CACV3444

IN THE COURT OF APPEAL FOR SASKATCHEWAN

BETWEEN

PRINCE ALBERT RIGHT TO LIFE ASSOCIATION
and VALERIE HETTRICK

APPELLANTS (Applicants)

- and -

CITY OF PRINCE ALBERT

RESPONDENT (Respondent)

FACTUM OF THE RESPONDENT
CITY OF PRINCE ALBERT

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PART I. INTRODUCTION

1. The essential ingredient in any legal dispute is a resolvable controversy affecting the rights of the parties, and the doctrine of mootness has long guided courts in declining to decide cases missing this substratum of litigation. This appeal lacks such a cornerstone, as it hangs on an application to use a municipal flagpole that is no longer available for use.

2. In April 2017, the Appellants, Prince Albert Right to Life Association ("**PARLA**") and Valerie Hettrick, requested that the Respondent, City of Prince Albert ("**City**"), fly an anti-abortion flag depicting a cartoon fetus on its courtesy flagpole. This flag had flown on the flagpole in previous years. Following the receipt of community complaints based on the new policy, the City deferred the application pending discussions a City delegate (the Mayor) was directed to have with the applicant.

3. The Appellants initiated a judicial review application seeking, *inter alia*, an order directing the City to permit the flag to fly, and a declaration that the City's discussions with the applicant amounted to a "decision" that violated the Appellants' freedom of expression.

4. By the time the matter returned before Justice Goebel in Queen's Bench Chambers, the City had eliminated the practice of hanging flags on the courtesy flagpole by removing and amending the relevant bylaw provisions.

5. In the Order dismissing the application for judicial review,[1] Justice Goebel appropriately concluded that the matter was moot, and her Ladyship reasonably

[1] *Prince Albert Right to Life Association v Prince Albert (City)*, 2019 SKQB 143, 88 MPLR (5th) 66 [Chambers Decision].

declined to exercise judicial discretion to decide on the moot matter. The Appellants disagree and request declaratory relief from this Court.

6. This appeal in its essence asks this Court to further entertain a hypothetical and academic discussion, and it would on that basis be appropriate to dismiss this appeal accordingly.

7. The Respondent cross-appeals respecting an award of costs, made in favour of the Appellants, that was arbitrarily reached based on a misapprehension of evidence and a misapplication of the doctrine of legitimate expectations.

8. The Respondent's position is summarized as follows:
   a. This appeal should be dismissed or quashed for mootness.
   b. The costs awarded should be set aside or varied.

PART II. JURISDICTION AND STANDARD OF REVIEW

9. As noted at paragraph 13 of the Appellants' Factum, the source of the right of this appeal and cross-appeal, and the basis for the jurisdiction of this Court to determine the appeal, are provided in sections 7(2)(a) and 10 of ***The Court of Appeal Act, 2000***.[2]

10. The standard of review applicable to the mootness analysis in the Chambers Decision is varied: the standard of correctness applies to the identification of legal factors used to determine whether a case is moot,[3] and a judge's broad

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[2] SS 2000, c C-42.1.
[3] *Plato v Canada (Revenue Agency)*, 2015 FCA 217 at para 4, 477 NR 197 [*Plato*]; see Appellants' Factum at para 14.

discretionary authority in determining whether or not to entertain a moot matter is owed deference.[4]

11. Additionally, the Chambers Judge's conclusion, within the determination of mootness, as to whether the availability of discretionary declaratory relief creates a live controversy between the parties attracts deference:

> As regards the exercise of discretion, "[a]ppellate intervention is warranted only if the judge has clearly misdirected himself or herself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice"...[W]here the judge at first instance has given sufficient weight to all relevant considerations and the exercise of discretion is not based on an erroneous principle, appellate reviewers must generally defer[.][5]
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> [citations omitted]

12. Further, this Court may choose to exercise anew its judicial discretion and decide for itself whether or not to hear the moot issues on appeal.[6]

13. The Respondent cross-appeals a discretionary costs award,[7] which this Court has found to be reviewable on a deferential standard per Justice Jackson:

> [100] As the Supreme Court indicated in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.), it is not quite accurate to say that the discretion to award costs is "unfettered and untrammelled, subject only to any applicable rules of court and to the need to act judicially on the facts of the case" (at para 42). In short, such decisions "are not completely insulated from review" (at para 43). Nonetheless, the standard of review is a deferential one. As Caldwell J.A. wrote for the Court recently in *Wongstedt v. Wongstedt*, 2017 SKCA 100, [2018] 4 W.W.R. 82 (Sask. C.A.) [*Wongstedt*], "the appellate court looks to

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[4] *Georgia Strait Alliance v Canada (Minister of Fisheries & Oceans)*, 2012 FCA 40 at para 58, 33 Admin LR (5th) 243 [*Georgia Straight Alliance*]; *Plato*, *supra* note 3 at para 4.
[5] *Canada (Attorney General) v Fontaine*, 2017 SCC 47 at para 36, [2017] 2 SCR 205 [*Fontaine*]; Appellants' Factum at para 16.
[6] *Georgia Strait Alliance*, *supra* note 4 at para 58.
[7] Chambers Decision, *supra* note 1 at para 60.

> see whether the judge misapplied some governing principle or rule or disregarded some critical fact or other consideration or whether the costs award is itself 'so obviously unjust as to invite intervention'" (at para 41, quoting *Benson* [(1994), 120 Sask R 17 (Sask CA)] at para 90).[8]

14. The Chambers Judge's decision is based on presumptions of contentious legal issues in favour of the Appellants for the purposes of conducting a preliminary mootness analysis, however, the Respondent submits that the Chambers Judge erred in relying on such presumptions outside of the mootness analysis.

15. The Respondent submits that the Chambers Judge erred in law by misapplying the doctrine of legitimate expectations and concluding that more formalized and expansive procedural fairness was owed, and that such a legal error is reviewable on a standard of correctness. This would be a question that appears to be one of mixed fact and law but amounts to a pure error of law.[9]

16. The Chambers Judge applied the appropriate standards of review respecting each issue considered on judicial review within the mootness analysis. Regarding whether procedural fairness was denied, the Chambers Judge cited the correctness standard,[10] and on review of the City's actions as a municipal decision-maker, the Chambers Judge applied the standard of reasonableness.[11] Finally, the Chambers Judge applied the deferential standard contemplated in ***Doré v Québec (Tribunal des professions)***[12] regarding the *Charter* challenge.[13]

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[8] *K.R. v J.K.*, 2018 SKCA 35, 294 ACWS (3d) 790.
[9] *Housen v Nikolaisen*, 2002 SCC 33 at para 27, [2002] 2 SCR 235.
[10] Chambers Decision, *supra* note 1 at para 25.
[11] Chambers Decision, *supra* note 1 at para 33.
[12] 2012 SCC 12 at para 51, [2012] 1 SCR 395 [*Doré*].
[13] Chambers Decision, *supra* note 1 at para 43.

PART III. SUMMARY OF FACTS

17. The following supplements the Appellants' summary of facts.[14]

18. On May 10, 2010, City Council adopted the *Half-Mast Policy*[15] which outlined policy and procedure respecting the City's use of its flagpoles. This bylaw did not govern use of the courtesy flagpole nor an application process for its use.

