C.A. No. CV3444

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 APPELLANTS

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INDEX

PART I. INTRODUCTION

1. This is an appeal of a decision of a judge in chambers, who concluded that the Appellants' application for judicial review was moot and dismissed the application. The chambers judge nonetheless awarded costs in favour of the Applicants, now the Appellants.[1] This is the Factum of the Appellants, Prince Albert Right To Life Association [PARLA] and Valerie Hettrick.

Background

2. "For many years the City of Prince Albert [City] allowed non-profit interest groups and charitable organizations like PARLA to use a flagpole located in Memorial Square just outside of City Hall to increase public awareness about their cause."[2]

3. The Appellants applied to fly a flag for a week in May, 2017 on the City's "Courtesy Flagpole", as they had for nearly twenty years. The proposed flag "portrayed a symbol of a smiling, fully-formed cartoon fetus and the words 'Celebrate Life Week' and 'Please Let Me Live'". The flag had been flown on the Courtesy Flagpole in seven previous years.[3]

4. The City did not allow the Appellants to fly their flag. While we detail the City's reaction to the application below, such as it was, the chambers judge concluded:

> [31] … The applicants were not advised of the case to be met, given an opportunity to be heard, provided with adequate reasons or had the assurance that the decision was made by an impartial decision-maker with the prescribed authority to make it. No intelligible response nor decision was communicated to the applicants. Instead, the requested days came and went without the City raising the requested flag. In the circumstances, I would have no hesitation in finding that there was a denial of procedural fairness.
> …
> [39] In this instance, despite granting the applicants' request to fly this particular flag for many years, the City did not grant the applicants' request in 2017. This "decision" was neither the product of a transparent process nor was it supported by intelligible reasons. In fact, no reasons were articulated to the applicants at all.[4]

5. The week the Appellants applied to fly their flag has long passed. Since May, 2018, the City no longer offers its Courtesy Flagpole for community groups' use.[5] Other than a *Charter*

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[1] *Prince Albert Right to Life Association v Prince Albert (City)*, 2019 SKQB 143 [Chambers Decision], at paras 59-60, Appeal Book ("AB") Tab 6, p 323.
[2] Chambers Decision, para 1, AB Tab 6, pp 301-02.
[3] Chambers Decision, para 2, AB Tab 6, p 302.
[4] Chambers Decision, paras 31, 39, AB Tab 6, p 311-12, 315.
[5] Chambers Decision, para 10, AB Tab 6, p 304.

declaration under section 24(1), there is no remedy that the Appellants might now seek, which would prevent, ameliorate or repair the restriction of freedom of expression that they suffered.

Outline of this Appeal

6. The Appellants continue to seek a declaration that their freedom of expression was unreasonably and unjustifiably impaired by the City's decision, contrary to Section 2(b) of the *Canadian Charter of Rights and Freedoms*.[6]

7. The chambers judge concluded that the available remedy for each of the City's failures – denying procedural fairness, giving no intelligible reasons, and unreasonably restricting freedom of expression – would be to return the decision to the City. Because there is now no "practical reason" to do that, the chambers judge decided that this case had become moot:

> [51] This (perhaps overly) long road of analysis is necessary to inform my determination of the preliminary issue - whether there remains a live controversy between the parties. The applicants attack the City's decision on three main grounds: a denial of procedural fairness, a lack of reasons and a denial of its freedom of expression. Even accepting that the applicants have advanced a compelling argument on each of these grounds, the appropriate remedy would result in the matter being directed back to the City. Given that the Policy no longer allows for public access to a Courtesy Flagpole, there is no practical reason to redirect the issue back to the City. There remains no live controversy between the parties and the application is moot.[7]

8. She considered whether to hear the case despite finding it moot but declined:

> [57) In this instance, the applicants have not satisfied me that I should exercise my discretion to fully determine the issues raised by this matter on the merits. For the reasons expressed above, not only is there no live and concrete controversy remaining, but there can be no ongoing adversarial context. There are no outstanding or legal issue at play between these parties, nor any collateral consequence that will be advanced by a full determination on the merits. The "heart of the dispute" disappeared when the City repealed its Policy eliminating any future use of the flagpole by the applicants: *Meigs* v *Saskatchewan Penitentiary*, 2012 SKQB 282, 401 Sask R 139. This has become an academic exercise with no practical value.
>
> [58] Further, I must remain mindful that the repeal of the Policy was part of a legitimate legislative function and pronouncing declarations in the absence of a concrete dispute may teeter upon intrusion into the role of the legislative branch.
>
> [59] For all of the above reasons, the application is dismissed as being moot.[8]

[6] Notice of Appeal, para 2, AB Tab 7, p 325.
[7] Chambers Decision, para 51, AB Tab 6, p 319.
[8] Chambers Decision, paras 57-59, AB Tab 6, p 323.

