SCC Court File No.: 41390

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

BETWEEN:

JASMIN GRANDEL AND DARRELL MILLS

APPLICANTS
(Appellants)

- and -

THE GOVERNMENT OF SASKATCHEWAN AND DR. SAQIB SHAHAB, IN HIS CAPACITY AS CHIEF MEDICAL HEALTH OFFICER FOR THE PROVINCE OF SASKATCHEWAN

RESPONDENTS
(Respondents)

REPLY TO RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(JASMIN GRANDEL AND DARRELL MILLS, APPLICANTS)
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

CHARTER ADVOCATES CANADA
[redacted]

Andre Memauri
[redacted]

Counsel for the Applicants

MINISTRY OF JUSTICE AND
ATTORNEY GENERAL
CONSTITUTIONAL LAW BRANCH
[redacted]

Theodore J. C. Litowski
Noah Wernikowski
[redacted]

Counsel for Respondents

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A. The appeal is not moot, but even if so, leave should be granted

The appeal is not moot

1. The Outdoor Gathering Restrictions expired long before the lower Court and the Court of Appeal's decisions. This case proceeded at each level of Court without mootness being submitted as an obstacle to review now partly raised on this basis by the Respondents.[1]

2. It is true that the Applicants themselves no longer have outstanding summary offence charges related to the PHOs. However, the Applicant, Darrell Mills, was forced to abandon the appeal of his summary offence conviction,[2] by *ex necessitate* due to vertical and horizontal *stare decisis,*[3] given the lower Court's findings and particularly after the release of the Court of Appeal's decision in this matter.

3. That is to say, the Applicant found himself in the position of being forced to abandon an appeal which became hopeless, given the mandatory authority of the Court of Appeal decision, which disposed of the same *Charter* issues. This circumstance which forced the abandonment, should not now serve the Respondents to evade this Court's review of the Court of Appeal decision on mootness. Otherwise, if these circumstances born *ex necessitate* permit the Respondents to evade review by this Court, they would create a harm for which there is no remedy, contrary to the ancient maxim, *ubi jus ibi remedium.*

4. Further to the point, it is neither practical, efficient or possible for the Applicants to have maintained their summary convictions in the Court system while facing both horizontal and vertical *stare decisis* to avoid a potential mootness challenge in this matter. Even if that were possible and expected of them to have this Court's indulgence, so goes the Respondents' concerns for "scarce judicial resources" as a basis to deny the hearing of this case for mootness. The Applicants would have to cause significantly more expense on scarce judicial resources, simply to seek leave of this Court without mootness being raised in this way.

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[1] Respondents' Memorandum of Law, at paras 30-31.
[2] See Notice of Appeal and Notice of Abandonment in CRM-SA-00095-2024.
[3] *R v Sullivan,* 2022 SCC 19, at paras 65 and 73.

5. In addition, the Applicants say the case is not moot in any event. Whether a person's *Charter* rights have been infringed is not a moot issue,[4] simply because what caused the infringements no longer have the effect of *continuing to infringe* on constitutional rights *further*.

6. In *Borowski,* this Court held that an issue is moot when, "a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties."[5] Whether the *Charter* rights of the Applicants *were infringed* is not hypothetical or abstract. The Applicants submit *it happened to them* and the Court's determination of what they submit, resolves a controversy affecting the understanding of their fundamental rights.

7. To have it otherwise, would permit government actors to evade review simply by repealing challenged laws at any point in time, including in the face of, or during proceedings. This would permit a harm done to become a harm unreviewable and forgotten.

Even if moot, leave should be granted

8. Even if moot, this Court "…may nonetheless elect to address a moot issue if the circumstances warrant".[6] In *Smith*, this Court provided a summary from *Borowski* that govern a Court's discretion when determining whether to hear a moot issue:

> *Borowski* identified three principal "underlying rationalia" for the "policy or practice" governing the continuance of moot appeals:
>
> a) the existence of a truly adversarial context;
>
> b) the presence of particular circumstances which justify the expenditure of limited judicial resources to resolve moot cases;
>
> c) the respect shown by the courts to limit themselves to their proper adjudicative role as opposed to making free-standing, legislative-type pronouncements.
>
> The Court indicated that these three "rationales" are not exhaustive, nor is their application a "mechanical" process, but the court must exercise its discretion "judicially ... with due regard for established principles.[7]

