

COURT FILE
NUMBER

QBG No. 395 of 2021

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE **SASKATOON**

APPLICANT(S) **JASMIN GRANDEL AND DARRELL MILLS**

RESPONDENT(S)

**THE GOVERNMENT OF SASKATCHEWAN AND
DR. SAQIB SHAHAB in his capacity as CHIEF
MEDICAL HEALTH OFFICER FOR THE
PROVINCE OF SASKATCHEWAN**

REPLY BRIEF OF LAW OF JASMIN GRANDEL AND DARRELL MILLS

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1. The Applicants provide the following reply to certain new issues raised by the Respondents in their Brief of Law.

A. Standing to challenge the Outdoor Gatherings Restrictions

2. The Applicants challenged the Respondents' orders that restricted the gathering of persons outdoors for peaceful, collective demonstrations or protests, including orders that had been, or would be, ordered (the "Outdoor Gatherings Restrictions"). In reply to the issue of standing raised by the Respondents,¹ the Applicants submit that they have standing to make this challenge. Starting in November 2020, the Applicants were both motivated to participate in protests.² From that time until December 17, 2020, the Respondents prohibited protests with more than 30 persons.³
3. Alternatively, this Court may exercise its discretion to find the Applicants have public interest standing to challenge the 30-person limit on outdoor protests: 1) it is clearly a serious justiciable issue; 2) the Applicants have a genuine interest in this issue; and 3) this challenge is a reasonable and effective way to bring this issue before the Court.⁴

¹ See Brief of Law on Behalf of the Respondents, The Government of Saskatchewan and Dr. Saqib Shahab ("Respondents' Brief") at paras 31-32.

² See Grandel Affidavit, paras 3-7; Mills Affidavit, paras 4-7.

³ See Kryzanowski Affidavit at para 47.

⁴ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012 SCC 45](#) at paras 35-51.

B. Assessing and weighing the expert evidence

4. The Respondents challenge Dr. Thomas Warren’s qualifications to provide expert opinion in this matter, and alternatively, argue that it should be given less weight than that of Dr. Khaketla.⁵
 1. **Dr. Warren is qualified as an infectious disease specialist to address the risk of transmission of SARS-CoV-2**
5. The Respondents object to the Court receiving Dr. Warren’s evidence on the false assumption that only a public health specialist can provide useful expert evidence to the Court.⁶
6. The core issue in this case is whether the strict numerical restrictions on public outdoor gatherings were reasonable and demonstrably justified for the purpose of “preventing, reducing and controlling the transmission of SARS-CoV-2.”⁷
7. This is precisely the issue on which Dr. Warren is qualified as an infectious diseases specialist to provide his expert opinion. The Respondents’ own expert acknowledged the understanding infectious disease specialists have concerning disease transmission.⁸
8. Dr. Warren’s report cogently outlined his opinion that “[t]he risk of outdoor transmission of SARS-CoV-2 at outdoor protests is negligible, particularly when physical distancing is maintained”⁹ and that the risk of transmission at outdoor protests was “substantially lower than many settings permitted by the Province of Saskatchewan”.¹⁰
9. Dr. Warren was not challenged as an expert by counsel for Manitoba in the *Gateway* case. Rather, the Court received his evidence as an expert including 1) on whether the presence of SARS-CoV-2 virus as detected by a PCR test is

⁵ See Respondents’ Brief at paras 76-77.

⁶ See Respondents’ Brief at para 72.

⁷ See eg Respondents’ Brief at para 124.

⁸ Khaketla Transcript, 29:25-30:14: “I would assume that they understand how disease transmission happens in order to be able to treat those individual patients, but I -- that's not my area of specialty, so I think that would be a question for them.”

⁹ Warren Affidavit at para 4; see also para 16.