19. The *Half-Mast Policy* was replaced by the *Flag Protocol Policy*[16] on January 25, 2016, which provided a more comprehensive policy and procedure. The *Policy* newly stipulated a process and requirements internal to the City's use of the courtesy flagpole which were not previously contemplated in the *Half-Mast Policy*.

20. The purpose of the *Policy* was set out at its outset at section 1.01:

> To establish a respectful and consistent process for the raising of half-masting of flags on municipally controlled flagpoles within the City of Prince Albert. This Policy was prepared following established guidelines of the Government of Canada and the Protocol Office of Saskatchewan.[17]

21. Other relevant portions of the *Policy* include the following:

> 6.05 Courtesy Flag Pole
>
> (a) The City of Prince Albert will maintain a courtesy flag pole to allow groups or organizations to fly the flag of:
>
> i. A charitable or non-profit organization to help increase public awareness of their programs and activities;

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[14] Appellants' Factum at paras 21-31.
[15] City of Prince Albert, Policy No 45, *Half-Mast Policy* (10 May 2016), Appeal Book, Tab 4, Record 1.
[16] City of Prince Albert, revised Policy No 45.1, *Flag Protocol Policy* (25 January 2016) [*Policy*], Tab 4, Record 2. This policy was replaced again by City of Prince Albert, revised Policy No 45.2, *Flag Protocol Policy* (28 May 2018).
[17] *Policy*, *supra* note 16 at 1.01; Chambers Decision, *supra* note 1 at para 29.

ii. An organization that has achieved national or international distinction or made a significant contribution to the community; or

iii. An organization that has helped to enhance the City of Prince Albert in a positive manner.

(b) The courtesy flag pole will not be available to any individual, User Group, or organization that promotes views or ideas which are likely to promote hatred or support violence or discrimination for any person on the basis of race, national or ethnic origin, ancestry, colour, citizenship, religion, age, sex, marital status, sexual orientation, gender identity, disability, receipt of public assistance or level of literacy.

(c) Requests to fly flags of commercial, political, or religious organizations require the approval of City Council.

(d) The City of Prince Albert will maintain a courtesy flag pole as a gesture of respect on the occasion of a visiting dignitary. The flag will be flown for the duration of the visit to Prince Albert and will take precedence over Section 6.05(a) above.

...

6.07 Flag Raising Booking Procedure

...

(c) The following guidelines shall be reviewed for the flying of guest flags:

i. Flag raisings shall be in conjunction with a particular circumstance by an organization;

ii. Flags of commercial, political, or religious organizations require City Council approval;

iii. **Flags of organizations which may be considered controversial, contentious or divisive within the community shall not be flown**;

iv. Flags that involve organizations which promote hatred of any person or class of persons, support or promote violence, racism, or intolerance, or otherwise involves illegal activity shall not be flown;

v. Flags that involve any undertakings or philosophy which are contrary to the City of Prince Albert's bylaws or policies shall not be flown; or

vi. **Flags that contain any inflammatory, obscene, or libelous statement shall not be flown.**[18]

[emphasis added]

22. On May 12, 2016, the City received community correspondence opposing PARLA's flag, which flew on the courtesy flagpole that week, citing, *inter alia*, the *Policy*'s new guidelines regarding use of the courtesy flagpole.[19] This correspondence purports to be endorsed by over 600 electronic signatures.

23. On March 29, 2017, before PARLA submitted the application at issue, the City received additional community correspondence requesting that the City not fly anti-abortion themed flags from on the courtesy flagpole, citing the *Policy*.[20]

24. City Council received and considered correspondence opposing the raising of PARLA's flag, signalling controversy, contention and divisiveness contemplated in section 6.07(c)(iii) and (vi) of the *Policy*. Council referred that correspondence to the Mayor's office for consultation with the applicant and to provide assistance to the Director of Community Services, who was responsible for administering the new *Policy* and determining PARLA's application.[21]

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[18] *Policy*, *supra* note 16 at 6.06, 6.07; Chambers Decision, *supra* note 1 at para 29.
[19] Email from Lana Wilson, Appeal Book, Tab 4.4, p 88.
[20] Email from Lana Wilson, Appeal Book, Tab 4.4, p 83.
[21] Media Release of the City of Prince Albert, dated Mar 5, 2017, Appeal Book, Tab 4.22, p 233.

25. On April 4 and 5, 2017, the Mayor spoke with Ms. Hettrick by telephone and "raised the possibility of PARLA changing its flag" and to inquire "about whether PARLA would consider getting a new flag"[22] that might prove less publicly contentious. That discussion canvassed the possibility that the application be changed to fly a nationally recognized pro-life flag.

26. On April 6, 2017, the Mayor executed an official proclamation naming the week of May 8 to 14, 2017 as "Celebrate Life Week" in the City of Prince Albert.[23]

27. PARLA had utilized the courtesy flagpole between 1996 and 2016, and the new flag featuring a cartoon fetus was used since 2007.[24] However, 2016 was the first year that the *Policy* governed the application process, and the community correspondence opposing PARLA's flag was provided to the City after it approved the 2016 application but in advance of the 2017 application.

28. On May 5, 2017, the City announced that PARLA's flag raising application was deferred, and that objections to the flag had been considered.[25]

29. On May 28, 2018, City Council passed a motion to amend the *Policy* and end the practice of the courtesy flagpole.[26]

30. The Chambers Judge dismissed the Appellants' application for judicial review, which sought a declaration that the decision was arbitrary, unreasonable, and contrary to principles of natural justice, a declaration that their right to freedom

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[22] Affidavit of Valerie Hettrick, Appeal Book, Tab 2, para 8, p 8.
[23] Proclamation of Celebrate Life Week, Appeal Book, Tab 4.16, p 215.
[24] Affidavit of Valerie Hettrick, Appeal Book, Tab 2, para 6, p 7.
[25] Media Release of the City of Prince Albert, Appeal Book, Tab 4.22, p 233.
[26] Chambers Decision, *supra* note 1 at para 10.

of expression was violated, and an order directing the City to permit them to fly their flag or an order remitting the matter back to the City.

31. The Respondent does not endorse the entirety of paragraphs 30, 31, nor 39 of the Chambers Decision as facts, as is presented by the Appellants.[27]

PART IV. POINTS IN ISSUE

32. The Respondent submits that the preliminary issue on appeal must be its mootness. The Respondent does not adopt the points in issue as formulated by the Appellants at paragraph 36 of their Factum, which suggests that this Court should undertake a fresh *Charter*[28] analysis outside of the mootness context as a preliminary issue in this appeal, despite a lack of factual findings on which to base such an analysis.[29]

33. The Respondent therefore raises the following issues:
    a. This case is moot.
    b. This Court should not exercise its discretion to decide this moot matter.
    c. The Chambers Judge erred in applying presumptions.
    d. The Chambers Judge misapplied the doctrine of legitimate expectations.
    e. The City did not infringe the Appellants' freedom of expression.
    f. The costs award was unreasonable.

PART V. ARGUMENT

A. This case is moot

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[27] Appellant's Factum at para 21.
[28] *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK)*, 1982, c 11 [*Charter*].
[29] Chambers Decision, *supra* note 1 at para 49.

34. The Chambers Judge appropriately concluded that the matter was moot on judicial review, and it remains moot on appeal. The Respondent submits that this appeal should be dismissed or quashed accordingly.