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[4] *Dubois v Saskatchewan,* 2022 SKCA 15, at paras 67, 69 and 71.
[5] *Borowski,* at page 344.
[6] *R v Smith*, 2004 SCC 14, [2004] 1 SCR 385 ["*Smith"*], at para 33.
[7] *Smith,* at pages 358-363 citing *Borowski.*

i. the existence of a truly adversarial context

9. In *Canadian Union of Public Employees (Air Canada Component) v. Air Canada*, the Federal Court of Appeal found the adversarial context was met since both sides were "represented by counsel, taking opposing positions."[8]

10. A long adversarial context exists in this case. The parties continue to be represented by counsel with stakes in the outcome and a full record from the Courts below. The PHOs were an unprecedented attack on section 2 rights, particularly on the freedom of peaceful assembly and the Applicants remain committed to being vindicated for exercising their fundamental freedoms.

11. The Respondents, no less, continue to have a direct interest in the outcome of the case. A successful result would be a final chapter in the defences they have mounted to date for taking unprecedented government action.

ii. the presence of particular circumstances which justify the expenditure of limited judicial resources to resolve moot cases

12. In *Borowski,* this Court held, "There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law."[9]

13. Further in *Borowski*, this Court cited the case *of Re Opposition by Quebec to a Resolution to amend the Constitution* as an example for this basis by stating, "While this Court retains its discretion to entertain or not to entertain an appeal as of right where the issue has become moot, it may, in the exercise of its discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this Court."[10]

14. Considering the above, the Respondents submit that the expense of judicial resources are justified because this case raises two significant issues of national public importance: 1) to ensure *Charter* rights are not forgotten in subsummation where an impugned law or government action has directly impacted such rights; and 2) the development of a much needed set of values, limits and scope underpinning section 2(c) with a test to be used by Canadian Courts.

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[8] *Canadian Union of Public Employees (Air Canada Component) v. Air Canada*, [2021] FCA 67, para 10.
[9] *Borowski*, at page 361.
[10] *Ibid,* at pages 361-362.

15. Although most Canadian Courts have found similar outdoor gathering restrictions justified, this has not been decisively considered by this Court to date and has not been entirely universal, as asserted by the Respondents.[11]

B. <u>While the same facts underpin each alleged violation, the proportionality analysis did not, and could not, sufficiently account for the other rights claimed</u>

16. Indeed, the Applicants agree, as asserted by the Respondents[12] that the gatherings attended by the Applicants *included* expressive content, and their application accordingly alleged a violation of section 2(b) of the *Charter.* However, this case is not a "straightforward infringement of section 2(b)" as stated by the Respondents.

17. Although the gatherings *contained* expressive purposes, the very act of the Applicants assembling at all, is *itself* a purpose which was *directly* prohibited by the PHOs and guaranteed by section 2(c) of the *Charter.* The right of Canadians to peacefully and physically assemble, does not fade or become subservient because a purpose within their assembly also engages another right. Indeed, gathering restrictions for protests are a direct violation of section 2(c)[13] just as they may also naturally engage other rights.[14]

18. While the same facts did underpin each alleged violation, it cannot be said that the other rights claimed *were sufficiently accounted for,* as the deleterious impacts on peaceful assembly and association were hardly even recognized in this matter. And how could they have been when the values, limits and scope of peaceful assembly are unknown.

C. <u>The lack of a s.2(c) test is a timely matter of national public importance, and this case *is* suitable</u>

19. This test case *is suitable* for fleshing out the values, scope and limits of peaceful assembly because:

i. It is within the nature of protest gatherings where peaceful assembly is most frequently subject of litigation and this case presents the appropriate factual basis to develop the law on section 2(c);

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[11] *Beaudoin v British Columbia*, 2021 BCSC 512, at paras 249 and 251.
[12] Respondents' Memorandum of Law, at para 38.
[13] *Hillier v His Majesty the King in the Right of The Province of Ontario,* 2023 ONSC 6611 ["*Hillier"*], at para 49 and 54.
[14] *Ibid*, at para 52.

ii. Subsuming section 2(c) into 2(b) in this case was an error, as the impugned law or government action both in purpose and effect targeted *the physical gathering of persons*, being the core of section 2(c) protection; and

iii. This Court would not be answering the legal question afresh as purported by the Respondents.[15] The lower Court acknowledged a void in law by stating, "…there is no established test for s.2(c) analysis…"[16], and went on to subsume it s.2(c) into s.2(b) partly for this reason, and it is open to this Court to fill such void raised by the lower court.

