Clerk's Stamp:

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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
APPELLANTS	TRACY FORTIN and CHURCH IN THE VINE OF EDMONTON
RESPONDENT	HER MAJESTY THE QUEEN
DOCUMENT	**APPELLANTS' MEMORANDUM**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. BACKGROUND

The Appellants

1. The Appellants, Pastor Tracy Fortin and Church in the Vine of Edmonton appeal the conviction and sentence of The Honorable Judge Creagh. Pastor Tracy and Church in the Vine were each charged with three counts of obstruction of a public health inspector contrary to section 71 of the *Public Health Act* (the "Obstruction Charges"), which are offences pursuant to section 73(1) of the *Public Health Act*. Pastor Fortin was fined $15,000 and Church in the Vine fined $65,000.

2. The facts of this case are—or would be, if this was the year 2019—extraordinary. Pastor Tracy is a pastor at Church in the Vine along with her husband, Lead Pastor Rodney Fortin. Church in the Vine is a mid-size Christian church in Edmonton. In most ways, it is an unremarkable church, at least as far as church itself remains unremarkable. It consists of a few hundred Christians that have gathered into a community so as to manifest their beliefs regarding the worship of God and fellowship with each other.

3. The whole Church community gathers in-person every Sunday morning at the Church building to worship God through the communal singing of worship songs, through prayer, both communal and individual, through preaching and the receipt thereof, through the reading of the Bible, through experiencing the presence of the Holy Spirit, and through spiritually and emotionally edifying and encouraging each other. This is done out of love for and obedience to God, and love for each other as exemplified by Jesus Christ. Various members of the congregation also gather in smaller groups throughout the week, whether in homes or at the Church building, but the Sunday morning worship gathering is preeminent.

4. Physically gathering together with the entire church community at least once a week is a command in Scripture that the congregants of Church in the Vine joyously fulfil and believe is a command that supersedes any conflicting demand of human authorities. It is rare in the recent history of western civilization that the Lord's command to gather has

been opposed by the command of civil authorities, although it is not rare outside the western democratic world, nor throughout antiquity and the Middle Ages.

5. This case involves the collision of the modern, secular, bureaucratic state with—what is to the unbeliever—the incomprehensible ancient belief that God and the worship of Him is not subject to the prejudices, fears, and tyrants of the day.[1]

Events Leading to the Obstruction Charges

6. As COVID-inspired public health orders began purporting to place limits on the worship gatherings of religious communities in Alberta in the fall of 2020, Pastors Tracy and Rodney sought the Lord's will regarding the Scriptural command to gather in the context of government demands not to, and the prevailing societal belief that doing so posed a health threat. They determined that the Church in the Vine congregation must continue to gather for worship on Sunday mornings as the Christian Church has done for 2,000 years. The Church in the Vine community agreed and worship gatherings continued to be fully attended.

7. Beginning in December 2020, an Alberta Health Services Officer, Meghan Allen (AHS Officer Allen) began seeking entry to the Church building on Sunday mornings during ongoing worship gatherings. On two occasions, she gained entry, one by consent of the Pastors through the front door of the building, and another by entering the back door unknown to the Pastors.

8. After experiencing the negative spiritual impact and disruption of these entries and realizing that again permitting entry would not prevent indefinite repeat attempts to enter, the Pastors decided to protect the gathered Church in the Vine congregants by declining entry to AHS Officer Allen. This occurred three times, twice in March 2021 and once in June 2021.

[1] See, for example, Transcript of the Sentencing Hearing, May 25, at page 28, lines 30-31, and page 29, lines 8 -12.

9. AHS Officer Allen ceased attempting entry during Sunday morning worship services after it was declared that, as of July 1, 2021, it would be the "best summer ever".[2]

10. Later in July 2021, the Obstruction Charges were laid against the Appellants. Church in the Vine was also charged with three counts of breaching an Order of the Chief Medical Office of Health related to worship gatherings that occurred in January, February, and May 2021. Importantly, after defence counsel indicated a section 52(1) constitutional challenge to the relevant CMOH Orders would be brought, the Crown stated those charges would be withdrawn prior to trial.

11. With the knowledge that the Appellants intended to make *Charter* arguments regarding the remaining Obstruction Charges, a three-day trial was scheduled for April 19-21, 2022. The Appellants filed a Notice of Intention to Raise Constitutional Argument ("*Charter* Application"), seeking *Charter* section 24(1) remedies and claiming breaches of freedom of religion, freedom of peaceful assembly, and freedom of association as guaranteed by sections 2(a), 2(c), and 2(d) of the *Charter*. Defence counsel sought a blended *voir dire* for the hearing of evidence relevant to the *Charter* claims.[3] The Crown filed a *Vukelich* application to summarily dismiss the Appellants' *Charter* Application.

12. On the first day of trial, the Learned Trial Judge heard the Crown's *Vukelich* application and then adjourned the trial until the next day. On the morning of the second day of trial, the Trial Judge granted the Crown's application and summarily dismissed the entirety of the Appellants' *Charter* Application. Trial concluded the following day and the Appellants were convicted of the Obstruction Charges on May 25, 2022.[4]

[2] Trial Transcript, April 20, at page 36, lines 18-21.
[3] See the Trial Transcript, April 19, at page 43, lines 16-22.
[4] Reasons for Decision, indexed as *R v Church in the Vine of Edmonton*, 2022 ABPC 108.

II. ARGUMENT: APPEAL OF CONVICTION

A. Decision of the Learned Trial Judge to Grant the Crown's *Vukelich* Application

13. The Appellants submit the Learned Trial Judge erred in law to such a degree that she failed to judicially exercise her discretion when she decided to summarily dismiss the Appellants' *Charter* Application. The Appellants' *Charter* Application had a reasonable likelihood of success and therefore the Appellants ought to have been permitted to call evidence and provide submissions in support of their *Charter* claims, and to have said claims adjudicated. By failing to permit an evidentiary hearing of the Appellants' *Charter* claims, the Trial Judge committed a reversable error of law.

Overview of the Law on Applications to Summarily Dismiss *Charter* Applications

14. It is trite law that trial judges are permitted and required to carefully guard trial time and disallow evidentiary hearings and applications that clearly lack any merit and will only waste the court's time because they could not, with any reasonable likelihood, change the eventual outcome. However, it is also trite law that the threshold to summarily dismiss an accused's application for *Charter* remedies is high.

15. In *R v Schulhtz*,[5] Judge Rosborough stated:

> Cases such as *Cody* and *Lising* confirm that a test higher than "some evidence" or an "air of reality is required". It is my view that, on a *Vukelich* application, ***the Applicant must demonstrate that there is no reasonable likelihood that the Charter application would succeed***.[6]

16. *Vukelich* applications are highly contextual, decided on a case-by-case basis, and involve many considerations. As the BC Supreme Court has stated:

> The rigour with which *Vukelich* is applied and the way in which a trial judge exercises his or her discretion in relation to such an application is case-specific and highly contextual. Among the factors that will shape the exercise of that discretion are: the extent to which

[5] 2018 ABPC 134.
[6] *R v Schultz*, at paragraph 32 [emphasis added].

> the facts or anticipated evidence underlying the alleged *Charter* breach are in legitimate dispute; ***the state and clarity of the law on the issue sought to be litigated***; and the infinite variety of pragmatic considerations that will arise in a given case and suggest resolution of the application in one way or another. What underlies the inquiry is the need to balance an Accused's fair trial interests with the public interest in the management of criminal proceedings by foreclosing lengthy and unnecessary pre-trial applications in circumstances where the remedy sought could not reasonably be granted.[7]

17. An important contextual factor in this case is the new and unique facts and resulting *Charter* claims. This is not a run-of-the-mill criminal case where breaches of sections 7, 8, or 9 are alleged. Rather, this case involves Obstruction Charges to a Christian church and its pastor for denying entry to a public health inspector during ongoing worship gatherings, knowing the purpose of her inspection related to unprecedented government attempts to severely limit worship gatherings. This issue and the facts that give rise to it are entirely new, never before addressed by the courts in this country.

18. Both the Appellants and the public have a right to a fair trial, which required the Court to address *bona fide Charter* rights issues raised by the Appellants, especially if the facts and claims of rights infringements are novel and are matters of public interest, as they plainly are in this case.[8] The courts must not permit the "public" and the "public interest" to be monopolized by the majority that would ostensibly support the conviction of the Appellants. The oppressed minority, some of whom flocked to attend Church in the Vine worship services during the material time, also compose part of the public and the public interest that must be considered by the courts.

