Court of King's Bench of Alberta

Citation: R v Church in the Vine and Fortin, 2022 ABKB 704

Date: 20221021
Docket: 210723391S1
Registry: Edmonton

Between:

Church In the Vine of Edmonton and Tracy Fortin

Appellants

- and -

His Majesty the King

Respondent

Decision
of the
Honourable Justice M. Hayes-Richards

Appeal from the Conviction and Sentence by
The Honourable Judge Creagh, SR
Convicted on the 04th day of May, 2022
Sentenced on the 28th day of June, 2022
(2022 ABPC 108 and 2022 ABPC 153, Docket: 210723391P1)

I. INTRODUCTION

[1] Church in the Vine of Edmonton and Tracy Fortin (the Appellants) were convicted of three counts of obstructing, molesting, hindering, or interfering with a person in the execution of duties imposed under the *Public Health Act*, RSA 2000, c P-37 (*PHA*) or its regulations, contrary to s 72 of the *PHA*. The Appellants appeal both their conviction and sentence.

[2] For the reasons below, I dismiss the appeals.

II. BACKGROUND

[3] On March 7, March 14, and June 6, 2021, the Appellants did not permit a *PHA* Inspector (the Inspector) to enter the Church in the Vine of Edmonton building (the Church) in order to conduct an inspection. The Inspector was authorized pursuant to the *PHA* to enter the Church to determine if the people inside were complying with orders issued by the Chief Medical Officer of Health for Alberta (CMOH). When the Inspector attempted to enter the Church on the three occasions at issue, Tracy Fortin denied the Inspector entry. The Inspector did not enter the Church and left each time after being denied entry. The Inspector was unable to carry out her duties and could not ascertain whether there were issues with compliance with the *PHA*.

[4] On two prior occasions, the Inspector did enter the Church. The pastors of the Church, Tracy and Rodney Fortin, deemed these prior entries to be disruptions to the sanctity of the worship services being held at the time. After the pastors made that decision, Tracy Fortin prevented the Inspector from entering the Church on the three occasions at issue.

[5] The Appellants did not bring a constitutional challenge to the governing legislation or the CMOH Public Health Notices at issue (Public Health Notices #04-2021, #05-2021, and #30-2021(the CMOH orders)) under the *Judicature Act*, RSA 2000, c J-2 (*JA*). They did bring a *Charter* application that the Trial Judge dismissed without holding a *voir dire*. The Trial Judge dismissed the *Charter* application on the basis that it had no prospect of success. She was of the view that the *Charter* application was a collateral attack on the validity of the governing legislation without a proper constitutional challenge pursuant to the *JA*.

[6] The Appellants were subsequently convicted on all three charges and sentenced to fines. The *PHA* was amended in 2020 (*Public Health (Emergency Powers) Amendment Act*, 2020, SA 2020, c 5). In that amendment, fines for contraventions of the *PHA* were increased from a maximum fine of $2000 to a maximum fine of $100,000 in the case of a first offence. The Appellants were sentenced pursuant to the amended penalties.

III. CONVICTION APPEAL

[7] The Appellants raise two grounds of appeal:

1. Whether the Trial Judge unreasonably exercised her discretion in granting the Crown's ***Vukelich*** application; and
2. Whether the Trial Judge displayed a reasonable apprehension of bias.

A. *Vukelich* Application

[8] Before the trial began, the Crown brought an application pursuant to ***R v Vukelich***, [1996] 108 CCC (3d) 193 (BC CA) [***Vukelich*]** (***Vukelich*** application), asking the Trial Judge to summarily dismiss the Appellants' *Charter* application without a *voir dire*. The Trial Judge granted the Crown's application. The Trial Judge found that none of the Appellants s 2 *Charter* rights were breached by the actions of the Inspector. Alternatively, if there was a breach, it was so trivial and insubstantial as to not require a remedy.

[9] The Appellants argue that the Trial Judge erred in law by failing to judicially exercise her discretion when she decided to summarily dismiss the *Charter* application. The Appellants submit that their *Charter* application had a reasonable prospect of success and therefore they ought to have been permitted to call evidence and make submissions in support of their *Charter* claims and have those claims adjudicated.

[10] The Respondent argues the Trial Judge properly exercised her discretion to summarily dismiss the Appellants' *Charter* application because its application could not succeed. The Respondent submits that the Appellants failed to cite any evidence of state conduct that would rise to the level of a s 2 *Charter* breach. As such, a hearing would not have assisted in determining any issue or disclosed a basis for a *Charter* remedy. The Respondent refers to the Supreme Court's strong encouragement of trial judges to consider truncating Court proceedings by dismissing applications that cannot succeed: ***R v Cody***, 2017 SCC 31 at para 38. The Respondent submits that Courts have authority to control their own process and should do so to make efficient use of Court time.

[11] I find no error in the Trial Judge's decision to decline to hold an evidentiary *voir dire* on the *Charter* issues raised in the Appellants' *Charter* Notice. The Trial Judge properly weighed the facts being alleged and exercised her discretion in a judicially appropriate way.