D. <u>There is no predetermined outcome to a properly conducted *Oakes* analysis</u>

20. The Respondents claim that no error in law is alleged to have occurred within the *Oakes* test[17] and that the outcome of the case would not be affected by the issues raised.[18] However, the Applicants maintain that the subsuming of s.2(c) into s.2(b) is an error which fundamentally undermined the *Oakes* analysis undertaken. Consequently, the proportionality analysis of salutary and deleterious impacts could hardly be said to have sufficiently accounted for the rights claimed. There is no predetermined outcome prior to conducting a proper *Oakes* test, which sufficiently engages the rights claimed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of September 2024.

Andre Memauri
Counsel for the Applicants

[15] Respondents' Memorandum of Law, para 51.
[16] *Grandel v Saskatchewan*, 2022 SKKB 209, at para 80.
[17] Respondents' Memorandum of Law, para 56.
[18] *Ibid,* at paras 6, 57, 64.

TABLE OF AUTHORITIES

APPLICANTS' AUTHORITIES	CITED AT PARAGRAPH NO.
CASES	
Beaudoin v British Columbia, 2021 BCSC 512	15
Borowski v. Canada (Attorney General), [1989] 1 SCR 342	6, 8, 12, 13
Canadian Union of Public Employees (Air Canada Component) v. Air Canada, [2021] FCA 67	9
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R v Sullivan, 2022 SCC 19	2

CRM-SA-00095-2024 Court File No.

IN THE COURT OF KING'S BENCH

JUDICIAL CENTRE OF SASKATOON

BETWEEN:

BARTEL BOOT, JACOB BOOT, JAXSON BOOT, JENNY BOOT, PETER BOETTCCHER, WALLACE COTTINGHAM, MARK FRIESEN, FREDERICK HARRISON, JOYCE HARRISON, DEBORAH HRETSINA, CODY KUNTZ, ARLEY LAROQUE, HALDEN LINDBJERG, MEAGAN MACHISKINIC, DARRELL MILLS, LUIZ AUGUSTO PENTEADO, AMANDA PHILIPENKO, JOYCE PIERCE, MICHAEL STYAN, LUKE TOURNIER, MICHELE TOURNIER, PAMELA WALDNER, and RICHARD BRENT WINTRINGHAM

APPELLANTS

AND

HIS MAJESTY THE KING

RESPONDENT

AND

ATTORNEY GENERAL OF SASKATCHEWAN

INTERVENOR

NOTICE OF APPEAL

THE APPELLANTS hereby appeal from:

☒the order made;

☒the conviction entered;

☒the sentence imposed for the following appellants only: MARK FRIESEN and RICHARD BRENT WINTRINGHAM; or

☐both the conviction entered and the sentence imposed;

in the Summary Conviction Court.

Information About the Conviction and/or Sentence Under Appeal:

1. Name of Summary Conviction Court

Provincial Court of Saskatchewan

2. Location of Summary Conviction Court

Judicial District of Saskatoon

3. Name of Presiding Judge or Justice in Summary Conviction Court

Judge Agnew

4. Date on which the Conviction was Entered

December 14, 2023

5. Description of Conviction Entered

Found guilty of the following charge under Information no. 991187737:

(1) On or about the 9th day of May, 2021 at or near Saskatoon in the Province of Saskatchewan, did:

FAIL TO COMPLY WITH A PUBLIC HEALTH ORDER BY ATTENDING A GATHERING EXCEEDING 10 PERSONS CONTRARY TO SECTION - 61 OF *THE PUBLIC HEALTH ACT, 1994*.