¹⁰ Warren Affidavit at para 15.

sufficient to indicate whether someone is infectious,¹¹ and 2) the likelihood of SARS-CoV-2 transmission from asymptomatic and pre-symptomatic cases.¹²

10. Dr. Warren was also qualified as an expert in the *Trinity Bible* case, where he provided the Court with the same opinion he has provided here, namely “that the risk of transmission of the virus in outdoor settings is negligible.”¹³
 11. The Respondents’ attack on Dr. Warren’s qualifications to provide his expert opinion as an infectious disease specialist on the risk of transmission of the SARS-CoV-2 virus outdoors should be rejected outright.
- 2. Dr. Warren’s opinion should be given greater weight than Dr. Khaketla’s**
12. Likewise, the Respondents’ arguments for ascribing Dr. Warren’s opinion “less weight than that of Dr. Khaketla”¹⁴ should be rejected.
 14. As described above, public health experts are not the only medical specialists with relevant expertise in relation to Covid-19. To evaluate the reasonableness of restricting *outdoor* gatherings more severely than *indoor* gatherings, the opinion of an infectious disease specialist with expertise on the transmission risk of SARS-CoV-2 indoors and outdoors is clearly relevant and necessary.
 15. The Respondents are incorrect to state that Dr. Warren did not consider or deemed the local Saskatchewan context irrelevant to his report.¹⁵ Dr. Warren explicitly reviewed the list of Saskatchewan Covid-19 Active Outbreaks and considered the risk of SARS-CoV-2 transmission at outdoor protests relative to other settings permitted by the Province of Saskatchewan.¹⁶ As Dr. Warren explained in his cross-examination, the fact that he did not consider the number of active Covid-19 cases in Saskatchewan sufficiently relevant to include in his

¹¹ *Gateway Bible Baptist Church et al. v. Manitoba et al.*, [2021 MBQB 219](#) [*Gateway 2*] at para 105.

¹² *Gateway 2* at para 187.

¹³ See *Ontario v. Trinity Bible Chapel*, [2022 ONSC 1344](#) [*Trinity Bible Chapel*] at para 66.

¹⁴ Respondents’ Brief at paras 77-79.

¹⁵ Respondents’ Brief, at para 78.

¹⁶ Warren Affidavit at paras 12 and 15; Dr. Warren also reviewed the sole purported report of outdoor transmission in Saskatchewan relied on by the Respondents, noting in fact that “it is impossible to conclude that any transmissions occurred outdoors.” Reply Affidavit of Thomas Warren, sworn January 27, 2022, at para 30.

report evidences his opinion as to the negligibility of the risk of transmission of SARS-CoV-2 at outdoor protests.¹⁷

16. For their third argument against giving weight to Dr. Warren's report, counsel for the Respondents misconstrue Dr. Warren's reply to the challenge to the relevance of his discussion of risk of transmission of two important respiratory tract infections, namely tuberculosis and influenza. By putting Dr. Warren's reply quote in context, it is easy to understand his point about the unreasonableness of assuming that Covid-19 as a respiratory tract infection would have a significant risk of transmission outdoors:

The risk of outdoor transmission is considered negligible for those infections [TB and influenza], as it is for all other respiratory tract infections. The point is that in the absence of definitive evidence to the contrary, it can be assumed that outdoor transmission of SARS-CoV-2 is negligible. The burden of proof requires evidence to the contrary, showing that outdoor transmission of SARS-CoV-2 is significant. In the absence of that evidence, the default assumption remains that the outdoor transmission of SARS-CoV-2 is negligible. It would be remarkable indeed if SARS-CoV-2 was the first respiratory tract infection in history to have significant outdoor transmission.

17. Dr. Warren's report further showed that this existing scientific assumption about the low risk of outdoor transmission of respiratory tract infections was confirmed by the early studies of SARS-CoV-2, which showed negligible SARS-CoV-2 transmission outdoors.¹⁸ The SARS-CoV-2 studies cited by Dr. Warren were published in 2020 before the Respondents reinstated their prohibition on outdoor protests with more than 10 persons in mid-December 2020, while allowing public indoor events with up to 30 persons.¹⁹
18. It is rather ironic for the Respondents to assert the "absurdity"²⁰ of Dr. Warren's opinion, when 1) the Respondents own witnesses agree with Dr. Warren that the

¹⁷ Warren Transcript 22:8-23; Warren Affidavit at paras 4, 15-16.

¹⁸ Warren Affidavit, paras 9-14.

¹⁹ See Warren Affidavit, Exhibits "G", "H", "L" and "M".

²⁰ Respondents' Brief, para 82.

risk of transmission outdoors is less,²¹ and 2) despite this knowledge, the Respondents allowed three times as many people to gather for *indoor* public events than for *outdoor* protests.