35. A matter is moot when the decision of the court will not have the effect of resolving a controversy which affects or may affect the rights of the parties. If so, the court will decline to decide the case by reason of its mootness, absent compelling justification to exercise judicial discretion to decide the case.[30]

36. Justice Sopinka in *Borowski* created a two-stage analysis,[31] which considers
    1) whether the dispute between the parties has disappeared and the issue has become academic (i.e. the "live controversy test"); and
    2) if so, whether the court should use its discretion to hear the case considering relevant criteria, including:
        a. whether an adversarial context still exists;
        b. concern for judicial economy; and
        c. the need to guard against unwarranted judicial intrusion into the legislature's area of function.

37. The facts of *Borowski* are well-known: the plaintiff began an action seeking a declaration that the provisions of the *Criminal Code* permitting therapeutic abortions were unlawful.[32] Prior to hearing the appeal, the Supreme Court of Canada held that the entirety of section 251 of the *Criminal Code* was of no force and effect.[33] The Court declined to decide the moot case.

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[30] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at para 15 (WL) [*Borowski*].
[31] *Ibid* at paras 16, 29-42; see also *Meigs v Saskatchewan Penitentiary*, 2012 SKQB 282 at paras 15, 22, 401 Sask R 139 [*Meigs*].
[32] *Criminal Code*, RSC 1985, c C-46, ss 251(4), (5), (6) [*Criminal Code*].
[33] See *R v Morgentaler*, [1988] 1 SCR 30.

38. Justice Danyliuk similarly applied *Borowski* in *Meigs* in finding a federal prison inmate's *habeas corpus* application to be moot. The inmate had applied for *habeas corpus* after being transferred from a medium-security institution to a maximum-security institution, however, following the application, the inmate was reclassified and transferred back to a medium security facility. The application was dismissed for being moot.

39. This matter clearly fails to meet the live controversy test at the first stage of the *Borowski* analysis. There is no dispute nor relationship between the parties, there is no practical relief available, and the dispute cannot recur.

40. The City no longer maintains a courtesy flagpole and remitting the matter back to the City would have no consequence. The Appellants are not able to apply to fly their flag, nor is any other interested person. Although the Appellants have not challenged the *Policy*, but rather the City's application of the *Policy* in the circumstances, the Respondent submits that the elimination of the relevant portions of the *Policy* renders the matter moot in these circumstances.[34]

41. This matter has become a purely academic discussion that lends itself to hypothetical analysis. Justice Goebel undertook a thorough examination of the Appellants' best-case scenario on judicial review by considering the application's issues based on jurisdictional presumptions that favoured the Appellants. Even if the Appellants were successful with their desired outcome, there would be no practical remedy available to them.[35]

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[34] See *Borowski*, *supra* note 30 at para 23, where the Court states that the inapplicability of a statute to the party challenging the legislation renders a matter moot.
[35] Chambers Decision, *supra* note 1 at para 51.

42. The general policy that a live controversy provides the lifeblood of a legal dispute is not peculiar to Canada, and it is even more fully developed in American jurisprudence. The jurisdiction of American federal courts is constitutionally limited so that the courts have no authority over hypothetical or moot cases lacking a controversy, subject to certain exceptions.[36]

43. For example, the Supreme Court of the United States found that the challenge of a denied admission to law school by a student who was slated to graduate within months of the anticipated decision was a moot matter. The Court's decision would not have affected the student's rights.[37]

44. The Appellants argue that the stand-alone declaratory *Charter* relief they seek constitutes a live controversy in reliance on the Alberta Court of Appeal's decision in ***Trang v Alberta (Edmonton Remand Centre)***.[38] This decision provides an exceptional example that is distinguishable from the present case.

45. *Trang* involved an application for *habeas corpus* as well as a claim for declaratory relief to remedy numerous alleged *Charter* breaches respecting prisoner conditions. Due to staying of the criminal proceedings, the application was left to address declaratory relief.[39] The Alberta Court of Appeal concluded that the matter was not moot and that an action for a declaration may proceed in the absence of a claim for any other remedy.[40]

46. Unlike in the instant case, the declaratory relief sought in *Trang* presented a wider-reaching utility because it could clarify whether remand centre

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[36] US Const, art III, § 2, cl 1; *Borowski, supra* note 30 at paras 24-25.
[37] See *DeFunis v Odegaard*, 416 USD 312 (1974).
[38] 2005 ABCA 66, 363 AR 167 [*Trang*].
[39] *Ibid* at para 2.
[40] *Ibid* at para 5.

conditions had violated *Charter* rights. Conversely, the present case seeks to challenge a singular deferred application under a repealed portion of bylaw respecting an application process that cannot recur. The remand centre and its conditions remained a reality, whereas the courtesy flagpole does not. The Queen's Bench Application Judge was alive to this distinction in citing Professor Kent Roach for the proposition that an important factor in determining whether declaratory relief is appropriate is whether the situation is capable of arising again in the future.[41]

47. *Trang* supports the position that an action for a declaration *may* proceed in the absence of any other remedy, but it does not stand for the proposition that such an action *must* proceed, nor that it cannot be moot. In this respect, the Appellants' argument that the Chambers Judge erred in failing to find that declaratory relief raises a live and concrete controversy must fail.[42] It should be recalled that the aggrieved party in *Borowski* also sought judicial declarations of *Charter* infringements, albeit in the context of challenged legislation, but that the possibility of such a remedy did not alter the matter's mootness.

48. The instant case arises from an application for judicial review of a municipal decision maker's application of its own (former) bylaw, and the concerted purpose of requesting judicial intervention was to have the City reconsider the matter or fly the flag. This cannot become a reality, nor can the situation recur.

49. This is not a reference case, and the Respondent submits that the Court should not be called upon to make a non-essential *Charter* determination.[43]

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[41] *Trang v Alberta (Director, Edmonton Remand Centre)*, 2004 ABQB 497 at para 52, 360 AR 133.
[42] Appellants' Factum at paras 17-19.
[43] *Phillips v Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 SCR 97 at paras 9-12.

50. Declaratory orders, although capable of constituting stand-alone relief, are discretionary in nature.[44] Such discretion should be exercised sparingly and with extreme caution, and courts generally will not make a declaratory order or decide a case when the decision will serve no practical purpose because the dispute is theoretical, hypothetical, or abstract, and the remedy of declaratory relief is not generally available where the dispute or legal right may never arise.[45] A court will withhold the discretionary remedy of a declaratory order where such a declaration cannot meaningfully be acted upon by the parties or serve some utility.

51. The British Columbia Court of Appeal followed this policy in refusing to entertain the request for a declaration impugning the conduct of a village's decision maker where there was no practical effect in the context of judicial review proceedings and relief was not available.[46]

52. The Respondent submits that it cannot be said that the Chambers Judge misdirected herself or failed to give sufficient weight to all relevant considerations, nor that failing to exercise her discretion was based on an erroneous principle. In fact, Justice Goebel was alive to the intricacies of the analysis which was undertaken in detail:

> A more nuanced analysis is warranted taking into account a number of considerations including whether the situation is likely to arise again in the future, whether the declaration will settle the law or prevent further disputes in promotion of judicial economy or whether the relief will provide legal and practical guidance that solves underlying issues and prevents new ones from arising between the parties[.][47]

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[44] Chambers Decision, *supra* note 1 at paras 19-21.
[45] *Godin v Sabourin*, 2016 ONSC 770 at para 6, 262 ACWS (3d) 1038.
[46] *Webber v Anmore (Village)*, 2012 BCCA 390 at paras 12-15, 4 MPLR (5th) 64.
[47] Chambers Decision, *supra* note 1 at para 20.