[12] There is no automatic entitlement to an evidentiary *voir dire* in a *Charter* claim: ***R v Orr***, 2021 BCCA 42 at para 46 [***Orr***]. Where there is no reasonable likelihood that a *voir dire* can assist in determining the issues before the Court, or no reasonable prospect of success in proving an infringement or obtaining the sought-after relief, a trial judge has clear jurisdiction to decline an evidentiary *voir dire* and to summarily consider and dismiss the application: see ***Orr*** at para 46, citing ***Vukelich***, ***R v Greer***, 2020 ONCA 795 at para 108, ***Trans Mountain Pipeline ULC v Mivasair***, 2020 BCCA 225 at paras 49 – 52, ***R v Edwardsen***, 2019 BCCA 259 at para 62, leave ref'd [2019] SCCA No 337, ***R v Vickerson***, 2019 BCCA 39 at para 61, ***R v Frederickson***, 2018 BCCA 2 at paras 11 – 14, 24, 26, 33, 39; ***R v Joseph***, 2018 BCCA 284 at paras 20 – 25; ***R v Cody***, 2017 SCC 31 at para 38; ***R v Mehan***, 2017 BCCA 21 at paras 43 – 47, 49; ***R v Pires, R v Lising***, 2005 SCC 66 at para 35.

[13] ***Vukelich*** applications are highly contextual, involving factors such as the extent to which the facts are in dispute, and the state and clarity of the law on the issue: ***R v McDonald***, 2013 BCSC 314 at para 21. Counsel alleging the *Charter* violation must put their best foot forward as to the particulars and merit of their motion: ***R v Giesbrecht***, 2019 MBCA 35 at para 158 [***Giesbrecht***]. An appeal court can only intervene with a trial judge's exercise of discretion not to hold an evidentiary hearing where the trial judge failed to exercise their discretion judicially. Deference is owed to the discretionary decision: ***Giesbrecht*** at para 136.

[14] In this case, the Trial Judge applied the three-part procedure for considering a ***Vukelich*** application as set out in ***R v Blanchard***, 2018 ABQB 43 at para 17 [***Blanchard***]:

1. The trial judge should assume the truth of the facts the applicant sought to prove to establish their entitlement to a constitutional remedy.
2. The trial judge should consider whether those facts disclosed a basis in law for the constitutional remedy on the grounds set out in the applicant's notice.
3. If the trial judge concludes that the applicant would not be entitled to a constitutional remedy on those grounds, even if he proved the facts he alleges, the trial judge can exercise his or her discretion and decline to embark on an evidentiary hearing.

[15] Under the first step, the Trial Judge stated that she would presume the most favourable facts alleged by the Appellants. Those facts included the following:

- The CMOH orders required all individuals in the Church to be masked and that 15% of the fire code capacity not be exceeded;
- Public complaints regarding *PHA* compliance had been made against the Church in the Fall/Winter of 2020/2021;
- In response to these complaints, the Inspector, whose lawful duty it was to investigate such complaints, went to the Church on several occasions to look into these complaints;
- The Inspector was able to enter the Church on at least one occasion;
- Further complaints were made in early 2021. The Inspector tried to make arrangements to inspect the Church but was not successful in finding a convenient time;
- The Inspector attempted entry three times on the charge dates. Each time, Tracy Fortin, a pastor at the Church, denied the Inspector entry into the Church;
- The contact between Tracy Fortin and the Inspector was polite at all times, but also brief. The Inspector left each time after being denied entry to the Church;
- Although the Trial Judge was unclear on whether services were going on when the Inspector sought entry on these three occasions, she assumed that on at least the June date, a Church service was occurring when the Inspector sought to inspect.

[16] Under the second step, the Trial Judge adopted Shaigec J's summary of the law with respect to the scope and purpose of s 2 *Charter* rights as set out in ***R v Coates***, 2021 ABPC 162 [***Coates***] at paras 27 – 42, and 50. The Trial Judge found Shaigec J's analysis of the law to be accurate and thorough, and rejected the Appellants' assertion that the analysis was cursory.

[17] The Trial Judge concluded that the Inspector's actions did not form the basis to find a *Charter* breach of conscience or religion, freedom of peaceful association, or freedom of assembly. She accepted the prosecutor's description of the Inspector's actions alleged to constitute the breach as an attempt to enter the premises to undertake her duties under the *PHA*. The Trial Judge found that the Inspector did nothing that in any way touched any element of the *Charter* rights at issue. The Trial Judge specifically pointed out that when counsel for the Appellants was pressed as to what precise actions of the Inspector constituted the breach, he was not able to give a particularly clear answer. She found the closest he came was his assertion that

when the Inspector was able to enter the Church in the previous Fall, her presence was disturbing to Church members.

[18] The Trial Judge concluded that since Tracy Fortin was successful in preventing the Inspector's entry into the Church on the three charge dates, the Inspector had no actual presence in the Church. Therefore, the Inspector's presence could not have disturbed Church members. The Trial Judge found that even if it could be said that the Inspector's presence did disturb the Church members, the breach was trivial and insubstantial, and no remedy was available or required.

[19] Under the third step, the Trial Judge concluded that this was an appropriate case to exercise her discretion to decline to embark on an evidentiary hearing because there was no reasonable likelihood that the *Charter* argument would succeed. The Trial Judge further found that the *Charter* application, was, in effect, a collateral attack on the validity of the CMOH orders and *PHA*, which had not been challenged.

[20] The Appellants submit the Trial Judge made a number of discrete errors in granting the Crown's ***Vukelich*** application.

[21] First, they submit the Trial Judge failed to recognize the key issue of religious freedom as raised by the facts in this case, and that this failure underwrote many of the Trial Judge's erroneous findings. As an example, they point to the Trial Judge's finding that the *Charter* application was a collateral attack on the validity of the CMOH orders and the *PHA*. They argue that in both written and oral submissions to the Trial Judge, counsel for the Appellants was clear that they were impugning the Inspector's exercise of her authority insofar as it breached the Appellants' s 2 *Charter* rights, and the Inspector's decision to lay obstruction charge when she could not exercise her inspection authority the way she wanted.

