the breach and the evidence that ultimately would lead to conviction.²⁰ In *R v Herter*²¹, this Court stayed the proceedings of an accused based on his *Charter* section 9 rights having been breached.²² Likewise, the Supreme Court of Canada has stayed proceedings against an accused due to a breach of their *Charter* section 7 and 11 rights.²³
31. A stay of proceedings is appropriate when two criteria are fulfilled:
- 1) The prejudice caused by the abuse in question will be manifest, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
 - 2) No other remedy is reasonably capable of removing that prejudice.
32. These guidelines apply equally to prejudice to the accused or to the integrity of the judicial system.²⁴ The presence of either one of the criteria justifies the exercise of discretion in favour of a stay.²⁵

¹⁵ [1984] AJ No 940, 57 AR 49

¹⁶ *R v Elliott*, [1984] AJ No 940, 57 AR 49 at paras 13-14.

¹⁷ *R v Flintoff*, [1998] OJ No 2337, 111 OAC 305

¹⁸ *R v O'Connor*, [1995] 4 SCR 411, [1995] 4 RCS 411 at para 82.

¹⁹ 2003 ABPC 7

²⁰ *R v Pringle*, 2003 ABPC 7 at para 95.

²¹ 2006 ABPC 221, AJ No 1058

²² *R v Herter*, 2006 ABPC 221, AJ No 1058 at para 45.

²³ See *R v Demers*, 2004 SCC 46, 2 SCR 489 and *R v Carosella*, [1997] 1 SCR 80.

²⁴ *R v O'Connor*, [1995] 4 SCR 411, 4 RCS 411 at para 75.

²⁵ *R v Carosella*, [1997] 1 SCR 80 at para 56.

33. It would bring the administration of justice into disrepute and prejudice the integrity of the judicial system—more than it already has been through the era of COVID restrictions—to permit the prosecution and fining of a Christian church and its pastor for exercising their most fundamental rights to protect the congregation in the manifestation of their religious beliefs to worship together in-person. This, without any evidence that the public health officer could not effectively gather the evidence she desired for enforcement purposes without physically entering the sanctuary of Church in the Vine during an ongoing worship service.

The following materials of evidence will also be relied upon in support of this application:

- 34. The oral testimony of the accused;
- 35. The oral testimony of Rodney Fortin; and
- 36. Such further and other material or evidence as counsel may advise.

Applicable Acts and regulations

- 37. *Constitutional Notice Regulation*, Alta Reg 102/1999
- 38. *Canadian Charter of Rights and Freedoms*;
- 39. *Criminal Code*, R.S.C., 1985, c. C-46; and
- 40. Such other enactments as counsel may advise.

AND FURTHER TAKE NOTICE THAT in support of this application the Accused may rely on the following cases and such other authority as counsel may advise:

- *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, 2 SCR 567.
- *Baars v Children's Aid Society of Hamilton*, 2018 ONSC 1487.
- *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2, 1 SCR 19.
- *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62.
- *Dunmore v Ontario (Attorney General)*, 2001 SCC 94.
- *Garbeau c Montreal (Ville de)*, 2015 QCCS 5246.

- *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295;
- *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54.
- *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.
- *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62, 3 SCR 141.
- *Mounted Police Assn. of Ontario v Canada (Attorney General)*, 2015 SCC 1.
- *Roach v Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406
- *R v 974649 Ontario Inc*, 2001 SCC 81, 3 SCR 575.
- *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295.
- *R v Carosella*, [1997] 1 SCR 80.
- *R v Demers*, 2004 SCC 46, 2 SCR 489.
- *R v Elliott*, [1984] AJ No 940, 57 AR 49.
- *R v Ferguson*, 2008 SCC 6.
- *R v Flintoff*, [1998] OJ No 2337, 111 OAC 305.
- *R v Grant*, 2009 SCC 32.
- *R v Herter*, 2006 ABPC 221.
- *R v O'Connor*, [1995] 4 SCR 411, 4 RCS 411.
- *R v Pawlowski*, 2011 ABQB 93.
- *R v Pringle*, 2003 ABPC 7.
- *R v Weaver*, 2005 ABCA 105, 27 C.R. (6th) 397.

AND FURTHER TAKE NOTICE THAT the Accused expressly reserves the right to raise additional constitutional arguments that are disclosed by the evidence and that are not the subject of this notice.

AND FURTHER TAKE NOTICE THAT any statements of fact contained in this notice should not be interpreted as admissions of fact, but rather, merely as anticipated evidence based on disclosure provided by the Crown.

IT IS UNDERSTOOD that the opposing party or parties must be served with this Application and any other material to be relied upon, in accordance with the Provincial Court of Alberta Rules of Court.

RESPONDENT'S NAME
AND CONTACT
INFORMATION

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DATED at the City of Calgary in the Province of Alberta this 1st day of March 2022.



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