53. The Respondent therefore submits that the Chambers Judge appropriately determined that this case is moot, and that the matter remains moot on appeal.

B. This moot case should not be decided

54. The Respondent submits that the Chambers Judge reasonably declined to exercise judicial discretion to decide the case, and that it is equally open to this Court to use its discretion to quash the appeal due to the matter being moot.

55. The Appellants' Factum does not argue the reasonableness of the Chambers Judge's decision not to exercise discretion to decide the moot case at the second stage of the mootness test. The Appellants' position in this regard appears to rest on the argument that the matter should not have been found moot.

56. At second stage of the *Borowski* analysis, a court weighs relevant criteria or rationale in deciding whether it should use its discretion to hear a moot case.

57. For the first criterion, the Court in *Borowski* emphasized that an adversarial context is a fundamental tenet of the legal system that ensures issues are well argued by parties who have a stake in the outcome. A collateral consequence might fulfil this requirement where a court's decision will have a practical side effect on the rights of the parties. [48]

58. Neither party in the instant appeal has a stake in the outcome since the courtesy flagpole and its underlying *Policy* are no longer available to the Appellants nor any other interested person, nor will the relevant portions of the *Policy* be

[48] *Borowski, supra* note 30 at para 31; See e.g. *Vic Restaurant Inc. v Montreal*, [1959] SCR 58.

utilized by the City. There is no current nor foreseeable relationship between the Appellants and the City.

59. Regarding judicial economy, the Court in *Borowski* emphasized the need to ration scarce judicial resources.[49] Although this matter is slated to receive a hearing, the Respondent submits that judicial economy applies to this appeal, where significant time and costs have already been expended on these proceedings despite there being no practical remedy available to either party.

60. An exception to the strict application of the mootness doctrine and judicial economy might present itself in moot cases which are of a recurring nature but of brief duration, however, it is ideal to determine such issues in a genuine adversarial context.[50] This case does not provide such an exception, as the facts arise from an isolated set of circumstances that cannot recur.

61. Even if a court does decide to use its discretion to decide on a moot case of a brief but recurring nature, it should avoid making non-essential or unnecessary constitutional pronouncements. ***Tremblay v Daigle***[51] speaks to this point, although in a private action. *Daigle* involved a mother's appeal of the validity of an interlocutory injunction prohibiting her from having an abortion, however, the mother had undergone an abortion by the time the matter was before the Supreme Court of Canada. The Court decided to hear the moot matter because it raised an important legal issue that could affect other women:

> As we have indicated, the Court decided in its discretion to continue the hearing of this appeal although it was moot, in order to resolve the important legal issue raised so that the situation of women in the position in which Ms. Daigle found herself could be clarified. *It would, however, be quite a different matter to explore further legal*

[49] *Borowski, supra* note 30 at para 34-36.
[50] *Ibid* at para 36.
[51] [1989] 2 SCR 530.

> *issues which need not be examined in order to achieve that objective. The jurisprudence of this Court indicates that unnecessary constitutional pronouncement should be avoided*[.][52]
>
> [emphasis added; citations omitted]

62. American jurisprudence contemplates a similar exception where a matter is capable of repetition, yet evading review. This was the case in the landmark decision of ***Roe v Wade***,[53] where the challenge of a law forbidding particular abortions was rendered moot by virtue of the plaintiff no longer being pregnant, but the Supreme Court of the United States found the case to be an exception due to the time constrains of the human gestation period.[54]

63. Another basis to use judicial resources in a moot case is when the issue is of public importance and a resolution is in the public interest.[55] For example, in ***Re Objection by Québec to a Resolution to amend the Constitution***,[56] the Supreme Court of Canada chose to exercise its discretion to hear a moot case after the question of the constitutionality of the partition of the Constitution had been rendered moot by the actual occurrence of the event.

64. The challenge of the City's application of its defunct bylaw does not rise to such a level of public importance to warrant judicial intervention. Further, the mere presence of national importance in a moot appeal is insufficient absent an additional ingredient of social cost in leaving the matter undecided.[57] Appellate courts should be wary of entertaining moot appeals absent a strong public

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[52] *Ibid* at 571-72.
[53] 410 US 113 (1973).
[54] *Ibid* at 125.
[55] *Borowski*, *supra* note 30 at para 37.
[56] [1982] 2 SCR 793.
[57] *Borowski*, *supra* note 30 at para 39.

interest in the resolution of the issues and questions of broad social and constitutional importance.[58]

65. The third factor discussed in *Borowski* is the need for a court to consider its proper law-making function and to resist overreaching into the legislative branch or political sphere:

> The court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.[59]

66. This Court provided an overview and application of the doctrine of mootness in ***Radiology Associates of Regina Medical PC Inc. v Sun Country Regional Health Authority***.[60] In that case, the plaintiff radiologists had a contract to provide services to the defendant hospital. The hospital believed that the contract did not cover CT scans, so it sought bids for a supplier. The radiologists moved for an injunction to prevent the hospital from tendering for a supplier, but the motion judge dismissed the injunction motion after concluding that damages could remedy any breach of contract. The hospital then sought bids and entered into a contract with a supplier for CT scans. The radiologists appealed the dismissed injunction motion, but the Court agreed that the matter was moot, especially since the Court could not grant the remedy sought:

> In this appeal, it is clear that, if this Court found the Chambers judge had erred, the Court could not give Radiology the remedy it seeks: it cannot enjoin Sun Country's actions because they have already been performed. If the Court were disposed to decide the appeal, the only decision this Court could render is to say whether an injunction *should have been* granted. Radiology asks this Court, in essence, to grant a declaration in circumstances where no declaration would be granted in first instance. Further,

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[58] *Tamil Co-operative Homes Inc. v Arulappah* (2000), 49 OR (3d) 566 at para 26 (CA).
[59] *Borowski*, *supra* note 30 at para 40.
[60] 2016 SKCA 57 at paras 14-32, 480 Sask R 1 [*Radiology Associates*].

> granting such a declaration would have no readily apparent meaningful consequences for either side. It also could have the unintended effect of prejudicing the eventual outcome at trial.[61]

67. The Appellants similarly request that this Court declare whether the relief sought on judicial review *should have been* granted. As cited by the Chambers Judge, this Court in *Radiology Associates* refused a declaration that would have no readily apparent meaningful consequence for either party.[62]

68. In ***Daniels v Daniels***[63] this Court declined to decide on a moot constitutional issue that would amount to turning a private cause of action into a constitutional reference.

69. A repealed bylaw was relevant to the Alberta Court of Appeal in ***Edmonton (City) v Grimble***.[64] In that case, the chambers judge determined that two city bylaws contravened a third bylaw. The city appealed the ruling, but later enacted a new bylaw that repealed the third bylaw in response to a plebiscite. The city argued that the moot issue should be decided as it may affect future litigation with other parties, but the Court disagreed, finding that there was no evidence of any potential future litigation or adversarial context warranting the Court's discretion. Further, the city's electorate pronounced on the issue by way of a plebiscite, so an adjudication by the Court could be construed as an unwarranted intrusion into the political arena.