[22] I agree with Appellants' counsel that it was clear, both before the Trial Judge and this Court, that the Appellants were arguing the Inspector's exercise of her authority under the *PHA* was unreasonable, and therefore a violation of the Appellants' s 2 *Charter* rights. The Appellants were not arguing the constitutional validity of the CMOH orders and *PHA*, and in fact, could not do so at the Provincial Court trial (see Part 3 of the *JA*). Despite being clear that the issue was the **way** in which the Inspector exercised her authority under the *PHA*, the Appellants failed to lead any evidence to substantiate their argument. When the Trial Judge asked what specific actions of the Inspector violated the Appellants' s 2 *Charter* rights, counsel for the Appellants repeatedly argued that the Inspector's mere presence in the Sanctuary of the Church was the violation. However, nothing in the Appellants' *Charter* Notice, or in their written or oral submissions expanded on this claim other than to say that the Inspector's presence was disturbing to the Church members.

[23] The Appellants' entire argument relating to unreasonable exercise of authority was based on the mere presence of the Inspector in the Sanctuary of the Church and nothing more. This argument was a veil over the Appellants' real argument, which was the validity of the CMOH orders that authorized the Inspector's presence in the Church. The Appellants were attempting to challenge the validity of the CMOH orders and *PHA* by arguing an unreasonable exercise of authority. The Trial Judge recognized this when she concluded that the *Charter* argument was, in effect, a collateral attack on the CMOH orders and *PHA*. I agree with the Trial Judge's conclusion in this regard, but also note that it had no effect on the outcome of the ***Vukelich***

application. The ***Vukelich*** application was granted on the basis that there was no reasonable likelihood that the *Charter* argument would succeed.

[24] The Appellants second argument is that, although the Trial Judge correctly articulated the three-step test laid out in ***Blanchard***, she failed to correctly apply the first step, which was to assume the truth of the facts sought to be proved by the Appellants. The Appellants point to the Trial Judge's statement that she "accepted the prosecutor's description of the actions alleged to constitute the breach" instead of accepting, as required, the Appellants description.

[25] The Trial Judge was correct in finding that nothing the Inspector did on the charge dates could constitute a violation of the Appellants' s 2 *Charter* rights. On the charge dates, the Inspector did nothing more than attempt to enter the Church to inspect for compliance with the CMOH orders. When entry was refused, the Inspector left.

[26] The Appellants argue that the Trial Judge failed to recognize their argument: that by refusing the Inspector's entry they were trying to protect their s 2 *Charter* rights. Had they allowed the Inspector to enter, the Church members would have "suffered the same violence" as was suffered on the previous occasion when the Inspector entered the Church during a worship service. The Appellants submit the Trial Judge failed to consider the Appellants' facts regarding the effect of the Inspector's actions during her previous entry into the Church and that the Inspector was almost certain to engage in the same actions should she enter the Church again.

[27] Even if the Appellants are correct that the Trial Judge was required to consider their argument that they would have "suffered the same violence" as was suffered on the previous occasions when the Inspector gained entry into the Church, there was no evidence before the Trial Judge of what constituted the "violence suffered." The only evidence before the Trial Judge was that the Inspector's mere presence in the Sanctuary was disturbing to Church members. It is clear the Trial Judge was aware of this argument. Immediately after finding that the Inspector's attempts to enter the Church on the three charge dates did nothing that in any way touched any element of the Appellants' s *2 Charter* rights, the Trial Judge stated that, despite her inquiries, she was not told what precise actions by the Inspector the Appellants were suggesting constituted the *Charter* breach. The Trial Judge noted that the most detail she could get was that the Inspector's mere presence in the Sanctuary, on the prior occasion, was disturbing to Church members. This was not an oversight by counsel, or a failure to expand on the exercise of the Inspector's authority. This was the argument that the Appellants wanted to advance – the Inspector's mere presence in the Sanctuary was a violation of the Appellants' s 2 *Charter* rights.

[28] I accept the summary of the law with respect to the scope and purpose of the s 2 rights as outlined by Shaigec J in ***Coates*** and I agree with the Trial Judge that Shaigec J's analysis of the law in this area is accurate and thorough. At paras 27 – 32, Shaigec J correctly articulated the authorities surrounding s 2(a) *Charter* rights, which includes the principle that s 2(a) of the *Charter* only shelters beliefs that might reasonably be threatened **in more than an insubstantial way, and only after competing interests are weighed**: see ***Alberta v Hutterian Brethren of Wilson Colony***, 2009 SCC 37 at para 32 and ***Syndicat Northcrest v Amselem***, 2004 SCC 47 at para 62 (emphasis mine). At para 50 Shaigec J correctly articulated that law governing s (2)(c) and (d) rights of assembly and association. There was nothing in the way the Inspector exercised her authority under the *PHA* that interfered in any way with the Appellants s 2 rights of assembly and association and the *PHA* and CMOH orders were not challenged.