13. Dr. Warren’s opinion on the low risk of outdoor transmission of SARS-CoV-2 is worthy of significant weight from this Court. It is supported by clear and uncontradicted science and by numerous admissions of the Respondents.

a. Factors in weighing Dr. Khaketla’s opinion

14. In considering the relative weight to give Dr. Khaketla’s opinion, Dr. Khaketla’s lack of independence and impartiality weigh against giving her opinion weight in this matter.²² The following facts illustrate Dr. Khaketla’s lack of independence and impartiality:

- a) Dr. Khaketla’s role as a public health officer was to urge people to follow the public health orders issued by the Respondents.²³
- b) Dr. Khaketla did in fact urge people to follow the public health orders containing the restrictions on public outdoor protests at issue, including by video and radio interviews, social media, regular community meetings and communications with various stakeholders including municipal leadership, businesses and individuals.²⁴
- c) When public outdoor gatherings over 10 persons were prohibited by public health order, Dr. Khaketla signed an open letter published in local papers stating: “It is more critical now than ever to follow public health orders, which are the law”; “We must all do this to get through this pandemic.”²⁵

²¹ See e.g. Kryzanowski Affidavit at para 18 (“transmission is less likely to occur outdoors”) and para 58 (“the transmissibility of COVID-19 may be lower outdoors relative to indoors”); Kryzanowski Transcript at 27:23-28:24; Khaketla Transcript 45:13-48:9; Khaketla Report R-1371: “Most of transmission is known to occur in indoor and crowded settings”.

²² See *White Burgess Langille Inman v Abbott and Haliburton Co.*, [2015 SCC 23](#), at paras 38-40.

²³ Khaketla Transcript 21:14-22:16.

²⁴ Khaketla Transcript 22:17-23:14.

²⁵ Khaketla Transcript 30:20-31:19.

- d) Part of Dr. Khaketla’s role as a medical health officer is to provide recommendations to the Respondents on how to manage public health threats, including specifically by making public health orders.²⁶
 - e) Dr. Khaketla had a “direct leadership role in response to the current COVID-19 pandemic” in “partnership with the Saskatchewan Ministry of Health to achieve public health objectives”, which involved “constant and regular communication” with the Respondents, specifically the Ministry of Health, Dr. Shahab and deputy chief medical health officers, “in order to ensure that there’s a -- a coordinated effort in the response activities related to the pandemic within the province.”²⁷
 - f) Dr. Khaketla, as a public health officer, regularly met with representatives of the Respondents, including “meeting for one hour twice a week” in addition to a weekly “Saskatchewan medical health officer committee meeting” chaired by the deputy chief medical health officer.²⁸ These meetings allowed Dr. Khaketla to provide “recommendations for public health measures” including public health orders,²⁹ and to give feedback on the orders made.³⁰
15. Specifically in regard to Dr. Khaketla’s conclusion that the restriction on outdoor protests was “warranted and justified”,³¹ the Applicants submit that it should receive no weight because it intrudes into the ultimate legal issue which is the province of this Court, specifically the *Charter* section 1 responsibility to determine whether the Outdoor Gatherings Restrictions on outdoor protests are “demonstrably justified” as reasonable limits of *Charter* protections.
16. A court cannot defer to an expert on the legal conclusion of whether something is reasonable and justified. Justice Scherman in *R v Pinsky* addressed the accused’s proposal to have an expert give opinion “that he and other users of the internet have a reasonable expectation of privacy as regards their identity as

²⁶ Kryzanowski Transcript 28:7-15.

²⁷ Khaketla Transcript 13:10-15:21.

²⁸ *Kryzanowski* Transcript 25:25-19.

²⁹ Kryzanowski Transcript 26:20-27:6.

³⁰ Khaketla Transcript 15:10-21, 19:16-21:13.

³¹ Khaketla Report: R-1370: “Temporary restriction of the maximum number of people who could attend indoor and outdoor gatherings - including those for the purpose of protests – was warranted and justified.”

owners of IP addresses.”³² Justice Scherman noted that the Court determines objective reasonableness on the basis of factual evidence “relating to the totality of the circumstances and counsels’ submissions on matters of law and how the law intersects with the facts.”³³ The Court, not an expert, assesses the public interests at issue.³⁴ Justice Scherman held that the expert evidence proposed in *Pinsky* was

not necessary for a proper determination of the *Charter* challenges, that the potential prejudice that might result from its admission would more than offset any benefit to the decision making process and that the proposed evidence encroaches so closely upon the ultimate issue that it should not be admitted into evidence.³⁵