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[61] *Ibid* at para 29.
[62] Chambers Decision, *supra* note 1 at para 56; *Radiology Associates*, *supra* note 60 at paras 29-32.
[63] (1989), 79 Sask R 62 (CA).
[64] (1996), 133 DLR (4th) 587 (Alta CA).

70. Similarly, the Manitoba Court of Appeal in ***Pestrak v Denoon***[65] declined to grant leave to appeal a private prosecution of a professional engineer's conviction for unlawful practice as an architect. In that case, the relevant impugned statute had since been repealed, and the new legislation was not before the Court in the case.

71. The Chambers Judge cited and applied the appropriate legal and factual considerations at the second stage of the *Borowski* analysis[66] in concluding that the Appellants have not established judicial discretion should be exercised to fully determine the issues raised on their merits:

> [N]ot only is there no live and concrete controversy remaining, but there can be no ongoing adversarial context. There are no outstanding or legal issues at play between the parties, nor any collateral consequence that will be advanced by a full determination of the merits. The "heart of the dispute" disappeared when the City repealed its Policy eliminating any future use of the flagpole…This has become an academic exercise with no practical value.[67]
>
> [citations omitted]

72. The Respondent therefore submits that the Chambers Judge's conclusion not to exercise judicial discretion to decide the moot case should not be disturbed, and that this Court should similarly dismiss or quash the appeal.

C. The Chambers Judge erred in applying presumptions

73. The Respondent submits that the Chambers Judge erred in the application of several presumptions, rather than factual or legal findings, for the purpose of conducting a mootness analysis:

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[65] 2000 MBCA 79, [2010] 10 WWR 387.
[66] Chambers Decision, *supra* note 1 at paras 52-59.
[67] Chambers Decision, *supra* note 1 at para 57.

> [23] My analysis presumes that other preliminary or jurisdictional issues were resolved in favour of the applicants including the scope of the record (inclusive of the affidavits filed), the determination that a decision was made by the City and the further determination that that the decision falls within the scope of this court's power of review.[68]

74. These presumptions resulted in an abstract context where determinative issues were hypothetically resolved to the Appellants' advantage for the purpose of the analysis. Basing the mootness analysis on these presumptions was not necessary to determine mootness, however, it is understandable that this exercise eliminated the Court's need to expend unnecessary resources on fully deciding the issues on their merits. It also provided the Appellants' with their strongest possible position to succeed against a mootness determination.

75. The Chambers Judge nevertheless found the matter to be moot, but the application of these presumptions outside of the mootness analysis practically resulted in an arbitrary costs award in favour of the Appellants. The Respondent submits that these presumptions taint the findings and conclusions within the mootness analysis respecting procedural fairness in reaching a "decision", reasonableness of a "decision", and *Charter* implications of that "decision", such that they are hypothetical and academic conclusions that would be inappropriate to apply outside of the mootness discussion.

76. Specifically, the Chambers Judge's presumption that a reviewable decision was made by the City formed the basis of findings, within the mootness analysis, that procedural fairness was denied.[69] Further, the presumption of a reviewable decision was used to determine that *if* a "decision" were unreasonable, and *if* it breached the Appellants' *Charter* right to freedom of expression, then the

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[68] Chambers Decision, *supra* note 1 at para 23.
[69] *Ibid* at paras 31, 60.

appropriate relief would be to remit the matter back to the City for a proper and fair determination, which would serve no practical effect.[70] The Respondent submits that these findings, which are hypothetically based on presumptions, are not legal conclusions applicable outside of the mootness analysis.

77. The presumption that the City's deferral of the Appellants' application constituted a reviewable decision was highly contested in the Court below, and the Respondent submits that the Chambers Judge did not have jurisdiction to review the deferral of the application. Although the Chambers Judge presumed that the Court had jurisdiction to review the matter for the limited purposes of a mootness analysis, no substantive review was in fact undertaken and there was no decision regarding jurisdiction.

78. There was no decision made by the Director of Community Services to judicially review. The City's Director of Community Services never accepted nor denied PARLA's request to fly their flag during the application process, which was deferred for further discussion with the applicant amid preliminary correspondence. Not every aspect of an administrative body's process can be reviewed, and courts should not undertake judicial review where no decision has yet been made and the statutory process is in its preliminary stages.[71]

79. In ***Timberwolf***, for example, a provincial commissioner proposed adjustments to a forestry company's stumpage fees based on an audit, and the company was given thirty days to review and respond to the proposal. The company asked for certain disclosure, which was provided, and then the company unsuccessfully sought further disclosure. The company applied for judicial review respecting

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[70] *Ibid* at paras 39-40, 50-51.
[71] *Timberwolf Log Trading Ltd. v British Columbia (Commissioner Appointed Pursuant to s. 142.11 of the Forest Act)*, 2011 BCCA 70 at paras 23, 40, 47, 331 DLR (4th) 405 [*Timberwolf*].

the commissioner's decision to refuse disclosure, but both the British Columbia Supreme Court[72] and its Court of Appeal found, *inter alia*, that the issue was in an assessment stage and there was no decision.

80. In this matter, similarly to *Timberwolf*, the City made suggestion for PARLA's consideration proposed as a possible balance the applicant's request and the public contentiousness demonstrated: that a nationally recognized pro-life flag be submitted into the application process.[73] Ms. Hettrick, in response, directed questions to the Mayor, which were answered, but PARLA did not respond to the City's proposal, and thereby effectively abandoned the application. PARLA's application or request was left on hold[74] and PARLA proceeded to apply for judicial review of what was effectively the City's interim proposal and deferral during the preliminary assessment stage of an application.

81. The British Columbia Supreme Court followed *Timberwolf* in ***I.A.B.S.O.I., Local 97 v British Columbia (Labour Relations Board)***.[75] In *IABSOI*, unions sought judicial review in relation to an unfair labour practices application before the Labour Relations Board. The unions requested an order prohibiting the Labour Relations Board from adjudicating their application following a letter sent by the mediator respecting proposals for a solution. There was an allegation of bias, and the unions argued that the mediator acted as a decision-maker when writing the letter. Justice Bernard found that there was no reviewable decision before the court, and that the mediator merely sought to facilitate resolution of the dispute.[76]

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[72] *Timberwolf Log Trading Ltd. British Columbia (Commissioner Appointed Pursuant to s. 142.11 of the Forest Act)*, 2010 BCSC 500, [2010] BCWLD 4772.
[73] Affidavit of Valerie Hettrick, Appeal Book, Tab 2, paras 8-15, pp 8-9;
[74] Media Release of the City of Prince Albert, Appeal Book, Tab 4.22, p 233.
[75] 2011 BCSC 614, 23 Admin LR (5th) 210 [*IABSOI*].
[76] *Ibid* at paras 31-34.