19. As Judge Fitch of the BC Supreme Court aptly put it:

> I accept, of course, that trial judges must be vigilant in ensuring that criminal proceedings are kept within reasonable scope and that unmeritorious arguments that are wasteful of public resources are filtered out. But it must also be recognized that ***the contours of constitutional rights are settled through the litigation of emerging, unresolved and contentious issues***. This process starts in the trial courts. In the result, ***some considerable care must be taken not to***

[7] *R v McDonald*, 2013 BCSC 314, at paragraph 21 [emphasis added].
[8] *R v McDonald*, at paragraph 45.

use Vukelich to stifle novel, but unsettled and important points of law.[9]

The Errors of Law

20. In the reasons for her decision to dismiss the Appellants' *Charter* Application, the Learned Trial Judge made several discrete errors.

21. First, the central issue in this case is determining the scope of state power to inspect pursuant to public health when that power interferes with gathering for worship, which is an exercise of the fundamental freedoms to manifest religious beliefs, peacefully assemble, and associate guaranteed by section 2 of the *Charter*. This is the primary issue raised by the novel facts of this case, which boil down to a public health inspector attempting to enter unwanted during worship gatherings to obtain evidence for the purpose of penalizing those same worship gatherings, followed by Obstruction Charges when entry was denied.

22. This was lost on the Trial Judge, who was preoccupied with "the throes" of a "pandemic" and "super-spreader" theories.[10] She failed to apprehend the key issue of religious freedom as raised by the facts in this case. This failure underwrote many of the Trial Judge's erroneous findings.

23. For example, the Trial Judge erroneously found the Appellants' *Charter* Application was a "collateral attack on the validity of the public health orders and the supporting legislation".[11] She provided no reasons for this finding and there was no basis in the record before her for this finding. In both written and oral submissions, defence counsel was clear the Appellants were impugning AHS Officer Allen's ***exercise*** of her authority insofar as it breached section 2 rights, and the laying of Obstruction Charges when AHS Officer Allen could not exercise her inspection authority the way she wanted.[12] The

[9] *R v McDonald*, at paragraph 44.
[10] See the Trial Transcript, April 19, at pages 28, lines 25-28 and April 21, at page 38, lines 20-25.
[11] Trial Transcript, April 20, at page 4, lines 32-33.
[12] See paragraphs 13, 15, 16, 25, and 26 of the Appellants' Charter Notice and paragraphs 7, 8 and 13 of the Appellants' Reply to the Crown's *Vukelich* Application. See also, for example, the Trial Transcript, April 19, at pages 40-41.

Appellants did not, directly or indirectly, impugn the provisions of the *Public Health Act* authorizing inspections or the CMOH Orders (referred to by the Trial Judge as "public health orders").

24. It is trite law that statutory authority is limited by *Charter* rights. A public health inspector may have the statutory authority to inspect a church building, just as a police officer may have the authority to stop a motorist. But, in exercising that authority, public health inspectors must not engage in actions that breach section 2 rights just as police officers must not engage in actions that breach section 8, 9, or 10 rights. It is an open, unanswered question whether it is a breach of section 2 rights for a public health inspector to enter an ongoing worship gathering without consent for the purposes of an inspection. The mere statutory authority to inspect does not oust the *Charter* rights of those being inspected. Just as the mere incidental common law authority of police officers to detain does not oust the section 9 rights of detainees. On the contrary, the *Charter* operates to place limitations on such authority. It is not a "collateral attack" on a statutory authority itself or its enabling legislation to claim that a particular exercise of the authority limited a *Charter* right.

25. Second, although correctly articulating the three-step test as laid out in *R v Blanchard*,[13] the Trial Judge failed to correctly apply the first step, which is to assume the truth of the facts sought to be proved by the Appellants. The Trial Judge "accepted the prosecutor's description of the actions alleged to constitute the breach" instead of accepting, as required at law, the Appellants' description.[14]

26. In the Appellants' *Charter* Application and written submissions in response to the Crown's *Vukelich* application, the Appellants repeatedly made it clear that the breach of *Charter* rights flowed from the laying of the Obstruction Charges when AHS Officer Allen did not gain entry. The Appellants' position was that the Obstruction Charges ***penalized*** the Appellants for ***exercising*** their section 2 rights to worship unmolested by government officials.[15] As argued by defence counsel in both written and oral

[13] 2018 ABQB 43.
[14] Trial Transcript, April 20, 2022, at page 3, line 27.
[15] See, for example, the Trial Transcript, April 19, at page 41, line 11 – page 42, line 5.

submissions, had the Appellants permitted AHS Officer Allen entry on the material dates, the Church in the Vine congregants would have suffered the same violence to their section 2 rights as they suffered on the previous occasions that AHS Officer Allen gained entry to the Church building during a worship gathering, such as on December 13, 2021.[16]

27. The Learned Trial Judge erred in law by not taking account of and accepting as true the facts the Appellants put forth as the basis for the alleged breach of *Charter* rights. The Trial judge only considered AHS Officer Allen's attempt to enter. She failed to consider the Appellants' facts regarding the effect of AHS Officer Allen's actions when she had previously gained entry and that AHS Officer Allen was almost certain to engage in the same actions should she gain entry again. The Trial Judge further failed to consider the Appellants' facts regarding the legal effect of laying Obstruction Charges when the Appellants took action to exercise their rights and prevent further rights breaches by AHS Officer Allen. This was a failure to account of material evidence, which justifies appellate intervention despite the deference owed to trial judge's discretionary decisions.[17]

28. Third, and partly due to the errors described above, The Learned Trial Judge erred in law by failing to find that the Obstruction Charges could reasonably constitute a breach of the section 2 rights of the Appellants assuming the truth of the facts put forth by the Appellants in their *Charter* Application for an evidentiary hearing. This, despite how new and untested the facts and legal issues are in this case.

29. As it turned out, much of the witness testimony during trial centred on the spiritual importance of the Church in the Vine sanctuary; the sacred and exclusive nature of the sanctuary during worship gatherings; that AHS Officer Allen caused a spiritual disruption the times she entered the sanctuary during ongoing worship services in late

[16] See paragraphs 13, 15, 16, 25, and 26 of the Appellants' Charter Notice and paragraphs 7, 8 and 13 of the Appellants' Reply to the Crown's *Vukelich* Application. See also the testimony of Pastor Rodney Fortin, Trial Transcripts, April 20, at page 51 lines 26-29 and the testimony of Meghan Allen, Trial Transcript, April 20, at page 27.

[17] See *Haaretz.com v. Goldhar*, 2018 SCC 28, at paragraph 49.

2021; and that Pastors Tracy and Rodney denied her entry to protect Church in the Vine congregants from again suffering the spiritual disruption of AHS Officer Allen's presence during worship.[18] Had a *voir dire* been permitted, much more of this type of evidence doubtless would have been heard. When presented with such facts—as the Trial Judge was through the submissions of defence counsel during the hearing of the Crown's *Vukelich* application[19]—a reasonable judge, acting judicially, would not pre-emptively rule out that such facts, novel as they are in this country, could form the basis of a breach of freedom of religion, freedom of peaceful assembly, and freedom of association.

