

COURT OF APPEAL FOR ONTARIO
(APPEAL IN AN APPLICATION)

B E T W E E N :

**SARAH HARJEE, EVAN KRAAYENBRINK, HIBAH AOUN, SARAH LAMB, SAM
SABOURIN, JACKIE RAMNAUTH, MARK MCDONOUGH, LINDA MCDONOUGH
and DAVID COHEN**

Appellants
(Applicants)

and

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO

Respondent

APPELLANTS' FACTUM REGARDING MOOTNESS

Date: October 23, 2023

CHARTER ADVOCATES CANADA

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TABLE OF CONTENTS

Overview	1
Live controversy and <i>Charter</i> damages	1
Discretionary Test	2
Adversarial Context	2
Judicial Economy	2
Court's proper adjudicative role	4
Conclusion	4

Overview

1. The Court has requested the parties address mootness. The Appellants' submit that the case at bar is not moot, given the fact that they have pled *Charter* damages. Before the Court can analyze whether or not they are entitled to damages, this Court must determine whether a *Charter* infringement has occurred.

2. In the alternative, if the Court finds that the case is moot, the Appellants' submit that the Court should exercise its discretion and hear the case, based on the *Borowski*¹ factors.

Live controversy and Charter damages

3. One of the remedies requested is that of *Charter* damages in the amount of \$1000 per Appellant. The Respondent has contested this remedy by arguing that it has qualified immunity.² The issue of damages is thus a live issue. The Appellants may be entitled to compensation, per the reasons set out in *Ward v Vancouver*³. However, before any issues regarding the purpose of *Charter* damages, and any prevailing factors against an award, the Court must find that there is a *Charter* breach first. At paragraph 24 of *Ward*, the SCC held that the first step for determining *Charter* damages is to establish the breach, which is the wrong the entire claim is based on. If the Court finds that there were no *Charter* breaches, then none of the *Ward* factors need to be analyzed.

4. *Charter* damages remain a live issue before this Court. The substratum of the litigation has not disappeared in this case, despite the fact the impugned law in question has been repealed.

¹ [Borowski v Canada](#), [1989] 1 SCR 342. [*Borowski*]

² Respondent's Factum at para 58.

³ [SCC 2010 SCC 27](#) at para 25 [*Ward*].

Discretionary Test

5. In the alternative, the Appellants submit that the Court should exercise its discretion and hear this appeal even if it is moot. The three *Borowski* factors are satisfied here and favour a hearing of the appeal on its merits.

6. The Court in *Borowski* set out the following 3 factors a court should consider before making a decision on exercising its discretion on hearing a moot case:

- a. Adversarial context
- b. Judicial economy
- c. Court is within its proper role.⁴

Adversarial Context

7. Firstly, there is an adversarial context. There is no question that the parties oppose one another in their positions and that counsel will argue zealously for their parties' interests as if there was a live issue. The parties are motivated in their preferred disposition of the appeal, even if this Court finds that it is moot, and will provide complete arguments for the Court to consider.

Judicial Economy

8. Secondly, judicial economy favours a hearing on the merits. Judicial economy weighs in favour of a hearing if an issue is evasive of review.⁵ Public health orders are by nature evasive of review. They can be introduced, amended or rescinded at a moment's notice by the Lieutenant-governor-in-council. There is no debate in the legislature over their introduction, and any discussions Cabinet had are protected by privilege.

9. The BCCA recently in *Kassian v British Columbia*⁶ exercised its discretion to hear a moot appeal, which also involved a vaccine passport scheme similar to the one in the case at bar.

⁴ *Borowski* at pp. 358-364.

⁵ *Ibid* at p. 360.

⁶ [2023 BCCA 383](#) at para 41. [*Kassian*]

The BCCA noted that the measures could return at any time, which was a factor in judicial economy. Similarly, the measures in this case are of a temporary duration. Without appellate guidance, the Respondents may bring back similar measures in Ontario at any time.