6. Date on which the Sentence was Imposed

February 2, 2024

7. Description of Sentence Imposed on Mark Friesen and Brent Wintringham

Appellant MARK FRIESEN: Fine in the amount of $7,500.

Appellant RICHARD BRENT WINTRINGHAM: Fine in the amount of $5,000.

Grounds of Appeal:

Charter Section 2

1. *Stare decisis* bound the learned trial judge to *Charter* issues raised in this matter which were determined in *Grandel v Saskatchewan*, 2022 SKKB 209, but the said underlying decision is under appeal and had in error failed to find that the public health orders, between December 17, 2020 through May 30, 2021 (including the May 6, 2020 public health order) were unjustified infringements on the freedoms of thought, belief, opinion and expression, peaceful assembly, and association, protected by sections 2(b), 2(c), and 2(d) of the *Charter*.

2. The appellants were convicted in error as the outdoor gathering restrictions imposed in the May 6, 2021 public health order unjustifiably infringed the fundamental freedoms of the appellants guaranteed by sections 2(b), 2(c) and 2(d) of the *Charter* and was therefore void and of no force or effect.

3. Such further grounds as counsel may advise and this Honourable Court may permit.

Appeal of Sentence imposed on Mark Friesen and Brent Wintringham

4. The learned trial judge erred in imposing a more severe penalty to Mark Friesen and Brent Wintringham for second or subsequent convictions under *The Public Health Act*, as any and all prior convictions for the said appellants occurred after the commission of the offence in this proceeding.

5. There exist no mandatory minimum sentences for second or subsequent offences pursuant to section 61 of *The Public Health Act*, 1994 Chapter P-37.1.

6. Such further grounds as counsel may advise and this Honourable Court may permit.

Order Sought:

7. That the convictions be overturned and that the information be quashed.

8. Alternatively, that the sentences for Mark Friesen and Brent Wintringham be set aside.

9. Any further remedy that this Honourable Court finds appropriate and just in the circumstances.

Information About the Appellants:

1. The Appellants are:

☐incarcerated at ; or

☒not incarcerated.

2. The Appellants:

☒will be represented by a lawyer on the Appeal; or

☐will not be represented by a lawyer on the Appeal.

3. The Appellants wish to present the Appeal:

☐by memorandum of argument; or

☒by oral presentation and by memorandum of argument.

4. The Appellants' address for service is:

[redacted]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Saskatoon, Saskatchewan, this 1st day of March 2024.

ANDRE MEMAURI
Counsel for the Appellants

TO: The Local Registrar of the Judicial Centre of Saskatoon

This document was delivered by:	
Name of firm:	Charter Advocates Canada
Name of Lawyer in charge of file:	Andre Memauri
Address of firm:	[redacted]
Telephone number:	[redacted]
Email address:	[redacted]

Court File No. CRM-SA-00095-2024

IN THE COURT OF KING'S BENCH
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

BARTEL BOOT, JACOB BOOT, JAXSON BOOT, JENNY BOOT, PETER BOETTCCHER, WALLACE COTTINGHAM, MARK FRIESEN, FREDERICK HARRISON, JOYCE HARRISON, DEBORAH HRETSINA, CODY KUNTZ, ARLEY LAROQUE, HALDEN LINDBJERG, MEAGAN MACHISKINIC, DARRELL MILLS, LUIZ AUGUSTO PENTEADO, AMANDA PHILIPENKO, JOYCE PIERCE, MICHAEL STYAN, LUKE TOURNIER, MICHELE TOURNIER, PAMELA WALDNER, and RICHARD BRENT WINTRINGHAM

APPELLANTS

AND

HIS MAJESTY THE KING

RESPONDENT

AND

ATTORNEY GENERAL OF SASKATCHEWAN

INTERVENOR

NOTICE OF ABANDONMENT

THE APPELLANTS hereby abandon this appeal on all grounds.

Dated at the City of Saskatoon, Saskatchewan, this 6th, day of August, 2024.

CHARTER ADVOCATES CANADA

Andre F. Memauri for the Appellants

CONTACT INFORMATION AND ADDRESS FOR SERVICE

Name of firm:	Charter Advocates Canada
Name of Lawyer in charge of file:	Andre Memauri
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TO: The Local Registrar of the Judicial Centre of Saskatoon