82. Reviewing courts should be cautious in undertaking judicial review for parties who seek to circumvent jurisdiction and develop a new form of incidental litigation.[77] In ***1099065 Ont***, the Federal Court of Appeal refused to accept that an e-mail correspondence between the Canada Border Services Agency and a company proposing a further meeting could be amenable to judicial review.[78]

83. The "deferral" complained of in this case did not occur in the context of any quasi-judicial process. There was no formal hearing, no formal taking of evidence, no completion of any decision process. A decision process, paused for consultation with the applicant, did not resume because the applicant did not ultimately respond to the proposal presented and received for consideration. The City, in the course of assessing PARLA's request to fly a proposed flag on the courtesy flagpole, made efforts to explore a resolution of issues with PARLA raised publicly to City Council, relevant to Section 6.07(c)(iii) and (vi) of the *Policy*, while identifying public controversy and community concerns.[79]

84. Although the City is a creature of statute that makes public decisions, the deferral in question does not amount to a reviewable exercise of a public power of decision. The Appellants only challenged the singular deferral at issue but not any protocol, bylaws, or procedures practised by the City.

85. The Respondent therefore submits that the Chambers Judge made legal presumptions for the purposes of a mootness analysis, and that would be inappropriate to apply conclusions respecting the City's "decision" (i.e.

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[77] *1099065 Ontario Inc. v Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FCA 47 at para 13, 375 NR 368 [*1099065 Ont*]; see *Addison & Leyen Ltd. v Canada*, 2007 SCC 33 at para 11, [2007] 2 SCR 793.
[78] *1099065 Ont*, *supra* note 77 at para 9.
[79] Media Release of the City of Prince Albert, Appeal Book, Tab 4.22, p 233.

procedural fairness, reasonableness, and *Charter* implications) outside of that abstract discussion.

D. The Chambers judge misapplied the doctrine of legitimate expectations

86. The Respondent submits that the Chambers Judge erred in misapplying the doctrine of legitimate expectations and finding that the Appellants were owed greater procedural rights:

> When the applicants submitted their application, as they had done in prior years, they held a legitimate expectation that the process prescribed by the Policy would be followed, that the designated decision-maker would assess the application within the context of the Policy and its criteria, *that the designated decision-maker would advise them if the application was adequate and if not, what needed to be done and that he/she would advise them of the decision that was ultimately made.*[80]
>
> [emphasis added]

87. It is trite law that the doctrine of legitimate expectations, at most, gives rise to procedural rights and not substantive rights.[81] The Respondent submits that the Appellants were not owed procedural rights beyond the expectation that the *Policy* would be contemplated.

88. Beyond the *Policy*, there were no clear, unambiguous, and unqualified representations[82] made by the City respecting procedural fairness which the Appellants could be said to have legitimately expected. The Chambers Judge did not consider any evidence respecting representations of a greater consultation or correspondence between the City and PARLA regarding the application's deferral.

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[80] Chambers Decision, *supra* note 1 at para 30.
[81] *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at para 26.
[82] *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 95, [2013] 2 SCR 559.

89. Further, PARLA's application in 2017 represented their second application under the new *Policy*, and the first application that elicited community controversy and complaint prior to the application being considered under the *Policy*. In these circumstances, the Chambers Judge erred in applying the doctrine of legitimate expectations to conclude that the Appellants were owed greater procedural fairness than was ever represented or contemplated.

90. The Respondent submits that the Chambers Judge misapplied the doctrine of legitimate expectations in finding that the Appellants were owed greater procedural fairness. It is further submitted that this error was a determinative factor relied on by the Chambers Judge in finding that there had been a denial of procedural fairness.[83] The Chambers Judge's conclusion respecting a denial of procedural fairness, although made within an abstract mootness analysis, is therefore also incorrect.

E. The City did not violate the *Charter*

91. If this Court decides to undertake a *Charter* analysis, either within or outside of a mootness analysis, then the Respondent submits that the City's application of the *Policy* did not infringe the Appellants' right to freedom of expression guaranteed by section 2(b) of the *Charter*.

92. Alternatively, if this Court finds a *Charter* infringement, the Respondent submits that the City's decision to defer the application was justified under section 1 of the *Charter*.

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[83] Chambers Decision, *supra* note 1 at paras 30-31.

93. From the outset, it should be noted that a *Charter* analysis in these circumstances poses several practical difficulties in addition to the above:
    a. There are limited factual and legal findings in the Chambers Decision which are not based on presumptions for the purpose of a mootness analysis.
    b. The *Charter* issue was not determined in the Chambers Decision (alternatively, if a determination was made, a *Charter* breach was not found).[84]
    c. The City's decision to defer the application did not result in an adequate record to review for the purposes of engaging in a proper ***Doré*** analysis.[85]
    d. If a *Charter* breach were found, the appropriate remedy would be to remit the matter back to the City for a proper and fair determination.

94. It is well-established that administrative decision-makers, including the City, must act consistently with *Charter* values when applying their discretion.[86]

95. Courts have traditionally held that the appropriate standard of review for a *Charter* issue is correctness.[87] However, the Supreme Court of Canada has employed deferential standard when reviewing administrative decisions that implicate *Charter* values so that courts do not merely retry decisions that would otherwise be subject to a reasonableness standard.[88]

96. In ***Vietnamese Association of Toronto v Toronto (City)***,[89] the Divisional Court of the Ontario Superior Court of Justice found on a similar set of circumstances

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[84] Chambers Decision, *supra* note 1 at paras 49-50.
[85] Chambers Decision, *supra* note 1 at paras 48-49.
[86] *Doré*, *supra* note 12 at paras 24, 42.
[87] *Whatcott v Association of Licensed Practical Nurses (Saskatchewan)*, 2008 SKCA 6 at paras 35-36, 304 Sask R 290 [*Whatcott*]; *Multani v Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6 at paras 20-21, [2006] 1 SCR 256.
[88] *Doré*, *supra* note 12 at para 51.
[89] (2007), 85 OR (3d) 656 [*VAT*].

that a city's refusal to fly an association's flag did not even engage section 2(b) of the *Charter*. Under the ***Irwin Toy***[90] analysis, even though the flying of a symbolic flag may be a form of expressive activity that falls within the sphere of conduct protected by section 2(b) of the *Charter*, a violation of that protection can only be established if the purpose or effect of the City's actions was to control PARLA's freedom of expression.[91]

97. In *VAT*, the city's Chief of Protocol denied a non-profit organization's request to fly their flag on City Hall's courtesy flagpole. The applicant argued, *inter alia*, that the decision infringed its right to freedom of expression. The panel court, led by Justice Swinton, dismissed the application for judicial review.

98. The city in *VAT* denied the association's request to fly their Heritage and Freedom Flag, which was the national flag of the former country of South Vietnam, despite having permitted requests to raise the flag annually for the preceding twenty five years. The Chief of Protocol reached the decision in consultation with the Mayor by interpreting the City's courtesy flagpole protocol policy as requiring, *inter alia*, that flags of nations be nationally recognized by the Government of Canada, Department of Foreign Affairs.

99. The City's purpose in adopting and applying the *Policy* was not to express PARLA's expression, but, as outlined at the beginning of the *Policy*, to establish a respectful and consistent process for raising flags. It did not create nor confer an entitlement upon any person or group to use the courtesy flagpole, but it offered an opportunity to certain groups to fly their flag based on the Director of Community Services' interpretation of the *Policy* and approval.

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[90] *Irwin Toy Ltd. v Québec (Procureur general)*, [1989] 1 SCR 927 [*Irwin Toy*].
[91] *VAT*, *supra note* 89 at para 14; *Irwin Toy*, *supra* note 90 at paras 40, 47.