30. An evidentiary hearing regarding the claimed section 2 breaches would plainly have assisted in determining the primary issue before the court, which, again, is whether, on the facts of this case, performing a public health inspection during an ongoing worship gathering without consent is a *Charter*-compliant action.[20]

Appellate Intervention

31. An appellate court may only intervene with a trial judge's exercise of discretion not to hold an evidentiary hearing where the trial judge failed to exercise it judicially. Deference is owed. However, the Appellants submit that the errors contained in the Learned Trial Judge's decision to dismiss the Appellants' *Charter* Application requires the intervention of this Honourable Court because the Trial Judge failed to exercise her discretion judicially. As the BC Court of Appeal has ruled, "[a] trial judge who exercises her discretion on the basis of an incorrect legal conclusion does not exercise that discretion judicially."[21]

32. Notwithstanding the high bar on appeal to overturn a trial judge's *Vukelich* ruling, the BC Court of Appeal in *R v B (M)* ruled that the first instance judge in that case engaged in a reversible error of law by dismissing a *Charter* Application ***that raised a new legal***

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[18] See, for example, the testimony of Pastor Rodney Fortin, Trial Transcript, April 20, at pages 42-45, 51-53, and 58; the testimony of Meghan Allen, Trial Transcript, April 20, at page 27; and the Testimony of Pastor Tracy Fortin, Trial Transcript, April 21, at pages 3-6.
[19] Trial Transcript, April 19, at page 24, line 28 – page 28, line 23.
[20] See *R v Lising*, 2005 SCC 66, at paragraph 35.
[21] *R v B (M)*, 2016 BCCA 476, at paragraph 48.

issue.[22] The Court overruled the trial judge even though it was not clear that the appellant would succeed on her section 7 challenge.[23] Chief Justice Bauman stated that he "[did] not rule out the possibility that [the appellant] will be able to establish a s. 7 infringement by leading evidence[.]"[24] The BC Court of Appeal correctly articulated and applied the *Vukelich* test. As long as an applicant has a reasonable chance of succeeding on their *Charter* argument, given the facts they have alleged, or, to put it another way, the trial judge could not rule out success, an evidentiary hearing must occur. *R v B (M)* is directly on point. In the case at bar, new legal issues regarding section 2 rights have been raised by the facts. In the *R v B (M)*, the BC Court of Appeal saw fit to intervene, notwithstanding the deference owed to a trial judge's discretionary decision, because it was an "error of law" that:

> [T]he trial judge erred in concluding that new legal issues had not arisen…. Despite the fact that it is far from certain that [the appellant] will succeed in her s. 7 challenge, in my opinion, there is a reasonable likelihood that an evidentiary hearing can assist in determining the constitutional issues she raises.[25]

33. Similarly, in the case of *R v Imola*, the Ontario Court of Appeal ruled a trial judge's decision to dismiss a *Charter* Application "was unreasonable and cannot stand", because the appellant's *Charter* application was "at least arguable on the merits and had a reasonable prospect of success".[26]

34. As for remedy when a Trial Judge has erred in law by dismissing an accused's *Charter* application, the appropriate remedy is to order a new trial.[27]

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[22] *R v B (M)*, at paragraphs 44, 48, 54, 68, 74, and 107.
[23] *R v B (M)*, at paragraph 71.
[24] *R v B (M)*, at paragraph 73.
[25] *R v B (M)*, at paragraph 74.
[26] *R v Imola*, 2019 ONCA 556, at paragraphs 20 and 22.
[27] *R v B (M)*, at paragraph 110.

B. Reasonable Apprehension of Bias

Overview of the Law on Judicial Bias

35. The test for determining if a trial judge is tainted by a reasonable apprehension of bias is long-standing and has received significant attention. The threshold to establish a reasonable apprehension of bias is a high one. Judges are presumed impartial. However, the presumption is rebuttable and, at times, has been rebutted with "cogent evidence".[28]

36. To establish a reasonable apprehension of bias, the Appellants must demonstrate that a reasonable, right-minded person, with knowledge of all the circumstances and having thought the matter through, would conclude that the judge was not impartial, or, in other words, whether consciously or unconsciously, would not decide fairly.[29] An alternative way to articulate the test is whether the judge had an open mind, was willing to listen, and could be swayed by reasonable evidence and argument as opposed to being resistant to persuasion, having a closed mind, or having pre-judged the issues.[30]

37. When reviewing for a reasonable apprehension of bias, an appellate court must look to all the circumstances of the case cumulatively and consider each impugned comment or ruling of the judge in the context of the whole.[31]

38. The impetus for requiring an absence of a reasonable apprehension of bias, and not merely the absence of actual bias, is rooted in the need for justice not to merely be done, but to also ***appear to be done***.[32] Justice must be rooted in the public's confidence, which is destroyed when right-minded people look at a case and think to themselves, 'the judge was biased'. The public must reasonably perceive judges to be impartial.[33]

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[28] *R v S (RD)*, [1997] 3 S.C.R. 484, at paragraph 117.
[29] *Bizon v Bizon*, 2014 ABCA 174, at paragraph 38; *R v Stephen*, 2021 ABCA 82, at paragraph 108; *Yukon Francophone School Board, Education Area No. 23 v Yukon Territory (Attorney General)*, 2015 SCC 25, at paragraph 20; *R v S (RD)*, at paragraph 111.
[30] *Bizon*, at paragraph 59; *R v. Abdulkadir*, 2020 ABCA 214, at paragraph 27; *Yukon Francophone School Board*, at paragraphs 22-23 and 29.
[31] *R v Stephen*, at paragraph 111; *Yukon Francophone School Board*, at paragraphs 26 and 37.
[32] *R v Stephen*, at paragraphs 109-110; *R v S (RD)*, at paragraph 110.
[33] *Bizon*, at paragraphs 33 and 38.

39. This is no less important in cases involving COVID. In fact, it is even more important. Government responses to COVID have led to the worst civil liberties crisis this country has faced since the advent of the *Charter*. The public is looking to the courts to protect their fundamental rights in the face of unprecedented state overreach because "this is Canada and ***our judicial system has an obligation to keep it Canada***".[34] As the Supreme Court has noted:

> It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties.[35]

Comments and Conduct of the Learned Trial Judge that Give Rise to A Reasonable Apprehension of Bias

40. As Justice Pazaratz of the Ontario Superior Court of Justice aptly stated:

> We're all weary. We all wish COVID would just go away. But pandemic fatigue is no excuse for short-cuts and lowering our standards. We all have to guard against the unconscious bias of thinking "*Why won't these people just do what the government tells them to do?*"[36]

41. The Learned Trial Judge seemed intent on making this case about COVID and not about freedom of religion. That started, of course, with the Crown's *Vukelich* application to dismiss the *Charter* Application, and continued throughout the trial and into the Trial Judge's decision on sentencing.

[34] *JN v CG*, 2022 ONSC 1198, at paragraph 25 [emphasis added].
[35] *R v S (RD),* at paragraph 118.
[36] *JN v CG*, at paragraph 12 [emphasis original].

Comments About COVID

42. During defence counsel's submissions on the *Vukelich* application, while explaining the nature of the claimed freedom of religion breach, the Learned Trial Judge interrupted to say:

> But at the time, the greater society which includes the church, and its parishioners was in the throes of a pandemic that was of a disease that was killing a lot of Albertans and a lot of vulnerable people.[37]

43. On the last day of trial, during defence counsel's closing submissions regarding whether Church in the Vine was a public or private place for the purposes of the *Public Health Act*, the Trial Judge stated:

> When I consider the definition, am I to take into account the fact that at the time, COVID, which is highly communicable, was in society and that a place such as a church would be a ***super spreader*** event, I think is the term they were using? That people could come there, they could be exposed, they could leave and they could take the disease wherever they wanted to go with it. And so it is absolutely necessary for it to be considered a public place so that this can be prevented.[38]

44. In the Trial Judge's Reasons for Sentence, she made the following comments:

> ***Obviously***, the spread of COVID (or other diseases) within the community at large is a potential effect of the offence.
> …
> In this case, I have concluded that the gravity of the offence this is high. As I said above, at the time, Alberta was in the midst of a pandemic. Albertans were dying from COVID and our hospitals were challenged to accommodate and treat the sick. Major surgeries were postponed and treatments for other illness were postponed.[39]

45. These statements and conclusions demonstrate two problems that, together, lead a reasonable person to conclude that the Trial Judge was not impartial and unable to decide

[37] Trial Transcript, April 19, at page 28, lines 25-28.
[38] Trial Transcript, April 21, at page 38, lines 20-25 [emphasis added].
[39] Reasons for Sentence, indexed as *R v Church in the Vine of Edmonton*, 2022 ABPC 153, at paragraphs 20 and 26 [emphasis added].

the case fairly. These problems are independent of the fact the Trial Judge's views regarding COVID are highly questionable as far as their truth or accuracy.

46. First, the Trial Judge plainly holds strong, pre-determined, personal views regarding COVID, which is a serious concern for trial fairness in this case. The Trial Judge's views regarding COVID are aligned with the prosecution. The Trial Judge's comments above contain rhetoric sometimes employed by the Crown in this case and often used by advocates of lockdown-style public health measures, such as overstated phrases like "throes of a pandemic", "killing a lot of Albertans", and "Albertans were dying from COVID". Implicit within these comments is the assumption or stereotype that people who did not adhere to all the public health restrictions, such as the Appellants, were to blame for the deaths of fellow citizens and other societal problems.