9. The burden of justifying a restriction of *Charter* rights and freedoms falls on the statutory decision-maker that restricts them. The requirement that a decision-maker have and give intelligible or reviewable reasons when exercising administrative discretion in a way that restricts *Charter* rights and freedoms is not merely an aspect of the decision-maker's obligations under an enabling statute, but is a requirement of substantive constitutional law.

10. If, therefore, a decision-maker limits someone's freedom of expression, without "intelligible or transparent reasons",[9] it follows that *the restriction that actually occurred* was unreasonable.[10] If the Appellants' *Charter*-protected freedom of expression was impaired by the City's refusal to let them fly their proposed flag – and binding authority conclusively shows that it was – a "full determination on the merits" flows directly from the chambers judge's conclusion that the refusal was unsupported by intelligible reasons.

11. The chambers judge erred in her understanding of the importance of declaratory relief when a court reviews a discretionary administrative decision that impairs *Charter* rights or freedoms. The declaration sought by the Appellants is an appropriate and just remedy for the *Charter* breach they suffered at the hands of the City. It is the only way for the Court to bring home to the City that when the City restricts access to public facilities based on the content of planned speech or expression, it *must* focus on the value of freedom of expression and articulate intelligible and reviewable reasons why the restriction is justified.

12. We therefore say:

    a. The City has a constitutional obligation to restrict access to public facilities that facilitate expression only in a manner that complies with the *Charter*. It must proportionately balance the impact of a denial of access on protected rights and freedoms, here, freedom of expression, against competing public purposes.

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[9] Chambers Decision, para 60, AB Tab 6, p 323.

[10] See *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 **[Appellants' Authorities, TAB 7]** at para 47: "A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, *reasonableness is concerned mostly with the existence of justification, transparency and intelligibility* within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." [Emphasis Added]

b. The chambers judge found that the City did not do that, at all. Its denial of the Appellants' application to use the Courtesy Flagpole in May 2017 was therefore an unreasonable restriction of their freedom of expression.

c. A declaration that the City unreasonably restricted the Appellants' freedom of expression when it refused their application to use the Courtesy Flagpole without intelligible or reviewable reasons is an appropriate and just remedy to be given by this Court.

d. This case is therefore not moot. The Appellants' request for declaratory relief pursuant to Section 24(1) of the *Charter* remains a live and concrete controversy between the parties. The Appellants need not rely on a court's discretion to hear this case.

PART II. JURISDICTION AND STANDARD OF REVIEW

13. The Appellants appeal the decision of the chambers judge pursuant to sections 7(2)(a) and 10 of the *Court of Appeal Act*, 2000:[11]

> 7(2) Subject to subsection (3) and section 8, an appeal lies to the court from a decision:
>
> (a) of the Court of Queen's Bench or a judge of that court;
>
> … .
>
> 10 The court has appellate jurisdiction in civil and criminal matters where an appeal lies to the court, with any original jurisdiction that is necessary or incidental to the hearing and determination of an appeal.

14. The chambers judge dismissed the application on the basis that the application was moot. The question of whether a matter is moot is a question of law, to be reviewed on the standard of correctness.[12]

15. The chambers judge reached the conclusion that the application is moot on grounds and academic commentary that address circumstances in which declaratory relief, which is always discretionary, may be refused.[13]

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[11] SS 2000, c C-42.1 **[Appellants' Authorities, TAB 17]**

[12] See, e.g., *Plato v Canada (Revenue Agency)*, 2015 FCA 217 **[Appellants' Authorities, TAB 12]**, at para 4: "The identification of the legal factors to determine if a case is moot is a question of law reviewable under the standard of correctness."; *Housen v Nikolaisen*, 2002 SCC 33 at paras. 33-35 **[Appellants' Authorities, TAB 9]**

[13] Chambers Decision, para. 20ff, AB Tab 6, pp 307ff. See, generally, Kent Roach, *Constitutional Remedies in Canada*, (Canada Law Book, 1994), chapter 12 **[Appellants' Authorities, TAB 18]**

16. In *Canada (Attorney General) v Fontaine,*[14] that Court described the standard of appellate review appropriate to an exercise of judicial discretion:

> [36] ... 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" [Citations]. As this Court has said, where 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 [Citations].

17. The decision below is best read and most properly reviewed as a decision in which the chambers judge concluded that this case is moot only because she did not believe the declaratory relief sought by the Appellants raises "a live and concrete controversy". In this she was mistaken.