100. Although the courtesy flagpole's placement in Memorial Square may be a public space, there is no right to the flagpole itself which is not public property to which the public has historically had access. In this regard, the Appellants' contention that they were refused to be allowed to express themselves in a public facility must fail.[92]

101. The Appellants present ***Greater Vancouver Transportation Authority v Canadian Federation of Students***[93]as dispositive and indistinguishable from the instants case as it relates to a *Charter* infringement.[94] The Respondent disagrees: *GVTA* is readily distinguishable as it involved the challenge of a transit authority's broad policies that prohibited political advertising on municipal buses, whereas the instant matter challenges the application of the *Policy* and not the *Policy* itself.

102. The platform of expression in *GVTA*—advertisement on transit—was open to anyone who payed the fee. All persons have access to that particular platform of public expression, and a municipality cannot broadly limit the use of that open access platform through policy.

103. Conversely, in the instant case, applying to use the courtesy flag pole was only open to select organizations for select purposes pursuant to the *Policy*, and the *Policy* was not challenged. The Respondent did not have a duty to provide the Appellants unfettered access to the courtesy flag pole as a platform of expression.

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[92] Appellants' Factum at para 39.
[93] 2009 SCC 31, [2009] 2 SCR 295 [*GVTA*].
[94] Appellants' Factum at paras 39-41.

104. Even a government body with possessory rights to premises may exclude others from accessing its premises, and is not obliged to provide any reasons[95] or any other procedural fairness.[96] The flagpole's use is, and must be, carefully regulated, as flags flown "can and without question are perceived, rightly or wrongly, as the expression of the City's perspective and approval."[97]

105. The City's Director of Community Services is owed deference for drawing on its own particular expertise and experience in carrying out its duties under its *Policy*.[98] It is reasonable for a municipality to exercise its own judgment in applying its policy.[99]

106. Alternatively, if this Court finds that the City's referral of PARLA's request into the consultation with the applicant infringed section 2(b) of the *Charter*, the Respondent respectfully submits that the infringement was justified. Courts have often found that certain municipal prohibitions of expression are justified in a free and democratic society. For example, noise bylaws,[100] a bylaw prohibiting signs above the roof line of a building,[101] and the regulation of lap dancing.[102]

107. The first step under the *Doré* analysis is to examine the statutory objective being promoted. As noted above, the *Policy* seeks to promote a respectful and

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[95] *Covenant Health v Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562 at para 126, 596 AR 234.
[96] *Cordsen v Greater Victoria Water District* (1982), 123 DLR (3d) 456 at para 7 (WL) (BC Sup Ct).
[97] *VAT, supra* note 89 at para 19.
[98] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 49, [2008] 1 SCR 190.
[99] See e.g. *Eagle's Nest Youth Ranch Inc. v Corman Park No. 344 (Rural Municipality)*, 2016 SKCA 20, 395 DLR (4th) 24.
[100] *Montréal (Ville) v 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 SCR 141.
[101] *Vancouver (City) Jaminer*, 2001 BCCA 240, 198 DLR (4th) 333.
[102] *Ontario Adult Entertainment Bar Association v Metropolitan Toronto (Municipality)* (1997), 151 DLR (4th) 158.

consistent process for raising flags as a part of the City's objective to promote a safe and viable community. The latter objective has been upheld as valid in the case law, including the objective to protect the public from hateful expression.[103]

108. The second step under the *Doré* analysis is to determine the reasonableness of the decision considering whether the restraint on expression is proportional to the statutory objective and the expression is minimally impaired.[104]

109. The City, recognizing demonstrated public concerns and controversy, took efforts to avoid any application of the *Policy* that would render the flying of a PARLA flag outside of the *Policy*, and issues were discussed with Ms. Hettrick to encourage resolution.[105] In doing so, the City reviewed and considered community objections to the flag as required under the *Policy*.[106].

110. Although PARLA promotes and broadcasts anti-abortion animus, abortion is a legal medical procedure in Canada. Whereas abortion was at one time prohibited by law, the Supreme Court of Canada found the previous law on procuring of miscarriages to be unconstitutional over thirty years ago in *Morgentaler*. Specifically, the former provision criminalizing abortion was found to infringe upon the right to security of the person[107] of pregnant women in a manner not justified in a free and democratic society.[108]

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[103] *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154 at para 64 [2018] 6 WWR 463 [*CCBR v Grande Prairie*].
[104] *Ibid* at para 65.
[105] Affidaivt of Valerie Hettrick, Appeal Book, Tab 2, paras 8, 10, p 8.
[106] Media Release of the City of Prince Albert, Appeal Book, Tab 4.22, p 233.
[107] *Charter*, s 7.
[108] *Morgentaler*, *supra* note 33 at para 70.

111. The City, in assessing PARLA's request and pausing it pending consultation with the applicant, was therefore involved in a balancing process revolving around its statutory and municipal objectives and between the importance of PARLA's right to expression. The Court in *Doré* called for a balancing analysis on judicial review rather than a strict application of the *Oakes*[109] analysis.[110]

112. The Court dismissed the appeal in *Doré* after finding that a disciplinary board's decision to sanction a lawyer was a reasonable balance between the lawyer's expressive rights and the statutory objectives underlying the legal applicable legal regulation.[111]

113. The Court in *Doré* balanced "the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession."[112] The fact that the disciplinary body had demonstrated that they gave a balanced due regard to the important expressive rights at issue was given deference in the Court's adjudication that the decision was reasonable.

114. A government who chooses to provide a means of expression must do so in a manner consistent with the *Charter*, and it is well-established that section 2(b) of the *Charter* does not guarantee a right to any particular means of expression.[113] The Appellants had no guarantee to use the flagpole to express themselves, especially if their expression risks infringing the *Policy* or other statutory objectives. Similarly to the association in *VAT*, PARLA was permitted

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[109] *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].
[110] *Doré*, *supra* note 12 at para 57.
[111] *Doré*, *supra* note 12 at para 71.
[112] *Doré*, *supra* note 12 at para 66.
[113] *Native Women's Association of Canada v Canada*, [1994] 3 SCR 627 at paras 45, 54, 76 (WL); *VAT*, *supra* note 14 at paras 17, 20.

to use Memorial Square at City Hall for its ceremony, participants maintained the ability display their flags or express themselves without use of the City's flagpole; and "[the] fact that they cannot display their flag in the way they wish does not constitute a denial of freedom of expression."[114]

115. A prohibition of expression must be proportionate, meaning that the *Charter* right at issue must be minimally impaired.[115] In this case, the City made multiple efforts with the Applicant regarding a flag more broadly recognized by PARLA's cause. Similarly to *CCBR v Grande Prairie*, the City never took the position that it would refuse to fly a pro-life flag, but only that there were issues with PARLA's particular flag as it related to its interpretation of the *Policy*. In fact, the City accepted PARLA's request to proclaim the week "Celebrate Life Week" and endeavoured to come to a solution where PARLA could still use the courtesy flagpole in a manner meaningful to the public voicing of their cause.