47. Only a judge with a closed mind as to the issue of the transmission of COVID would say "***obviously*** the spread of COVID within the community at large is a potential effect of the offence". There is no persuading such a decision-maker to the contrary viewpoint. They've already decided their point of view on the matter is obviously correct. The Appellants are entitled to be tried by a judge that has an open mind regarding COVID and is not overtly supportive of the Crown's narrative regarding COVID. Anything less calls into question whether the Appellants can reasonably expect to be fairly tried.

48. Perhaps worst of all, the Judge's biased views regarding COVID led her to label Church in the Vine's worship gatherings as "super spreader" events. The use of this pejorative term to refer to the Church's worship gatherings reveals the depth to which the Judge subscribes, consciously or unconsciously, to the pro-lockdown narrative. Lockdown advocates early on adopted this phrase to denounce and blame Christian churches for the transmission of COVID in Canada and America. There remains no evidence beyond speculation and conjecture to support the notion that church services "spread" COVID in any kind of "super" way. That the learned Trial Judge would use this term reveals that she imported her personal views regarding COVID in a way that compromised her impartiality regarding the Appellants' case.

49. The second problem is that these conclusions about COVID are not directly relevant to the case. The issues of COVID transmission, COVID deaths, and surgeries are peripheral to the case. The Obstruction Charges are not directly linked to COVID or public health restrictions. Those charges were withdrawn by the Crown. The reasonable apprehension of bias becomes even stronger because the Trial Judge holds pro-lockdown views of COVID ***and*** places undue emphasis on her views as if the transmission and effects of COVID are somehow the central issues of the case. Doing so coloured her ability to impartially view the issue of religious freedom and whether the Appellants' *Charter* Application should be dismissed, coloured her ability to decide the issue of whether the Church in the Vine building is a "public place" under the *Public Health Act*, and coloured her ability to impose a fit and just sentence. The defence, appropriately so, argued the case was about section 2 *Charter* freedoms and whether the Church in the Vine building was a public or private place. The defence did not make arguments about COVID because the Obstruction Charges were about obstructing a health inspector, not about contravening COVID public health restrictions. The Trial Judge made the case about COVID when she did not need to and should not have. As Lord Denning himself observed:

> [T]he judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large[.][40]

50. The Appellants submit the Trial Judge's statements regarding COVID alone give rise to the appearance of bias from the perspective of a reasonable, right-minded person. The notional observer could not conclude, having viewed the Trial Judge's comments in the context of the whole record, and the weight she placed on them, that the Trial Judge decide the case impartially. However, these comments must also be considered in the context of the Trial Judge's conduct during trial, her *Vukelich* ruling, and the exorbitantly high fine amounts.

[40] *Yukon Francophone School Board*, at paragraph 28, quoting *Jones v National Coal Board*, [1957] 2 All E.R. 155(Eng CA), at p 159.

Conduct During Trial Regarding Witnesses

51. During the *viva voce* portion of the trial, the Trial Judge repeatedly intervened to prevent questions or witness testimony that was primarily about religion.

52. During examination in chief, AHS Officer Allen discussed her Anglican faith.[41] She also testified that she had recently dealt with "numerous churches" as a health inspector.[42] During cross-examination, AHS Officer Allen acknowledged that when Pastor Tracy told her that her presence in the sanctuary was a disturbance, AHS Officer Allen replied, "well, it isn't at my church".[43] She also offered the testimony that, although she was Anglican, her husband was Catholic. She further offered testimony that her faith was strengthened at a church during COVID.[44]

53. When defence counsel asked a simple question about whether different individual Christians hold to different beliefs, the Trial Judge did not allow the witness to answer.[45] The Trial Judge then disallowed a question to AHS Officer Allen regarding the beliefs of some churches about government.[46] Then the Trial Judge disallowed defence counsel's question to AHS Officer Allen about which church was the church she meant when she said to Pastor Tracy, "not at my church".[47] The Trial Judge stated that asking this question was "too personal" despite the fact AHS Officer Allen referenced this church in her capacity as a public health inspector while attempting to conduct an inspection.

54. Equally concerning, the Trial Judge twice interrupted the testimony of Pastor Rodney so as to circumscribe further testimony about the Appellants' religious beliefs. During examination in chief of Pastor Rodney, as he was explaining the beliefs of Church in the Vine and why the sanctuary is so important to the congregants, the Trial Judge stated, "he is taking a bit longer to answer your questions than should be necessary,"; "we have to

[41] Trial Transcript, April 20, at page 14, lines 31-32.
[42] Trial Transcript, April 20, at page 24, lines 40-41.
[43] Trial Transcript, April 20, at page 32, lines 27-30.
[44] Trial Transcript, April 20, at page 33, lines 36-37.
[45] Trial Transcript, April 20, at page 33, lines 20-23.
[46] Trial Transcript, April 20, at page 34, lines 1-2 and 23-25.
[47] Trial Transcript, April 20, at page 34, line 31 – page 35, line 21.

answer to the clock"; and that she wanted "shorter answers".[48] Later on, when Pastor Rodney was about to read from the Bible as part of an answer to defence counsel's question, the Trial Judge interrupted to say "I think it will suffice if you paraphrase it".[49]

55. The Appellants' choice to deny AHS Officer Allen entry into the Church in the Vine building was religiously motivated. Pastors Tracy and Rodney made the decision to not permit any further entries into the Church building during worship gatherings to protect their congregants and because they thought they had the *Charter* right to freedom of religion to do so. When denied entry, AHS Officer Allen referred to how things were different at "her church". Although the Trial Judge disagreed, this case is unavoidably about religious beliefs. Viewed in the context of the rest of trial, the Trial Judge's conduct in thwarting testimony relating to religious beliefs contributes to a reasonable apprehension of bias. She roadblocked evidence about the true primary issue of the case (freedom of religion), while, through her comments elsewhere, shifted the focus to what she considered the case to really be about (COVID).

Conclusion on Bias

56. The Appellants submit that the Trial Judge's repeated comments about COVID and interventions when the case steered toward matters of religion and away from COVID, viewed in the context of the Judge's refusal to hear evidence in support of a freedom of religion claim and her decision to impose such extraordinarily high fines, give rise to a reasonable apprehension of bias. A reasonable, right-minded person, having thought the matter through, would conclude the judge, whether consciously or unconsciously, did not have an open mind regarding matters that touched on COVID and would not decide the case fairly.

57. It is universally acknowledged that, unless a stay of proceedings is ordered, the only appropriate remedy when an appellate court finds that there is a reasonable apprehension of bias regarding the first instance judge is to order a new trial. The Appellants ask for a new trial.

[48] Trial Transcript, April 20, at page 46, lines 6-22.
[49] Trial Transcript, April 20, at page 52, lines 35-37.

III. ARGUMNENT: APPEAL OF SENTENCE

A. Judicial Notice

Overview of the Law on Judicial Notice

58. Judicial notice is succinctly described by the Supreme Court of Canada in the case of *R v Find* as follows:

> Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy[.][50]

59. Judicial notice is a rule of evidence. It is the only exception to the general rule that cases must be decided on the evidence before the court.[51] Trial judges are only permitted to rely on facts contained in the record before them, which is the evidence presented by the parties, unless they take judicial notice.[52] As Justice Pazaratz stated in the aforementioned *JN v CG* case, "We have to rely on—and insist upon—evidence".[53]

60. Trial Judges may only take judicial notice of two types of facts described by the Supreme Court above. Facts are only "notorious" enough for judges to take judicial notice of them if they are "clearly uncontroversial"[54] and "not the subject of reasonable dispute".[55]

61. Supreme Court Justice Binnie, writing for the Court in *R v Spence*, described judicial notice of "notorious" facts thus:

> I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform

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[50] *R v Find*, 2001 SCC 32, at paragraph 48. See also *R v Hussein*, 2022 ABCA 219, at paragraphs 16-19.
[51] *Droit de la famille – 091768*, 2013 SCC 5, at paragraph 240.
[52] *R v Hussein*, at paragraph 18.
[53] *JN v CG*, at paragraph 14. See also Justice Pazaratz rhetorical question at paragraph 4: "Should judges sit back as the concept of "Judicial Notice" gets hijacked from a *rule* of evidence to a *substitute* for evidence?"
[54] *R v Find*, at paragraph 48.
[55] *Droit de la famille – 091768*, at paragraph 239.

> themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used*, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.[56]

62. Further, as the Ontario Court of Appeal recently noted:

> [U]nless the criteria of notoriety or immediate demonstrability are present, a judge cannot take judicial notice ***of a fact within his or her personal knowledge, even if it has been proved before the judge in a previous case***.[57]

63. Importantly for the case at bar, the Alberta Court of Appeal stated in June 2022:

> [A] trial judge ***ought not to supplement and supplant the evidentiary record*** except in very limited situations where taking judicial notice is permitted.[58]

64. "Taking judicial notice, as a legal question, is reviewed on a standard of correctness."[59] Further, "[a]n error in taking judicial notice is a legal error and may be enough, on its own, to require an appeal to be allowed".[60]

The Learned Trial Judge Erroneously Took Judicial Notice of Facts About COVID

65. As part of the Learned Trial Judge's Reasons for Sentence, she made the following findings:

> Obviously, the spread of COVID (or other diseases) within the community at large is a potential effect of the offence.
> …
> I note that we are still identifying the ongoing effects of COVID. Those include serious and ongoing illnesses, such as long COVID. There are also ongoing consequences to our health system.
> …

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[56] *R v Spence*, 2005 SCC 71, at paragraph 65 [emphasis original].
[57] *R v JM*, 2021 ONCA 150, at paragraph 34 [emphasis added].
[58] *R v Hussein*, at paragraph 19 [emphasis added].
[59] *R v Hussein*, at paragraph 10.
[60] *R v JM*, at paragraph 83.

> As I said above, at the time, Alberta was in the midst of a pandemic. Albertans were dying from COVID and our hospitals were challenged to accommodate and treat the sick. Major surgeries were postponed and treatments for other illness were postponed.[61]

66. None of these facts referred to by the Trial Judge about COVID were properly before her. The Crown did not provide evidence regarding these facts. No opportunity for cross-examination of these facts occurred during the trial. The Appellants have no idea where these facts came from. The Appellants were prejudiced by these facts, yet had no means of addressing them.[62] The Trial Judge is not permitted at law to refer to these facts or rely on them, as she plainly did, in determining a sentence.[63] That is, unless these facts are properly the subject of judicial notice in this case. But they are not. In fact, defence counsel, in anticipating that the Trial Judge may attempt to take judicial notice of facts about COVID, cautioned her not to do so.[64]

67. The rate and means of the transmission of COVID, the severity of COVID, the effects of COVID, "long COVID", the "consequences" of COVID "to our health system", how many Albertans "died from COVID", whether they actually died ***of*** COVID, whether "our hospitals" were in fact "challenged… to treat the sick", and the cause of why "major surgeries were postponed" are all matters that have been highly contested and debated since the Spring of 2020. Granted, the contest and debate regarding COVID has largely been between an official government public health narrative, supported by the mainstream media and public institutions, and a minority of dissenting scientists, professionals, academics, journalists, and laypeople whose views are suppressed by the former. But, judicial notice of facts is not permitted merely because the facts a judge is looking to take notice of have more official support. What is required is ***no existence of a reasonable debate***, not the existence of a debate wherein one side employs censorship and allegations of "misinformation" to silence their opponents. Those who contest the

[61] Reasons for Sentence, at paragraphs 20, 22 and 26.
[62] *R v Spence*, at paragraph 51.
[63] Reasons for Sentence, at paragraph 26.
[64] Transcript of Sentencing Hearing, May 25, at page 18, lines 34-38.

facts the Trial Judge erroneously relied upon ***are reasonable***, as demonstrated by the reasonableness and quality of their contrary evidence and arguments.

68. The scientific issues around COVID are anything but uncontroversial. This is hardy surprising considering COVID itself has only been around for two and a half years. New facts, especially ones associated with ever-changing science and tainted with efforts to suppress dissent, do not overnight become "uncontroversial" and no longer "the subject of debate between reasonable persons". Judicial notice is not available for the COVID facts relied upon by the Trial Judge.[65]

69. Further, the COVID-related facts referred by the Trial Judge in her Reasons for Sentence are the subject of much litigation, both public and private, before this and all Courts in this Province, and all across the country. Numerous expert reports have been filed as part of these cases.[66] As the jurisprudence makes clear, if the facts require expert evidence to establish, or in this case, is also contested through extensive expert evidence, the facts are categorically incapable of judicial notice.[67]

70. The Appellants submit the COVID facts relied upon by the Trial Judge are neither capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy, nor are they clearly uncontroversial and undebated by reasonable persons. The Trial Judge therefore erred in law by relying on these facts, which were not in evidence.

71. There can be no doubt the Trial Judge taking judicial notice of her personal views on COVID was a determining factor for the fine amount. The judicially-noticed facts about COVID made up a significant portion of the Trial Judge's statements where she discussed the factors for sentencing for a *Public Health Act* offence.[68] The critical role

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[65] *R v Mabior*, 2012 SCC 47, at paragraph 71.
[66] See for example, *Kowalchuk v Provincial Court of Alberta et al*, Queen's Bench Action No. 2101-09412; *Matthew Tartal v Woodlands County,* Queen's Bench Action No. 2103 18535; *Ingram v Her Majesty the Queen et al*, Queen's Bench Action No. 2001-14300; and *Bernier et al v Attorney General of Canada*, Federal Court Docket No. T-145-22; and the expert reports filed thereunder, such as the Expert Reports of Dr. Thomas Warren, an infectious disease consultant.
[67] *R v JM*, at paragraph 35.
[68] Reasons for Sentence, paragraphs 19-26; See also *R. v. 1266480 Alberta Ltd.*, 2017 ABPC 85, at paragraph 35.

the Trial Judge's views regarding COIVID played in her decision on sentence is confirmed at paragraph 33 of her Reasons for Sentence, where she stated, "[f]rom all that I have said about this offence, it is clear that a fine ***must be significant***."[69] The Appellants' appeal regarding sentence should therefore be allowed on this ground alone,[70] as the Trial Judge's reliance on these facts was essential to arriving at the sentence of $80,000 in fines.

B. Worship Services are Not Regulated Activities

72. At paragraphs 15-18 of her Reasons for Sentence, under the heading "Nature of the regulated activity", the Learned Trial Judge found that the Appellants' argument that worship gatherings are not regulated activities "fails".

73. The Trial Judge's reasons in support of this finding are confusing. The Trial Judge began her reasons for this finding by misstating the Appellants' argument on this issue and conflating churches as entities with the activities engaged in by church congregations. Paragraph 15 reads:

> Among its arguments the defence submits that since Churches ***are not for profit businesses***, they are not ***regulated activities*** and should be treated differently than other offenders on sentence.

74. Defence counsel made submissions at the May 25, 2022 sentencing hearing ***that worship gatherings are not regulated activities***, ***not*** that churches are not regulated entities.[71] This distinction is critical and obvious, yet the Trial Judge conflates the two, despite being familiar with defence counsel's submissions on this issue, which were also provided on the first day of trial.[72] Defence counsel argued two discrete points: that the fines imposed on Church in the Vine should be on the lower end because, ***one***, ***worship gatherings are not regulated activities*** and, ***two***, because Church in the Vine, as an

[69] Reasons for Sentence, paragraph 33 [emphasis added].
[70] *R v JM*, at paragraph 83.
[71] Transcript of Sentencing Hearing, May 25, at page 14, lines 22-30 and page 15, line 25 – page 16, line 18.
[72] See the Trial Transcript, April 19, at page 38, lines 10-18.

entity, is a religious charity, funded by donations only, and not a large, for-profit corporation.[73]

75. The Trial Judge then proceeded to strip down the straw man she had set up by finding that churches are regulated entities and church buildings are regulated. The Appellants did not object to regulations applying to the Church in the Vine as an entity or even to the Church building. Rather, the Appellants' concerns were with the provisions of the CMOH Orders that purported to place limits on ***worship gatherings*** through the ***regulatory*** framework of the *Public Health Act* that ***religiously and spiritually interfere*** with those worship gatherings.