C. The proper standard of review is correctness under *Oakes*

19. The Respondents rely on Dr. Shahab’s purported authority to make certain orders under section 38 of *The Public Health Act, 1994* (the “*Act*”) to argue for reasonableness review of the Orders under *Doré*, rather than a correctness review under *Oakes*.³⁶
20. While the Applicants have not challenged the jurisdiction of the Chief Medical Health Officer to issue the impugned Orders, section 38 of the *Act* cannot reasonably be found to support orders restricting every single person in the Province from participating in protests over a specified number of attendees.
21. A section 38 order must be directed at “a person”, not the public at large.
22. The Respondents in fact stopped relying on section 38 as an ostensible basis for their Orders after the January 12, 2021 Order.³⁷
23. The other provisions cited as a basis for the impugned Orders, section 45 of the *Act* and section 25.2 of the *Regulations*, outline Ministerial powers. The impugned Orders, dependant as they are on Ministerial powers, are entirely

³² *R v. Pinsky*, [2011 SKQB 371](#) at para 1.

³³ *Ibid* at para 58.

³⁴ *Ibid*.

³⁵ *Ibid* at para 63.

³⁶ Respondents’ Brief at paras 100-107.

³⁷ See Saskatchewan Government Public Health Orders Archive available at <https://publications.saskatchewan.ca/#/categories/5478>.

distinguishable from the Orders reviewed under *Doré* in *Beaudoin* which were issued solely in reliance on the Provincial Health Officer's statutory authority.³⁸

24. The Saskatchewan context is also distinguishable from the direct authority possessed by Manitoba's Chief Public Health Officer to issue Orders under section 67 of Manitoba's *Public Health Act* which were then subject to the Minister's approval.³⁹ The fact that the Minister of Health in Saskatchewan purported to delegate his authority to a medical health officer, specifically Dr. Shahab, does not entitle that decision to a more deferential review under *Doré* when the nature of the Orders remains "in essence, akin to legislative instruments of general application rather than an administrative decision that affects only particular individuals."⁴⁰

D. The Respondents' attempted justifications

25. The Respondents chose to categorically limit the ability of the *more than one million* Saskatchewan residents to participate in public outdoor gatherings. The Respondents attempt to justify this by speculating about the hypothetical non-compliance of a *small number of individuals* with other measures not at issue, such as masking, physical distancing and contact tracing.⁴¹
26. Such speculation does not demonstrably justify the violation of a population's *Charter* rights: "Justification under s. 1 is a process of demonstration, not intuition or automatic deference to the government's assertion of risk."⁴²
27. It is entirely unreasonable to justify imposing a population-wide restriction on the basis of the alleged non-compliance of a *few* individuals with *different* rules. It is even more unreasonable to assert that some people not following un-ordered

³⁸ *Beaudoin v British Columbia*, at paras 19-26.

³⁹ *Gateway Bible Baptist Church v. Manitoba*, [2021 MBQB 218](#) [*Gateway 1*] at para 8.

⁴⁰ *Gateway 2* at para 36.

⁴¹ Respondents' Brief at paras 129, 136 and 141.

⁴² See *Carter v. Canada (Attorney General)*, [2015 SCC 5](#), at paras 119-120: "A theoretical or speculative fear cannot justify an absolute prohibition.... The resolution of the issue before us falls to be resolved not by competing anecdotes, but by the evidence."

apparent aspirations of the Respondents, such as wearing masks outdoors,⁴³ justified the harsh restriction of outdoor public events at issue.

28. While vaunting the “rigor” of the mandatory protections it imposed on numerous indoor public gatherings,⁴⁴ the Respondents failed to even attempt to implement additional safety protocols for outdoor protests, which their own expert agreed could “potentially permit a protest larger than ten people to be of a minimal risk”:

A. Yes, it would be possible for specific layers of protection to be incorporated in outdoor gatherings to minimize the risk of disease transmission within those settings, to further minimize it, yeah.⁴⁵