116. The deferral cannot be construed as a blanket rejection, but merely an isolated assessment of a specific flag.[116] Flags flown in front of City Hall have the effect of showing the City's approval of a particular expression, and the City cannot be compelled to fly PARLA's flag and therefore express a particular opinion.[117]

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[114] *VAT*, *supra* note 14 at para 20.
[115] *CCBR v Grande Prairie*, *supra* note 103 at para 92.
[116] *CCBR v Grand Prairie*, *supra* note 103 at para 92.
[117] See e.g. *Sundance (Summer Village) v W.A.W. Holdings Ltd.* (1980), 117 DLR (3d) 351 at para 32 (WL) (Alta CA); *Thunder bay Seaway Non-Profit Apartments v Thunder Bay (City)* (1991), 85 DLR (4th) 229 (Ont Ct J); *Bimini Neighbourhood Pub Ltd. v Vancouver (City)* (1982), 139 DLR (3d) 300 (BC Sup Ct).

117. The Respondent therefore submits that it did not violate the Appellants' right to freedom of expression under section 2(b) of the *Charter*, or, alternatively, that any infringement was justified.

F. The costs award was unreasonable

118. The Respondent submits that the discretionary award of costs against the Respondent and in favour of the Appellants by the Chambers Judge was arbitrary and unreasonable for having been based on presumptive legal conclusions rather than findings:

> This proceeding was sincerely brought as a result of the mishandling of the application tendered by PARLA to fly its flag on the Courtesy Flagpole in May 2017. It is evident that the City did not follow its own Policy or proceed in a procedurally fair manner. Further, I am unable to complete any reasonable analysis because of the lack of intelligible or transparent reasons. As such, while I have concluded that any decision to remit the determination back to the City has been rendered moot by the repeal of the Policy in question, in these circumstances, it is fit to exercise my discretion to award costs in favour of the applicants which I fix at $6,000 payable within 30 days.[118]

119. This costs award relies on findings the City did not proceed in a procedurally fair manner. As discussed above, this finding was made within a mootness analysis that was based on legal presumptions. The Respondent submits that it is inappropriate to use these findings from within the abstract mootness analysis as a basis to award discretionary costs. In this regard, the Chambers Judge clearly erred in principle and failed to act judicially in

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[118] Chambers Decision, *supra* note 1 at para 60.

misdirecting herself on the facts and the law and proceeding arbitrarily in applying discretion to award costs against the City.[119]

120. The Court of Queen's Bench enjoys discretion respecting the costs of and incidental to a proceeding and may make any direction or order respecting costs that is considers appropriate pursuant to Rule 11-1 of ***The Queen's Bench Rules***:

> **Discretion of Court**
>
> **11-1**(1) Subject to the express provisions of any enactment and notwithstanding any other rule, the Court has discretion respecting the costs of and incidental to a proceeding or a step in a proceeding, and may make any direction or order respecting costs that it considers appropriate.
>
> (2) In exercising its discretion as to costs, the Court may determine:
>
> (a) by whom costs are to be paid, which may include a successful party;
>
> (b) to whom costs are to be paid;
>
> (c) the amount of costs;
>
> (d) the date by which costs are to be paid; and
>
> (e) the fund or estate or portion of the fund or estate out of which costs are to be paid.
>
> (3) In awarding costs the Court may:
>
> (a) fix all or part of the costs with or without reference to the Tariff;
>
> (b) award a lump sum instead of or in addition to any assessed costs;
>
> (c) award or refuse costs with respect to a particular issue or step in a proceeding;

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[119] *Fontaine*, *supra* note 5 at para 36; *Rimmer v Adshead*, 2002 SKCA 12 at para 58, [2002] 4 WWR 119.

(d) award assessed costs up to or from a particular step in a proceeding;

(e) award all or part of the costs to be assessed as a multiple or a proportion of any column of the Tariff;

(f) award costs to one or more parties on one scale, and to another party or other parties on the same or another scale;

(g) direct whether or not any costs are to be set off; and

(h) make any other order it considers appropriate.

(4) In exercising its discretion as to costs, the Court may consider:

(a) the result of the proceeding;

(b) the amounts claimed and the amounts recovered;

(c) the importance of the issues;

(d) the complexity of the proceedings;

(e) the apportionment of liability;

(f) any written offer to settle or any written offer to contribute;

(g) the conduct of any party that tended to shorten or to unnecessarily lengthen the proceeding;

(h) a party's denial of or refusal to admit anything that should have been admitted;

(i) whether any step in the proceeding was improper, vexatious or unnecessary;

(j) whether any step in the proceeding was taken through negligence, mistake or excessive caution;

(k) whether a party commenced separate proceedings for claims that should have been made in one proceeding or whether a party unnecessarily separated his or her defence from that of another party; and

(l) any other matter it considers relevant.

121. The modern approach to the costs rules is discussed in ***Good Spirit School Division No. 204 v Christ The Teacher Roman Catholic Separate School Division No. 212***:

> Modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. Courts employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice — courts use costs awards so as to encourage settlement, to deter frivolous actions and defences, to discourage unnecessary steps in the litigation and to sanction unreasonable or vexatious behaviour. Courts may exercise their discretion on costs so as to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.[120]

122. A traditional principle of awarding discretionary costs is that a party who has been wholly successful should be entitled to an award of costs unless there are strong reasons to the contrary.[121] The general rule is that discretion to award costs must be exercised judiciously and ought to follow the ordinary rules unless the circumstances justify a different approach.

123. Although public law cases can involve special circumstances that may warrant costs awarded to an unsuccessful litigant,[122] the Respondent submits that no such circumstances were canvassed by the Chambers Judge other than citing findings based on presumptions.

124. The Respondent therefore submits that the costs awarded were reached arbitrarily and awarded unreasonably, and the award should be set aside or varied.

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[120] 2018 SKQB 30 at para 22, [2018] 2 WWR 778 [quoting Neva R McKeague & Christine Johnston, *Saskatchewan Queen's Bench Rules, Annotated* (Regina: Law Society of Saskatchewan Library, 2006) at 546].
[121] *Schneider v McMillan LLP*, 2017 SKQB 222 at para 10, 4 CPC (8th) 54.
[122] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 39, [2003] 3 SCR 371.

PART VI. RELIEF

125. The Respondent therefore respectfully submits that it would be appropriate that this Honourable Court dismiss or quash this appeal for mootness and set aside or vary the costs awarded by the Chambers Judge in the Court below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Prince Albert, Saskatchewan, this 6th day of November, 2019.

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Per: _____
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PART VII. AUTHORITIES

Statutes

Canadian Charter of Rights and Freedoms, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK)*, 1982, c 11.

Constitution of the United States.

City of Prince Albert, Policy No 45, *Half-Mast Policy* (10 May 2016).

City of Prince Albert, revised Policy No 45.1, *Flag Protocol Policy* (25 January 2016).

City of Prince Albert, revised Policy No 45.2, *Flag Protocol Policy* (28 May 2018).

Criminal Code, RSC 1985, c C-46.

The Court of Appeal Act, 2000, SS 2000, c C-42.1.

The Queen's Bench Rules.

Case Law

1. *1099065 Ontario Inc. v Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FCA 47, 375 NR 368.

Addison & Leyen Ltd. v Canada, 2007 SCC 33, [2007] 2 SCR 793.

2. *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559.

3. *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817.

Bimini Neighbourhood Pub Ltd. v Vancouver (City) (1982), 139 DLR (3d) 300 (BC Sup Ct).

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