76. The thrust of defence counsel's submissions was that worship gatherings are first and foremost ***constitutionally protected activities***, regardless of whether or not the CMOH Orders are purporting to regulate such activities. The fact of the matter is, the religious and spiritual aspects of worship gatherings are not normally, and have not prior to COVID, been the subject of constitutionally acceptable regulations. Of course, church buildings are subject to fire codes and food regulations, but the act of congregational worship itself is not and cannot be restricted by regulations without infringing *Charter* section 2 rights. It is yet to be determined if the CMOH Orders purporting to regulate worship gatherings were demonstrably justified limitations of the freedoms of religion, peaceful assembly, and association.

77. The Appellants submit this is an important and relevant consideration for sentencing. But the Trial Judge failed to take account of this consideration. Instead, she focused on the fact churches and their buildings are regulated, something the Appellants did not contest. The Appellants submit the Trial Judge erred in principle by finding that Church in the Vine's worship gatherings are "regulated activities", and failing to find that they are, in fact, *Charter*-protected activities. This error of law warrants appellate intervention.

[73] Transcript of Sentencing Hearing, May 25, at page 23, lines 17-33.

C. The Learned Trial Judge Overemphasized the Gravity of the Offences

78. Overemphasizing an appropriate factor in arriving at a sentence is also an error of principle that invites appellate intervention.[74] The Learned Trial Judge addressed the issue of the "gravity" and "magnitude" of the Obstruction Charges at paragraphs 19 and 26 of her Reasons for Sentence, which is then referred to in paragraph 33 where she states the "fine must be significant".

79. In the event this Honourable Court finds that the Trial Judge erred in law by inappropriately taking judicial notice of the facts about COVID referred to in paragraph 26, the basis for concluding the "gravity" of the offences is "high" is essentially removed. In that case, the Appellants' submission that the Trial Judge overemphasized the gravity of the offences will be made out, as there is no other basis relied upon by the Trial Judge for the gravity of the offences being high. Indeed, there is none.

80. However, even if this Court finds otherwise, the Trial Judge overemphasized the factor of the gravity of the offences because, even if she is permitted to refer to the COVID facts she did, there is no causal link between the Obstruction Charges and things like "Albertans dying of COVID", hospitals being challenged, and surgeries being postponed. It ought to go without saying that outcomes like surgeries being postponed were the result of government decisions, not the virus itself, and certainly not the result of a church denying entry to a health inspector during an ongoing worship gathering. The only way there could possibly be a causal link is if the offences were breaches of a CMOH Order. But they were not. They were for obstructing a health inspector.

81. Contrary to the Trial Judge's conclusion at paragraph 19 of her Reasons, the offences did not "prevent the inspector from assessing the situation in the church", as AHS Officer Allen had already performed that assessment just weeks before the first offence date and nothing had changed. The Church in the Vine worship gatherings in March and June 2021 were no less or more compliant with CMOH Orders than they were in December, 2020, or January and February 2021. This fact equally applies to the conclusion, for

[74] *R v Rose's Well Services Ltd. (Dial Oilfield Services)*, 2009 ABQB 266, at paragraph 14.

which there is no evidence in the record to support, that the CMOH was prevented from "determining how best to protect the general public and the congregants in the church".[75]

82. Further, leaving aside the issue that ***the congregants did not <u>want</u> the protection <u>of</u> the CMOH***, but rather protection ***<u>from</u>*** the CMOH, the CMOH does not make determinations of how to address any individual church—AHS does, as the entity that enforces CMOH Orders. The obvious scenario to exemplify this is the boondoggle involving GraceLife Church. The CMOH issued Orders severely limiting worship gatherings in the Fall of 2020 and Winter of 2021. When GraceLife did not comply, AHS issued a Closure Order, and then eventually seized the GraceLife church building. Nothing the Appellants ever did prevented AHS Officer Allen from issuing a Closure Order based on the evidence she obtained on December 13, 2021 and at other times.

83. The Appellants submit the Trial Judge made an error in principle by overemphasizing the gravity of the offences and that this Court should intervene to reduce the sentence imposed by the Trial Judge because the gravity of the offences was the factor that received the most weight by the Trial Judge in arriving at the $80,000 figure.

D. Failure of the Learned Trial Judge to Consider Relevant Factors

84. Failure to consider a relevant factor is yet also an error of principle that attracts appellate intervention. The Appellants submit the Trial Judge failed to consider two relevant factors.

Lack of any other Accompanying Charges for Breaches of CMOH Orders

85. As repeatedly alluded to elsewhere, the Trial Judge failed to consider the Appellants were not charged or convicted of any other offence, including any offence related to breaching a CMOH Order. Indeed, in her Reasons and implicit in the extraordinarily high fine amount she imposed, the Trial Judge approached sentencing for the Obstruction Charges as if the Appellants ***had*** been convicted of breaching a CMOH Order.

[75] Reasons for Sentence, at paragraph 19.

86. Higher fines for obstruction may be somewhat more justified in the context of a party that obstructed for the purposes of hiding substantive contraventions and/or was convicted of breaching CMOH Orders or substantive requirements in the *Public Health Act*. Neither occurred in the case at bar. Church in the Vine did not hide the non-compliance of the Sunday morning worship gatherings. That was not the purpose of the obstruction. In setting a fit sentence for obstruction offences, it is necessarily relevant to consider that such offences appear on their own, absent any substantive offences, as it indicates a less serious problem than the much more common scenario of multiple convictions for various breaches of safety requirements.

87. The Trial Judge failed to consider this factor, and, indeed, sentenced the Appellants as if they ***had been*** convicted of other offences. This is an error of principle that contributed to the fine amount imposed.

Motivation for Obstruction was to Protect Church in the Vine Congregants

88. The motivation for denying entry to AHS Officer Allen was to protect the sanctity of the worship gathering, the sanctity of sanctuary, and the spiritual integrity of the congregants while they worshiped. Pastors Tracy and Rodney repeatedly testified to this,[76] the truth of their testimony having been unchallenged by the Crown and accepted by the Trial Judge. This is an important factor that the Trial Judge seemed to regard as an aggravating factor, instead of identifying as a mitigating factor, as, the Appellants' submit, she should have.

89. There is no indication that the congregants of Church in the Vine did not want Pastors Tracy and Rodney to protect them spiritually during the worship gathering, or to protect their sanctuary. The Crown led no evidence that would raise any doubt about this. In fact, one of the Church in the Vine congregants, who assisted Pastor Tracy with guarding the entrances to the Church building, gave testimony that she attends the Church because:

> ***I believe what they stand for and the fact that they have opened freely worshipping God and they don't put restrictions on me on***

[76] See testimony of Pastor Tracy, Trial Transcript, April 21, at page 2, line 14 – page 3, line 19; page 5, lines 1-20; and page 6, lines 14-34. See also the testimony of Pastor Rodney, Trial Transcript, at page 42, line 3 – page 45, line 18 and page 53, lines 12-30.

> ***how I'm going to worship God***. I go there because they accept me. They love me for who I am and all my faults and everything that I've done in the past. So they welcome me when I went through a hard time. So I was very grateful for this church.[77]

90. Instead of acknowledging this, the Learned Trial Judge made the following statements in her Reasons for Sentence:

> Churches are intended to be a place where people gather. Accordingly, ***the people attending must be confident they will be safe when they attend church***.
> …
> They prevented the inspector from assessing the situation in the church which in turn prevented the Chief Medical Officer from determining how best to protect the general public ***and the congregants in the church***.[78]

91. As surprising as it may seem to the Trial Judge, given her expressed personal views regarding COVID, the reality is that the Church in the Vine congregants, by late 2020, were not at all concerned about COVID, but very concerned about disruption to the spiritual integrity of their worship gatherings and about the loss of their freedom to openly worship God "in spirit and in truth".[79] They did not want to be "protected" by the CMOH, they wanted to be ***left alone*** by the CMOH—they wanted to be confident when attending Church in the Vine for worship that they would be ***safe from the CMOH and AHS***.

92. The Trial Judge's failure to properly account for this factor matters because, instead of finding that the Appellants' good-faith motivation to protect the Church congregants was a ***mitigating*** factor, as the Trial Judge should have, her statements indicate she regarded the actions of the Appellants to have somehow put the congregants in danger. This likely contributed to an ***aggravating*** factor identified by the Trial Judge, that the "stakes are high". The Trial Judge did not explain what she meant by this, but, taken in the context of her reasons, this is almost certainly a reference to the Trial Judge's views regarding

[77] Trial Transcript, April 21, at page 13, line 41 – page 14, line 4 [emphasis added].
[78] Reasons for Sentence, at paragraphs 18-19 [emphasis added].
[79] See John 4:24.

the transmission of COVID and the Appellants' actions in contributing to that transmission.