[29] I find the Trial Judge did not err when she accepted that the actions of the Inspector on the charge dates were the relevant actions to consider, and that the Inspector's unsuccessful attempts to enter the premises to undertake her duties under the *PHA* did not touch on any of the Appellants s 2 *Charter* rights. Furthermore, if the Trial Judge did err by failing to consider the prior actions of the Inspector on a different date, I find that the Trial Judge's conclusion still holds. The Inspector's mere presence in the Sanctuary is not a violation of the Appellants s 2 *Charter* rights given the competing interests of ensuring compliance with government regulations designed to protect the public. To the extent that it could be said to be such, it is so trivial and insubstantial as to require no remedy.

[30] The Appellants third argument is that the Trial Judge erred by failing to find that, assuming the truth of the facts put forth by the Appellants in their *Charter* application, the obstruction charges in and of themselves could reasonably constitute a breach of the Appellants' s 2 *Charter* rights. The Appellants submit that performing a public health inspection during an ongoing worship gathering is not a *Charter* compliant action. Had a *voir dire* been held, the Appellants would have been able to call evidence to support this assertion.

[31] The Appellants are essentially arguing that the Trial Judge failed to consider that the Inspector's authority to perform a public health inspection was an unreasonable infringement on the Appellant's s 2 *Charter* right. This is a collateral attack on the constitutionality of the *PHA*. The only way that the Appellants could have properly advanced this argument is if they challenged the authority of the CMOH to place limits on worship services, or the constitutional validity of the *PHA* that grants the Inspector's authority to make inspections. The validity of the CMOH orders and *PHA* was not challenged, and therefore they were presumptively valid.

[32] The Inspector went to the Church in response to community complaints and to inspect for compliance with the CMOH orders issued pursuant to the *PHA*. She was denied entry. Obstruction charges were a legitimate response to those circumstances. If the Trial Judge had accepted the Appellants' argument, she would have been deciding a constitutional challenge to the *PHA* without a proper hearing. Further, if the laying of obstruction charges in and of themselves were a breach of the Appellants' s 2 *Charter* rights, it would make the Appellants ungovernable under the *PHA*. The Appellants conceded that the Church was subject to fire codes and food regulations, which means that the Church and the activities within it were subject to the *PHA* and any accompanying regulations.

[33] Lastly, the Appellants argue that it is reversible error for a trial judge to dismiss a *Charter* application that raises a new legal issue. The Appellants rely on ***R v B(M)***, 2016 BCCA 476 [***B(M)***] at paras 44, 48, 54, 68, 74 and 107, which they submit is directly on point. The Appellants submit that the Trial Judge should have heard their *Charter* application because it raised new legal issues, regardless of whether it was clear that the Appellants would succeed. I disagree with the Appellants that ***B(M)*** is directly on point with this case. In ***B(M)***, the Court found that the trial judge erred in summarily dismissing a constitutional challenge without an evidentiary hearing based on *stare decisis* because the trial judge was wrong that the legal issue before the court had already been settled by the Supreme Court of Canada: see para 67. The Court did not say that anytime someone raises a factual argument that has not been considered before, there must be a *voir dire*. That is certainly a consideration for a trial judge, but not a requirement. In this case, the Trial Judge did not dismiss the Appellants' *Charter* application based on *stare decisis*. She dismissed it after applying the alleged facts to the law and finding the alleged facts did not disclose any breach as a result of the Inspectors' actions.

B. Reasonable Apprehension of Bias

[34] The Appellants argue that the Trial Judge was personally biased by the COVID-19 pandemic and as a result failed to take into account the Appellants' *Charter* rights, specifically any arguments or evidence pertaining to the Appellants' right to religious freedom. The Appellants take issue with the following comments made by the Trial Judge in the course of the trial and during her sentencing decision:

> (a) At the time, the greater society, including 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;
>
> (b) COVID-19 was highly communicable, was in society, and that a place such as a church would be a super spreader event in that people could go to that place, be exposed to COVID-19, leave, and take the disease wherever they wanted to go with it;
>
> (c) The spread of COVID-19 or other diseases within the community at large was obviously a potential effect of the offence;
>
> (d) Alberta was in the midst of a pandemic, Albertans were dying from COIVD, hospitals were challenged to accommodate and treat the sick, and major surgeries and treatments for other illnesses were being postponed as a result.

[35] The Appellants submit that these comments contained rhetoric that aligned with the prosecution and that implicit in these comments was an assumption that those who did not adhere to public health restrictions, like the Appellants, were to blame for the spread of COVID-19.

[36] The trial record as a whole does not suggest that the Trial Judge made decisions based on generalizations or prejudice, or that the Trial Judge was biased toward evidence about COVID-19 and away from evidence about religiously held beliefs or religious freedoms. The Trial Judge's decisions were grounded in either the evidentiary record before her or the rules of evidence that governed the proceedings

[37] The test for a reasonable apprehension of bias was affirmed in ***Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)***, 2015 SCC 25 [***Yukon***] at para 20: a reasonable apprehension of bias will exist if an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude that it is more likely than not that the decision-maker, whether consciously or unconsciously, did not decide fairly. There exists a strong presumption of judicial impartiality that is not easily displaced: ***Cokocaru v British Columbia Women's Hospital and Health Centre***, 2013 SCC 30 at para 22; see also ***Yukon*** at para 25. As such, there must exist a real likelihood or probability of bias: ***Arsenault-Cameron v Prince Edward Island***, [1999] 2 SCR 851 at para 2; see also ***R v S(RD)***, [1997] 3 SCR 484 [***S(RD)***] at para 136; ***Yukon*** at para 25. The inquiry is contextual and fact-specific with a high burden of proof on the party alleging the bias: ***Wewaykum Indian Band v Canada***, 2003 SCC 45 at para 77; see also ***S(RD)***, at para 114. The impugned conduct, taken in context and in light of the whole proceedings, must truly demonstrate a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations***: S(RD)*** at para 141; ***Yukon*** at para 26. The entire record must be considered to

determine the cumulative effect of the alleged improprieties: ***Miglin v Miglin***, 2003 SCC 24 [***Miglin***] at para 26; ***R v Stephan***, 2021 ABCA 82 at para 111.