E. The Respondents cannot show proportionality

29. The Respondents seek to establish the “proportionality” of their restrictions on outdoor protests by point to the availability of online “gatherings”.⁴⁶ This is simply misdirection from the issue at hand. There is no such thing as an online protest.
30. The Respondents’ argument shows the perverse effects in this case of subsuming the freedom of peaceful assembly into the consideration of the freedom of expression. While people can express themselves online (subject to going completely unnoticed or being muted by the intended parties), it is impossible to exercise one’s freedom to peacefully assemble online.
31. The Respondents further assert that it would have been possible to hold “multiple, smaller gatherings, concurrently”.⁴⁷ This argument ignores the fact that the Respondents prohibited public outdoor gatherings over ten persons, regardless of the physical distancing of attendees. Thus, a group of 10 protestors separated by 100 yards from another group of 10 protestors could still have been considered a prohibited gathering in excess of 10 persons.
32. The Respondents seek to justify their restriction on the number of people permitted at outdoor protests without any evidence, but rather with the bare claim

⁴³ Respondents’ Brief at paras 42, 64 and 136.

⁴⁴ Respondents’ Brief at para 140.

⁴⁵ See Khaketla Transcript at 55:3-58-25.

⁴⁶ Respondents’ Brief at para 149.

⁴⁷ Respondents’ Brief at para 150.

that the public health orders in general “had their intended effect.”⁴⁸ Ignoring whether all or some of the measures implemented in public health orders caused or correlated with an eventual reduction in Covid-19 cases, this Court must balance the harms of *the particular restriction at issue* against the benefits of that same restriction, not the alleged benefits of a host of other measures.⁴⁹

33. For example, in *R. v. K.R.J.*, the Supreme Court of Canada separately evaluated the proportionality of sections 161(1)(c) and 161(1)(d) of the *Criminal Code* although they had been adopted at the same time.⁵⁰ The Court found the retrospective operation of the no contact provision in section 161(1)(c) not to be proportional and while finding the retrospective operation of the Internet prohibition in s. 161(1)(d) to be proportional.⁵¹

F. The Respondents’ make baseless accusations against the Applicants

34. The Respondents conclude their argument by attacking the Applicants without any factual foundation. The Respondents claim that the “community was impacted by the Applicant’s non-compliance”⁵² is without any evidence. This irresponsible rhetoric risks prejudicing the determination of this matter.
35. The Respondents appear to rely on such rhetoric to make up for the fundamental flaws in their restriction of outdoor protests—that contrary to their own knowledge of the lower risk of transmission outdoors, the Respondents imposed harsher limits on *outdoor* public gatherings than on *indoor* public gatherings, and they cannot show the Court that the Outdoor Gatherings Restrictions prevented, reduced or controlled any transmission of Covid-19 in Saskatchewan.

⁴⁸ Respondents’ Brief, para 154.

⁴⁹ See *R. v. K.R.J.*, [2016 SCC 31](#), at para 77, quoting *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para 125: “The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from **the limitation** are proportional to its deleterious effects as measured by the values underlying the *Charter*.” [Emphasis added]

⁵⁰ *R. v. K.R.J.* at paras 1-7, 80.

⁵¹ *Ibid* at paras 81-114.

⁵² Respondents’ Brief at para 155.

Dated at the City of Calgary, in the Province of Alberta, this 22nd day of June of 2022.

A handwritten signature in black ink, appearing to read 'memauri' followed by a flourish, is written over a solid horizontal line.

Andre Memauri and Marty Moore
Counsel for the Applicants

LIST OF AUTHORITIES

Authorities	Legal Principle	Paragraph Cited
<u>Cases</u>		
<i>Beaudoin v. British Columbia</i> , 2021 BCSC 512	Charter s. 1	23
<i>Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society</i> , 2012 SCC 45	Standing	3
<i>Carter v. Canada (Attorney General)</i> , 2015 SCC 5	Charter s. 1	26
<i>Gateway Bible Baptist Church v. Manitoba</i> , 2021 MBQB 218	Charter s. 1	24
<i>Gateway Bible Baptist Church et al. v. Manitoba et al.</i> , 2021 MBQB 219	Charter s. 1	9, 24
<i>Ontario v. Trinity Bible Chapel</i> , 2022 ONSC 1344	Charter s. 1	10
<i>R. v. K.R.J.</i> , 2016 SCC 31	Charter s. 1	32- 33
<i>R v. Pinsky</i> , 2011 SKQB 371	Charter s. 1	18
<i>Thomson Newspapers Co. v. Canada (Attorney General)</i> , [1998] 1 S.C.R. 877	Charter s. 1	33
<i>White Burgess Langille Inman v Abbott and Haliburton Co.</i> , 2015 SCC 23	Charter s. 1	14