10. Similarly, the MBCA also decided on moot public health orders that restricted places of worship. In *Gateway Bible Baptist Church v Manitoba*⁷, the Court held that public health orders are brief in duration, can be varied in the types of restrictions and thus found that they were evasive of review.

11. Perell J. also held in the decision being appealed from at paragraph 25 that COVID-19 remains an issue, and that it is possible that similar orders may return, which would have practical utility for any future vaccine passport regime. For this reason, Perell J. exercised his discretion to hear the application at first instance. It should be noted that he did not consider the *Charter* damages, and instead moved on to the *Borowski* factors.

12. Another factor adding to judicial economy is the public interest.⁸ There are cases with matters of great public importance that leaving them undecided will have great social costs due to uncertainty in the law. The SCC did note that national importance alone is insufficient, and that there must be social uncertainty in the law.

13. The Appellants submit that the public importance factor is satisfied here, given the fact that a novel regime was implemented that affected a large number of Ontarians and not just the Appellants. Given the scope of the public health orders, which affected nearly every facet of public life in Ontario, and the novelty of the measures, there is great uncertainty in the law if the Application Judge's decision stands without appellate guidance. The state may believe that it can implement even more restrictive public health measures.

⁷ [2023 MBCA 56](#) at para 32. [*Gateway Bible*].

⁸ *Borowski* at p. 360.

14. Furthermore, this Court ought to consider its role as an appellate court. Public health measures are evasive of review due to their short duration. Even if some cases manage to be brought before a court while they are still in force, it is highly unlikely they will still be in force when it reaches the appellate level, given the complexity of *Charter* litigation, especially public health orders, which requires significant amounts of expert evidence. In *Minister of National Revenue v McNally*⁹, the FCA dismissed *McNally* on mootness because it did not find the issues were evasive of review. However, it accepted the proposition that “judicial economy is furthered where an appellate court decides to take on an important issue that is evasive of **appellate review.**”¹⁰

Court’s proper adjudicative role

15. On the third prong of the *Borowski* test, the Appellants submit that the Court is acting within its role. In *Gateway Bible*, the Court was aware that it should not make unnecessary constitutional pronouncements, however exercised its discretion because both the BCCA and ONCA had made similar pronouncements on public health orders. This fact convinced the Court in *Gateway Bible* to conclude that these issues were of great importance and should be heard on its merits, despite a finding of mootness.¹¹

Conclusion

16. The Appellants submit that the appeal is not moot due to the existence of *Charter* damages. The issue of qualified state immunity is the third part of the *Ward* test, which gives the state a chance to present countervailing factors against an award. The first step of *Ward* is to determine whether there is an infringement, which this Court will have to determine.

⁹ [2015 FCA 248](#) at para 10.

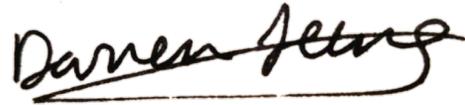
¹⁰ *Ibid* at para 10.

¹¹ *Gateway Bible* at para 33.

17. In the alternative, if this Court finds that the appeal is moot, it ought to exercise its discretion. There is an adversarial context, public interest weighs heavily in favour of hearing the case, given the evasive nature of public health orders and the great uncertainty in the law if there is no appellate guidance on how the state ought to proceed with a novel situation. Finally, the Court is within its proper role to consider this appeal on its merits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 23, 2023

A handwritten signature in black ink, appearing to read "Darren Leung", written over a horizontal line.

ALLISON PEJOVIC / DARREN LEUNG

Counsel for the Appellants

SCHEDULE "A"

List of Authorities

1	<i>Borowski v Canada</i>, [1989] 1 SCR 342
2	<i>Vancouver (City) v. Ward</i>, SCC 2010 SCC 27
3	<i>Kassian v. British Columbia</i>, 2023 BCCA 383
4	<i>Gateway Bible Baptist Church et al v Manitoba et al</i>, 2023 MBCA 56
5	<i>Minister of National Revenue v. McNally</i>, 2015 FCA 248

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