[38] If the party alleging bias is successful in rebutting the presumption of impartiality, the remedy is a new trial: ***Miglin***, 2003 SCC 24 at paras 29 – 30.

[39] In this case, the Trial Judge had actual evidence before her in the form of the CMOH orders regarding the presence of COVID-19 in Alberta, the highly infectious nature of COVID-19, and that COVID-19 posed a significant health risk. The following facts regarding the existence of COVID-19 in the Province of Alberta were contained in the CMOH orders:

- The CMOH initiated an investigation into the existence of COVID-19 within the province of Alberta;
- The investigation has confirmed that COVID-19 is present in Alberta and constitutes a public health emergency as a novel or highly infectious agent that poses a significant risk to public health;
- That the CMOH has the authority to order prohibitions or restrictions if the CMOH determines that people engaging in certain activities could transmit an infectious agent.

[40] Worship services were specifically addressed in the CMOH orders (Part 4 – Places of Worship in Notice #04-2021 and #05-2021 and Part 7 – Places of Worship in Notice #30-2021). The CMOH orders did not contain a ban on worship services but restricted the number of people who could gather inside a church building at one time.

[41] The Trial Judge's comments that Alberta was in the throes of a pandemic due to COVID-19, that COVID-19 was a highly communicable disease, that a place such as a church had the potential to cause the spread of COVID-19 were all drawn from the evidentiary record before her and not from her personally held views. The Trial Judge had actual evidence from the CMOH orders that COVID-19 was highly infectious and posed a significant risk to public health. Further, the only reasonable inference that the Trial Judge could have drawn from the restrictions imposed on worship services in the CMOH orders was that those restrictions were imposed to prevent the spread of COVID-19. This was specifically articulated in the preamble to the CMOH orders: that the CMOH has the authority to order **prohibitions or restrictions if the CMOH determines that people engaging in certain activities could transmit an infectious agent**.

[42] The Appellants take issue with the Trial Judge's "interference with evidence" surrounding personally held religious beliefs and the Appellants' religious freedoms. The Appellants submit that, due to her personal views or bias, the Trial Judge improperly excluded any evidence regarding religious freedoms or religiously held beliefs. I disagree. The Trial Judge's interventions were not driven by her personal views or bias. They were based on the rules of evidence. The Trial Judge properly intervened when the evidence strayed from the relevant and triable issues, breached a rule of evidence, or when the questions posed were improper.

[43] The Trial Judge did not "thwart" or "roadblock" evidence about religious freedoms and religiously held beliefs. Rather, she properly intervened when the evidence became irrelevant. The Appellants did not challenge the constitutionality of the *PHA* or the CMOH orders as unreasonably infringing on their s 2 *Charter* rights. Had the Appellants challenged the

constitutionality of the legislation or the authority of the CMOH to direct restrictions on the Church or the activities taking place inside, religious freedom and religiously held beliefs would have been relevant. Since they did not bring that challenge, the Trial Judge properly focused the evidence on whether the Appellants complied with a presumptively valid legislation, and if not, whether they had a reasonable excuse for their non-compliance.

[44] The Trial Judge allowed the Appellants to testify about their reasons for excluding the Inspector and gave Rodney Fortin wide latitude in explaining the religious motivation behind the Appellants' decision to exclude the Inspector from the Church Sanctuary during worship services. The Appellants take issue with the Trial Judge's decision to ask Rodney Fortin to paraphrase a passage from the Bible rather than reading it. The Trial Judge's decision was not improper or predicated on her personal views or bias. Rodney Fortin had already given extensive evidence about his religious beliefs that informed his decision to continue in-person worship services and to deny entry to anyone who was not attending the Church to worship. Reading a passage from the Bible served no legitimate purpose within the context of the triable issues.

[45] The Appellants argue that the Trial Judge improperly interfered with the cross-examination of the Inspector when the Inspector began testifying about religiously held beliefs. The Appellants submit that the Trial Judge expressed personal bias when she did not allow the Appellants to cross-examine the Inspector on where she attends church. The Appellant was permitted to cross-examine on the meaning behind the Inspector's comments about her own church that she made to Tracy Fortin on the date of the offences. The Appellants further submit that the Trial Judge expressed personal bias when she did not allow the Appellants to cross-examine the Inspector on whether she understood that different individual Christians held different beliefs. The Trial Judge properly disallowed this question because it was outside the scope of the Inspector's evidence and ability to testify. In both cases, the Trial Judge responded to a Crown objection. And, in both cases, the Appellants counsel did not argue as to why the question was proper. He simply moved on.

IV. SENTENCE APPEAL

A. Standard of Review

[46] An Appellate Court may not intervene with the sentence imposed unless the sentence is clearly unreasonable: ***R v Shropshire***, [1995] 4 SCR 227 at para 46. The sentencing Court is entitled to considerable deference from Appellate Courts. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, the Appellate Court should only intervene to vary the sentence imposed if it is demonstrably unfit: ***R v M(CA)***, [1996] 1 SCR 500 at para 90: see also ***R v LM***, 2008 SCC 31 at paras 14 – 15, ***R v Nasogaluak***, 2010 SCC 6 at paras 43 – 46, and ***R v Lacasse***, 2015 SCC 64 [***Lacasse***] at para 41.