93. Failing to consider the motivation of the Appellants to protect their congregants as a mitigating factor is an error in principle and one that contributed to increasing the fine imposed by the Trial Judge. Appellate intervention is warranted to correct this error.

E. $80,000 in Fines is a Demonstrably Unfit Sentence

94. Barring an error in principle or improper consideration of relevant factors, an appeal court will only intervene to vary a sentence imposed by a trial judge if the sentence is demonstrably unfit. A sentence is demonstrably unfit if it is so excessive that it falls outside of the acceptable range for the offence and the offender.[80]

95. $80,000 in total fines to a church and its pastor for three instances of denying entry to a health inspector that demanded to perform an inspection during an ongoing worship gathering is demonstrably unfit. So much is obvious to the reasonable person. Or, at least it would be, in the pre-COVID era. Fine amounts must accord with the principles of sentencing, both criminal and regulatory. The fines imposed by the Learned Trial Judge do not.

96. As the Trial Judge acknowledged, there are no recorded cases that involve convictions of stand-alone obstruction charges under the *Public Health Act*.[81] To determine an acceptable range, cases involving other obstruction charges pursuant to the *Public Health Act* and similar regulatory legislation must be looked at.

97. As for relevant cases involving fines for *Public Health Act* offences, defence counsel provided the Trial Judge with four. In her Reasons, the Trial Judge only addressed one, the *R v Khalaf* case, which is the only recorded case involving convictions for obstruction

[80] *R v Terroco Industries Ltd.*, 2005 ABCA 141, at paragraph 20.
[81] Reasons for Sentence, at paragraph 11.

under section 71 of the *Public Health Act*. The Trial Judge disregarded this case and the fact the total fines for the obstruction offences in that case were only ***$750***.[82]

98. The Appellants herein provide these same four cases and several others involving other regulatory offences. Together, these cases demonstrate that the upper end of the acceptable range for the Appellants' offences is far below $80,000.

***Public Health Act* Cases**

99. In *R v 1266480 Alberta Ltd.*,[83] a business was charged with 146 offences for operating a disgusting and unsafe motel.[84] Two individual defendants were fined approximately $28,000 each and a corporate defendant was fined the same amount for a total of approximately $84,000.[85] This case involved an enormous number of offences, serious potential and actual harm, and economic motivation. It is immediately clear that this case is far more egregious than the case at bar involving the Appellants.

100. In *R v 507357 Alberta Ltd.*,[86] this Court intervened to reduce the approximately $55,000 in fines imposed by the sentencing judge to only approximately $15,000.[87] This, notwithstanding the case involved 54 offences, serious health and safety concerns, including a bed bug infestation, and the defendant was a business engaging in a regulated activity for economic gain.[88]

101. In *R v Huttman*,[89] total fines imposed on the individual defendants were only $30,000, despite the defendants having operated for many years an unlawful, unsafe, and "disgusting" butchering business out of their garage.[90] This case also involved very high

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[82] *R v Khalaf*, 2017 ABPC 240, at paragraph 123.
[83] 2017 ABPC 85.
[84] *R v 1266480 Alberta Ltd.*, at paragraphs 1-2.
[85] *R v 1266480 Alberta Ltd.*, at paragraphs 75-77.
[86] 2009 ABQB 476.
[87] *R. v 507357 Alberta Ltd.*, at paragraph 44.
[88] *R. v 507357 Alberta Ltd.*, at paragraph 24.
[89] 2006 ABPC 15.
[90] *R v Huttman*, at paragraphs 22 and 24.

potential for significant harm and, again, a business engaged in a regulated activity for economic gain.

102. In *R v Khalaf*, in addition to 36 other charges, the individual defendant was charged with two counts of obstruction. The fines imposed for the two obstruction charges were only $250 and $500,[91] despite the fact Ms. Khalaf threw a "tantrum" each time she obstructed inspectors by yelling, striking objects, and verbally abusing inspectors.[92] Ms. Khalaf's reprehensible behaviour as compared to the calm and respectful manner of Pastor Tracy was not considered by the Trial Judge.[93]

103. The *Khalaf* case is plainly the closest to being on point for the case at bar, since it actually involves *Public Health Act* obstruction charges. Yet, the judge ruled it is "not much of a precedent" since there were over 30 other charges, and Ms. Khalaf plead guilty.[94] Although fine amounts for each individual offence are typically reduced in a case with a large number of offences due to the totality principle, and further reduced when the accused pleads guilty, that hardly accounts for the spectacular difference between $750 for two obstruction charges and $80,000 for three obstruction charges. Further, the fact Ms. Khalaf faced over 30 other charges does not make that case less serious than the case at bar. On the contrary, a case where obstruction charges are the only one indicates a less serious problem. The Trial Judge appears to get around this problem by finding that the obstruction in the *Khalaf* case was not "total", implying that it was total in the case at bar. The Trial Judge did not explain what she meant by "total obstruction" or how the obstruction in the case at bar was "total" considering the Appellants permitted AHS Officer Allen to conduct an inspection during an ongoing worship service a few months before the offences. Dismissing the relevance of this case directly contributed to the Trial Judge coming up with the $80,000 amount.

104. Some common features of the above cases stand out for being features ***absent*** in the case at bar. Each of the cases above involved activities that were not constitutionally protected

[91] *R v Khalaf,* at paragraph 123.
[92] *R v Khalaf*, at paragraphs 58-59, 68.
[93] Reasons for Sentence, at paragraph 31.
[94] Reasons for Sentence, at paragraph 31.

and engaged in for economic gain. Each of the above cases resulted in ***real*** potential or actual harm.

105. Each case also all involved substantive offences for having contravened requirements in the *Public Health Act*. The presence of other charges for substantive contraventions indicates a ***more*** serious problem, not a less serious problem, as the Trial Judge indicates when she discounted the *Khalaf* case. However "total" the obstruction was when AHS Officer Allen could not gain entry on the three dates in March and June 2021, the fact is she had gained entry twice before, once by consent of the Appellants. She gathered evidence through pictures and observations and charges were laid based on that evidence, but then those charges were withdrawn, presumably because the Crown was not satisfied prosecuting those charges was in the public interest and there was a reasonable likelihood of conviction.

106. Not only does $80,000 in fines to the Appellants far exceed the range established by these cases, a proper comparison of these case with the case at bar quickly reveals that a fit sentence for the Appellants should fall in the lower half of whatever the acceptable range is.

107. The above *Public Health Act* cases were all decided before the maximum fine amounts for offences under the *Act* were increased fifty-fold from $2,000 for a first offence to $100,000 in 2020. Although an increase in the statutory maximum is a relevant factor to consider, such an increase does not justify abandoning all the relevant precedents, as the Trial Judge has done. To do so violates the parity principle and results in an unfit sentence.

108. Further, little weight can be placed on such a drastic, fifty-fold increase. When the maximum fine amounts in the *Occupational Health and Safety Act* increased several years ago, it was from $150,000 to $500,000, a much more measured and reasonable increase.[95] Plainly, occupational health and safety contraventions were already regarded as very serious, much more so than public health contraventions, for which, until two

[95] *R v Rose's Well Services Ltd.*, at paragraph 17.

years ago, the maximum penalty was ***250 times less*** than the *Occupational Health and Safety Act* maximum.[96] Of course, this makes since, because violations of OHS legislation regularly leads directly to death and lifelong injury much more so than public health violations, as the cases below demonstrate.