B. Judicial Notice

[47] The Appellants argue that the Sentencing Judge took improper judicial notice of certain facts surrounding the COVID-19 pandemic as it existed at the time of the offences and at the time of sentencing. The Appellants submit that the circumstances of the COVID-19 pandemic were the subject of reasonable debate, and therefore not properly the subject of judicial notice.

[48] The Respondent submits that the sentencing judge did not take account of facts surrounding COVID-19 in a way that was improper.

[49] There was nothing improper about the Sentencing Judge's commentary on the COVID-19 pandemic. The Sentencing Judge either had actual evidence regarding the COVID-19 virus in Alberta or took proper judicial notice of facts that were capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

[50] The leading case on judicial notice is ***R v Find***, 2001 SCC 32 [***Find***]. At para 48 the Court explained:

> [48] 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.

[51] Information generated by Statistics Canada has been recognized as a reliable source of information and has been accepted as a source of judicial notice in appropriate cases: ***Warkentin Builders Movers Virden Inc v LaTrace***, 2021 ABCA 333 at para 34, see also ***R v Breitkreutz***, 2022 ABQB 559 at para 29. Judicial notice of certain facts contained in government publications are capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. This includes statistics regarding ICU admissions and their connection with the COVID-19 virus: ***RSP v HLC***, 2021 ONSC 8362 [***RSP v HLC***] at para 57. A Court cannot take judicial notice of an expert opinion: ***Find*** at para 49. This includes expert scientific opinions regarding the safety and efficacy of COVID-19 vaccines found in government publications: ***MM v WAK***, 2022 ONSC 4580; ***RSP v JLC*** at para 59; ***JN v CG***, 2022 ONSC 1198; ***CM v SLS***, 2022 ONCJ 206 at para 112.

[52] Judicial notice of facts regarding the COVID-19 pandemic has been the subject of numerous decisions across Canada. In May 2020, the Ontario Court of Appeal released ***R v Morgan***, 2020 ONCA 279 [***Morgan***], which was the first appellate Court decision to deal with judicial notice of the COVID-19 pandemic. At para 8, the Court stated:

> [8] In our view, it is not necessary to decide whether this court could take judicial notice of the effects of the COVID-19 pandemic to the extent to which the appellant would have us do that. We do, however, believe that it falls within the accepted bounds of judicial notice for us to take into account the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission.

[53] This principle was adopted in this Court by Graesser J in ***R v Mella***, 2021 ABQB 785 (released in September 2021) at para 40 and Whitling J in ***Sembaliuk v Sembaliuk***, 2022 ABQB 62 (released in January 2022) at para 8. In ***LMS v JDS***, 2020 ABQB 726 (released in October 2020) at para 18, Hollins J stated the following:

> [18] I can take judicial notice of certain things about COVID, namely that it is a global pandemic and that our own public health officials have provided us with commonly-accepted precautions to avoid contracting COVID (wearing a mask, keeping distanced whenever possible, reducing contacts, washing hands). However, in my view, I cannot take judicial notice of much more than that.

[54] In ***TRB v KWP***, 2021 ABQB 997 (released in December 2021) at para 12, Kubik J stated the following:

> [12] Since early 2020, Canadians have been living in the midst of a global pandemic caused by the SARS-CoV-2 virus. I take judicial notice of this fact which is so notorious and indisputable as to not require proof. I also take judicial notice of the regulatory approvals and directives issued by the various governments and agencies in Canada and Alberta. I accept that as a consequence of the pandemic, Alberta has, from time to time, invoked a state of public health emergency during which the Chief Medical Officer of Health has issued directives. At the time of this decision, Alberta is in a state of public health emergency, declared on September 15, 2021.

[55] There are several decisions from our Court and other Superior Courts that have dealt with judicial notice of COVID-19 facts in the context of bail. Those decisions primarily relate to whether the Court could take judicial notice of the conditions within remand and other correctional centres, and not with the COVID-19 virus, its transmission, or its impact on the health system. Similarly, in cases where Courts that have dealt with judicial notice of COVID-19 facts in the context of disputes over the vaccination of minor children, the decisions primarily relate to whether the Court could take judicial notice of the safety and efficacy of the COVID-19 vaccines available. Those cases are not relevant to the issues before this Court.

[56] In this case, the Appellants take issue with the following comments about the COVID-19 virus made by the Sentencing Judge:

- The spread of COVID (or other diseases) within the community at large is a potential effect of the offence;
- We are still identifying the ongoing effects of COVID, including serious and ongoing illnesses, such as long COVID;
- There are ongoing consequences to our health system;
- Alberta was in the midst of a pandemic;
- Albertans were dying from COVID;
- Our hospitals were challenged to accommodate and treat the sick;
- Major surgeries were postponed;
- Treatments for other illnesses were postponed;

[57] Specifically, the Appellants submit that the Sentencing Judge took improper judicial notice of the following facts regarding COVID-19:

- The rate, means of transmission, severity, and effects of COVID-19;
- Long COVID;
- The consequences of COVID to the health system in Alberta, whether hospitals were challenged to treat the sick, and the cause of why major surgeries were postponed;
- The number of Albertans who died from COVID and whether they actually died of COVID.

[58] The Appellants argue that some of the facts about COVID-19 relied on by the Sentencing Judge were not part of the evidentiary record. I disagree. The Sentencing Judge had actual evidence before her regarding the presence of COVID-19 in Alberta, the highly infectious nature of COVID-19 and that COVID-19 posed a significant health risk. The Appellants further argue

that some of the facts about COVID-19 relied on by the Sentencing Judge are matters that are highly contested, the subject of reasonable debate, and therefore not capable of judicial notice. I disagree. Decisions of this Court have found that judicial notice can be properly taken regarding certain facts surrounding the COVID-19 pandemic. Further, government publications that contained reliable statistical information about the COVID-19 pandemic were readily available to the Sentencing Judge.

[59] These CMOH orders contain information that "COVID-19…constitutes a public health emergency as a **novel and highly infectious agent**" and that "COVID-19…**poses a significant risk to public health**." This is actual evidence before the Sentencing Judge that COVID-19 was highly infectious and a severe risk to public health. As such, the Sentencing Judge did not take judicial notice of those facts as the Court did in ***TRB v KWP***.

[60] It was appropriate for the Sentencing Judge to take judicial notice of "the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including **its mode of transmission and recommended methods to avoid its transmission**": see ***Morgan*** at para 8. As the Court did in ***LMS v JDS***, it was appropriate for the Sentencing Judge to take judicial notice of "commonly-accepted precautions to avoid contracting COVID (wearing a mask, keeping distanced whenever possible, reducing contacts, washing hands)."

[61] During the time period of the offences (March 7 – June 5, 2021), there were almost daily reports from the CMOH that included statistical reports from Alberta on the number of confirmed COVID-19 cases, hospitalizations due to COVID-19 infections, COVID-19 patients in ICU, and Albertans who died after being infected with the COVID-19 virus. These were broadcast across several media platforms and published on the Government of Alberta website.

[62] On May 17, 2021, a presentation was made to the media and public by Premier Jason Kenney, Dr. Verna Yiu, Chief Executive officer of Alberta Health, and Dr. Deena Hinshaw, the CMOH (the May 17, 2021 presentation). That presentation focused on the following:

- An overview of the number of active COVID-19 cases in Alberta, including the positivity rate, hospitalizations, COVID patients in ICU, and other cases in ICU;
- The importance of balancing the easing of restrictions and the risk of increases in hospitalization due to COVID-19 infections with cancelling or postponing more surgeries and triaging patients;
- ICU occupancy for COVID and non-COVID patients, and the baseline and maximum capacity of ICU beds in Alberta, including statistics showing that the number of COVID ICU patients had increased by 155 between March 2 and May 13, 2021.

[63] As the Court did in ***RSP v HLC***, it was appropriate for the Sentencing judge to take judicial notice of statistics in these government publications regarding hospital admissions and their connection with the COVID-19 virus. All of these facts were published and updated on the Government of Alberta website and relate to statistics, not expert scientific opinions.

[64] When considering the evidentiary record as a whole and the statistical information contained in government publications available to the Sentencing Judge, there is nothing improper about the Sentencing Judge's reliance on facts surrounding the rate, means of transmission, and severity of COVID-19, the consequences of COVID-19 to the health system in

Alberta, whether hospitals were challenged to treat the sick, the cause of why major surgeries were postponed, and the number of Albertans who died after contracting COVID-19.

[65] The Appellants submit that there was no evidence before the Sentencing Judge on the effects of COVID-19 or "long COVID." While the Appellants are correct that there was no expert opinion evidence about the scientific effects of COVID-19 or "long COVID," as the Respondent points out, there were several trial witnesses who gave evidence about the effects of the COVID-19 pandemic, including efforts to adapt to the disease.

[66] Even if the Sentencing Judge erred in commenting on the effects of COVID and "long COVID" without any evidentiary foundation, the error is not sufficient to warrant appellate intervention. Appellate intervention is only warranted if the error had an impact on sentence: see ***Lacasse*** at para 44, and ***R v Friesen***, 2020 SCC 9 [***Friesen***] at para 26. The Sentencing Judge's only comments were that "we are still identifying the ongoing effects of COVID. These include serious and ongoing illnesses, such as long COVID." She did not specify any actual effects and did not elaborate on what the consequences of the "serious and ongoing illnesses, such as long COVID" might be. What she said was accurate. We are still identifying the ongoing effects of COVID.

C. Fitness of Sentence

[67] The Appellants argue that the sentence imposed on both the Church in the Vine of Edmonton as an entity and Tracy Fortin are demonstrably unfit. The Appellants argue that the Sentencing Judge failed to take into account several factors that should have mitigated sentence, and the Appellants' ability to pay. The Respondent argues that the fines are proportional to the gravity of the offence and the moral blameworthiness of the offender and are on the low end of the scale in relation to the maximum fine available.

[68] I find that the Sentencing Judge made no error in law or error in principle that has had an impact on the sentences imposed. I find the sentences imposed are not demonstrably unfit.

[69] The Appellants argue that the Sentencing Judge erred in conflating the regulated entity of the Church itself with the nature of worship gatherings as non-regulated activities. The Appellants concede that the *PHA* and regulations applied to the Church in the Vine of Edmonton as an entity and to the Church itself but take issue with the CMOH placing limits on worship gatherings. The Respondent submits that absent a constitutional challenge to the regulatory scheme or the CMOH orders, what was occurring inside the Church was irrelevant to the lawfulness of the inspection and the consequences of non-compliance with that inspection.