***Occupational Health and Safety Act* Cases**

109. In *R v Canadian Consolidated Salvage Ltd.*,[97] a worker fell through a large hole in a wall, suffering injuries to his leg that put him in the hospital for two weeks.[98] The employer knew about the hole, and the hazard it posed, but choose to ignore it. The injury was foreseeable. The corporate defendant showed no remorse.[99] Although trite, it must be noted that this case involved real harm to a real victim, a known dangerous situation, and an activity not constitutionally protected and that was engaged in for economic gain. The total fines, for six charges, was only $115,000.[100] This case was decided when the maximum fine under the *Occupational Health and Safety Act* in force at the time was $500,000.[101] This case, like the next one, reviewed many other cases so as to properly identify the acceptable range of penalty.[102]

110. In *R v Rose's Well Services Ltd.*, the Court of Queen's Bench upheld a fine of $100,000 under the *Occupational Health and Safety Act*, despite an appeal from the Crown seeking $150,000 - $200,000.[103] This case involved an explosion that injured two workers so severely they were still suffering from their injuries more than three years after the incident.[104] This case was also decided under the effect of the new maximum $500,000 fine amount. Like in *R v Canadian Consolidated Salvage Ltd.*, the Court in this case looked at a long list of comparable cases to determine if the sentencing judge had imposed a fine within the acceptable range.[105] Despite serious injuries and sometimes

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[96] *Occupational Health and Safety Act*, SA 2020, c O-2.2, at section 48(1)(a)(i).
[97] 2013 ABPC 120.
[98] *R v Canadian Consolidated Salvage Ltd.*, at paragraphs 14-17.
[99] *R v Canadian Consolidated Salvage Ltd.*, at paragraph 40.
[100] *R v Canadian Consolidated Salvage Ltd.*, at paragraph 60.
[101] *R v Canadian Consolidated Salvage Ltd.*, at paragraph 7.
[102] *R v Canadian Consolidated Salvage Ltd.*, at paragraph 51.
[103] *R v Rose's Well Services Ltd.*, at paragraph 81.
[104] *R v Rose's Well Services Ltd.*, at paragraph 6.
[105] *R v Rose's Well Services Ltd.*, at paragraphs 78-79.

even deaths, fines ranged from approximately $50,000 - $150,000. Again, this case and all the cases cited within involved companies engaged in always-regulated, for-profit business activities.

111. In *R v APM Constructions Services Inc.*,[106] an in-ground gas line was ruptured during construction.[107] The presence of the line was known. In this case, nobody was hurt, but the Provincial Court noted that, "***real*** danger was experienced by all workers on the job-site", and "[t]he potential for multiple fatalities was ***real***".[108] The accused plead guilty. A joint submission of $75,000 was accepted by the Court.[109] Obviously the fine amount would have been higher in the event there was no guilty plea and a joint submission. This case provides needed perspective for the case at bar, because, although nobody was actually hurt, there was ***real*** potential for multiple injuries and deaths and significant property damage. Again, this case involved an activity engaged in for economic gain that is not constitutionally protected. The fine amount in this case, given the facts, is irreconcilable with the fines imposed on the Appellants.

112. As before, some common features stand out about these cases, and, indeed nearly all cases involving regulatory fines. The entities and persons charged are engaged in activities for the purpose of economic gain, these activities being ones that are not accorded constitutional protection, there is usually real harm and an actual victim, there is always ***real*** potential for ***serious harm***, and the charges are for substantive contraventions, not failures to consent to inspection.

113. This is not to suggest that obstruction of an inspector is a mere technically, but regard must be paid to the difference between obstruction convictions in the absence of any other charge compared to cases where falls, explosions, and sub-standard facilities caused serious real harm to actual victims, or the real potential of serious harm. If the range for the latter is between $75,000 - $150,000, which it is, then the range for a set of

[106] 2020 ABPC 15.
[107] *R v APM Constructions Services Inc.*, at paragraphs 2-3 and 23.
[108] *R v APM Constructions Services Inc.*, at paragraph 23 [emphasis added].
[109] *R v APM Constructions Services Inc.*, at paragraph 37.

three first-time obstruction charges, on their own, must be significantly less. Otherwise, cases with real harm and real victims are unduly minimized.

Multi-Party Totality

114. "Multi-party totality arises with regulatory statutes that make numerous people concurrently responsible for the same delict."[110] Pastor Tracy and Church in the Vine were each charged for the same offence. Decisions such as the one made in this case to deny entry to AHS Officer Allen are made exclusively by Pastors Rodney and Tracy on behalf of the Church they lead. The adage that "corporations can only act by and through their human agents" equally applies in this case to the Pastors and Church in the Vine. Church in the Vine has no controlling mind independent of Pastors Rodney and Tracy.[111] An offence committed by the Church and one of the Pastors "is essentially one offence".[112] Therefore, the total sentence in this case "should not exceed the single appropriate and proportionate penalty".[113] Yet, the Trial Judge's sentence includes $15,000 above the amount imposed upon the Church. This effectively amounts to double-fining, especially when considering, as acknowledged by the Trial Judge,[114] Pastor Tracy's only income is from pastoring Church in the Vine and the Church will end up paying her fine in any event. This further demonstrates $80,000 in fines is an unfit sentence.

Conclusion on Unfit Sentence

115. Lastly, it is also instructive to consider the case of Pastor James Coates, of GraceLife Church in Edmonton. On March 22, 2021, Judge Champion of the Provincial Court rejected a joint submission on sentence and instead imposed a fine of $1,500 on Pastor Coates for breaching an undertaking contrary to section 5(5) of the *Provincial Offences Procedure Act*. This followed Pastor Coates being charged for substantive offences for contravening CMOH Orders when he hosted a worship gathering. Judge Champion made

[110] *Alberta (Health Services) v Bhanji*, 2017 ABCA 126, at paragraph 57.
[111] *Bhanji*, at paragraph 65.
[112] *Bhanji*, at paragraph 62.
[113] *Bhanji*, at paragraph 63.
[114] Reasons for Sentence, at paragraph 35.

a point of delivering a harsh admonishment to Pastor Coates, and yet still awarded only 75% of the statutory maximum he could have imposed. There is a ***10-fold disparity*** between this fine and the fine imposed on Pastor Tracy, who was not charged with breaching a CMOH Order.

116. The Appellants submit the acceptable range for the Obstruction Charges is $5,000 - $25,000, given that the Appellants are a pastor and a not-for-profit religious organization and the activity engaged in—a worship gathering—was constitutionally protected. A sentence of $80,000 is demonstrably unfit because it falls well outside this acceptable range. It is the product not of fit and just sentencing, but of a desire to "send a message".

IV. RELIEF SOUGHT

117. The Appellants seek the following remedies:

    a. An Order setting aside the conviction and directing a new trial;

    b. In the alternative, an Order setting aside the $80,000 in total fines imposed by the Trial Judge and reducing the fines to $3,000 in total for Pastor Tracy and $9,000 in total for Church in the Vine.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF AUGUST 2022

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LIST OF AUTHORITIES

1. *Alberta (Health Services) v Bhanji*, 2017 ABCA 126.
2. *Bizon v Bizon*, 2014 ABCA 174.
3. *Droit de la famille – 091768*, 2013 SCC 5.
4. *Haaretz.com v. Goldhar*, 2018 SCC 28.
5. *JN v CG*, 2022 ONSC 1198.
6. *R. v. 1266480 Alberta Ltd.*, 2017 ABPC 85.
7. *R. v. 507357 Alberta Ltd.*, 2009 ABQB 476.
8. *R v. Abdulkadir*, 2020 ABCA 214.
9. *R v APM Constructions Services Inc.*, 2020 ABPC 15.
10. *R v B (M)*, 2016 BCCA 476.
11. *R v Blanchard*, 2018 ABQB 43.
12. *R v Canadian Consolidated Salvage Ltd.*, 2013 ABPC 120.
13. *R v Church in the Vine of Edmonton*, 2022 ABPC 108 (Reasons for Decision).
14. *R v Church in the Vine of Edmonton*, 2022 ABPC 153 (Reasons for Sentence).
15. *R v Find*, 2001 SCC 32.
16. *R v Hussein*, 2022 ABCA 219.
17. *R v Huttman*, 2006 ABPC 15.
18. *R v Imola*, 2019 ONCA 556.
19. *R v JM*, 2021 ONCA 150.
20. *R v Khalaf,* 2017 ABPC 240.
21. *R v Lising*, 2005 SCC 66.

22. *R v Mabior*, 2012 SCC 47.

23. *R v McDonald*, 2013 BCSC 314.

24. *R v Rose's Well Services Ltd. (Dial Oilfield Services)*, 2009 ABQB 266.

25. *R v S (RD)*, [1997] 3 S.C.R. 484.

26. *R v Schultz*, 2018 ABPC 134.

27. *R v Spence*, 2005 SCC 71.

28. *R v Stephen*, 2021 ABCA 82.

29. *R v Terroco Industries Ltd.*, 2005 ABCA 141.

30. *Yukon Francophone School Board, Education Area No. 23 v Yukon Territory (Attorney General)*, 2015 SCC 25.