[70] The Appellants submit that worship gatherings are constitutionally protected activities and cannot be regulated without infringing s 2 of the *Charter*. However, the Appellants did not challenge the constitutionality of the *PHA* or the CMOH orders as unreasonably infringing on that right. Worship services were specifically addressed in the CMOH orders. If the Appellants had issue with the measures placed on worship services by the CMOH orders, it was incumbent on them to bring a constitutional challenge to the authority of the CMOH to direct such measures. They did not.

[71] *Charter* rights are not absolute and are subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society": *Charter* s 1. I agree with the Respondent that absent a constitutional challenge, the *PHA* regulatory scheme and the CMOH orders were presumptively valid as a reasonable limit prescribed by law to the *Charter* rights of

the Appellants. As such, the Inspector was lawfully placed to inspect the Church, and anyone gathered in it for compliance with the *PHA* and its regulations. The activities taking place inside the Church were subject to inspection just as the Church itself was subject to inspection. The nature of the activity that was taking place in the Church at the times when the Inspector attended is not relevant. The Sentencing Judge did not err in failing to take this into consideration.

[72] The Appellants argue that the Sentencing Judge overemphasized the gravity of the offence. The Appellants submit that there is no causal link between the obstruction charges and the circumstances that Alberta was facing due to the COVID-19 pandemic. Because the Inspector was able to perform an assessment weeks before the first offence date, the CMOH was not prevented from determining how to best protect the general pubic and the congregants in the Church.

[73] The gravamen of the obstruction was preventing the Inspector in exercising her lawful duty. Preventing the inspections made it impossible for the Inspector to determine if the Appellants had made the changes that she recommended after the first two assessments. As the Respondent argues, this made the Appellants as a regulated party ungovernable. It is irrelevant that the Appellants were of the opinion that the congregants were seeking protection from the CMOH. The CMOH was acting under the authority of a presumptively valid legislation. The proper avenue for raising that legal argument was in the context of a constitutional challenge to the CMOH orders, which the Appellants did not pursue.

[74] This relates directly to the Appellant's argument that the absence of any charges of actual breaches of the CMOH orders or the *PHA* was a mitigating factor. Time and time again, Courts have emphasized the need for strong denunciatory sentences for obstruction offences, especially when that obstruction prevents the potential discovery of other misconduct. The absence of substantive breach charges was a direct result of the Inspector not being allowed to enter the Church. The Sentencing Judge made no error in determining that this was not a mitigating factor.

[75] I agree with the Respondent that the Appellants acted in a premeditated and willful way to prevent the Inspector from observing what was going on in the Church. If the Appellants reasons for doing so had been a lawful excuse, they would not have been convicted. Since the convictions were proper, the Sentencing Judge made no error in determining that their reasons for excluding the Inspector were not mitigating.

[76] The Appellants argue that the fines imposed are excessive considering precedent cases, and therefore demonstrably unfit. The Respondent argues that the fines are not excessive when compared to precedent cases. The Respondent submits that the ratio of fines imposed as compared to the maximum penalty place them at the low end of the spectrum.

[77] In light of the 2020 amendments to the legislation that increased the maximum penalty from $2000 to $100,000, I agree with the Respondent that cases decided before the change in legislation are of little precedential value. The Government's decision to refine the range of sentence to reflect the gravity of the offence should shift the range of proportionate sentences as a response to the recognition of the gravity of these offences: ***Friesen*** at para 109; ***R v Lemay***, 2020 ABCA 365 at para 44. As a result, Courts should generally impose higher sentences than the sentences imposed in cases that preceded an increase in the maximum sentence.

[78] I agree with the approach in ***R v Hoyeck***, 2021 NSSC 178. In that case, the Summary Conviction Appeal Court determined that a global fine that represented 3% of the statutory maximum fine under the *Occupational Health and Safety Act*, SNS 1996, c 7 was demonstrably unfit. The Court found that the sentence failed to consider the 2011 amendments that substantially increased the maximum penalty for an offence. Following the reasoning in ***Friesen***, the Court found that a sentence that was at least 15 – 25% of the maximum fine was appropriate given the aggravating and mitigating factors, and the offender's high moral blameworthiness.

[79] In this case, Tracy Fortin received fines that were between 2% and 5% of the maximum penalty, and Church in the Vine of Edmonton received fines that were between 10% and 30% of the maximum penalty. I agree with the Respondent that these are on the low end, especially given the Sentencing Judge's findings that these acts were deliberate and intentional with high stakes, and both the gravity of the offence and the moral blameworthiness of the offenders was high.

[80] The Sentencing Judge properly took into account the Applicants' ability to pay, and that the fine must be both a deterrent and not unduly harsh. I see no error in the Sentencing Judge's reasoning that would make the fines imposed demonstrably unfit.

[81] As outlined in ***Lacasse*** at para 12, "proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender." The Sentencing Judge made no reviewable error in determining sentences that were proportional and tailored to the circumstances of the Appellants.

V. CONCLUSION

[82] For the reasons above, both the conviction and sentence appeals are dismissed.

Heard on the 16th day of September, 2022.
Dated at the City of Edmonton, Alberta this 21st day of October, 2022.

M. Hayes-Richards
J.C.K.B.A.

Appearances:

James SM Kitchen
for the Appellants

Natalie LA Johnson
for the Appellants

Craig Kallal
for the Respondent