18. The chambers judge did not appreciate that:

    a. Her finding of fact that the City denied the Appellants access to the Courtesy Flagpole for no intelligible or reviewable reason is itself legally sufficient for the declaration the Appellants seek, pursuant to Section 24(1) of the *Charter*; and

    b. That declaration is therefore a just and appropriate remedy for the *Charter* breach the Appellants suffered.

19. The chambers judge's conclusion that this case is moot is therefore wrong in law. Alternatively. she did not give "sufficient weight to all relevant considerations and [her] exercise of discretion is … based on an erroneous principle" in considering the declaratory relief sought by the Appellants, as the relief they seek was immediately available to the Court below.

20. The declaration sought by the Appellants should be granted by this Court.

[14] [2017] 2 SCR 205, 2017 SCC 47 **[Appellants' Authorities, TAB 2]**

PART III. SUMMARY OF FACTS

The flag application and the City's decision

21. The chambers judge accessibly summarizes all the important facts at paragraphs 1 through 8, 10, 29-31 and 39 of her reasons. Here we recount the evidence in slightly greater (but probably unnecessary) detail, to assure the Court that her findings are amply supported by the record.

22. The City of Prince Albert maintains a set of flagpoles at Memorial Square, directly outside City Hall.[15] One of the flag poles has been used for many years by charitable or non-profit organizations to fly flags or banners for one to seven days at a time.[16]

23. The City had a Flag Protocol Policy regarding use of this Courtesy Flagpole.[17] "It is evident that the City did not follow its own Policy … ."[18]

24. In March 2017, two people complained to the City, demanding that the City refuse requests to fly a pro-life flag on the Courtesy Flagpole or proclaim "Celebrate Life Week", as it had in the past.[19] The City's Executive Council considered those demands at its meeting held April 3, 2017. Executive Council referred the matter to the Mayor's Office.[20]

25. On April 3, 2017, Valerie Hettrick applied[21] on behalf of PARLA to fly its flag on the Courtesy Flagpole for the week of May 8 to 14, 2017 and to have that week declared "Celebrate Life Week," as it had done for the preceding 20 years. PARLA has flown this same flag on the Courtesy Flagpole since 2007. The pink and white flag depicts a cartoon fetus, "Umbert the Unborn" and displays the phrases "Please let me live" and "Celebrate Life Week".[22]

26. On April 4 and 5, 2017, the Mayor spoke with Ms. Hettrick by telephone and sought to have her propose a different flag.[23]

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[15] Flag Protocol Policy, section 6.04, attached as Exhibit A to the Affidavit of Valerie Hettrick ("Hettrick Affidavit"), AB Tab 2.A, p. 15.
[16] See sections 6.05 and 6.07, Flag Protocol Policy, AB Tab 2.A, p. 18.
[17] See Flag Protocol Policy, sections 6.05 and 6.07, AB Tab 2.A pp. 16, 18-21.
[18] Chambers Decision, paras. 31, 60 AB Tab 6, pp 311-12, 323.
[19] Hettrick Affidavit, para 7, AB Tab 2, p. 8; Respondent's Record of Proceedings ("Record"), Docs # 4 and 8, AB Tabs 4.4 and 4.8, pp 83-122 and 129-131.
[20] Hettrick Affidavit, para 7, AB Tab 2, p. 8; Record Docs # 6 and 7, Tabs 4.6 and 4.7, pp. 125 and 127.
[21] Hettrick Affidavit, Exhibit B, Request to Fly a Flag on Courtesy Flagpole, AB Tab 2.B, p. 24.
[22] Hettrick Affidavit, para 5, AB Tab 2, p. 7; an image of the flag appears at Hettrick Affidavit, Exhibit F, AB Tab 2.F, p. 34.
[23] Hettrick Affidavit, para 8, AB Tab 2, p. 8.

27. On May 4, 2017, the Mayor called Ms. Hettrick and informed her that the City would not allow the PARLA's flag to be flown on the Courtesy Flagpole because the flag was not "national" or "nationally recognized".[24]

28. Ms. Hettrick sent a formal letter to the Mayor Dionne, requesting that he clarify why their flag was being prohibited and what bylaw or provision was being used to prohibit their flag.[25] The City did not respond to PARLA's this letter.[26]

29. Rather, on May 5, 2017 the City issued a press release,[27] which read:

> After conferring with the applicants, the City of Prince Albert has deferred an application for a Right to Life flag raising in Memorial Square at City Hall. Correspondence opposing the Right to Life flag raising was heard at the Executive Committee meeting on Monday, April 3, 2017. The correspondence was referred to the Mayor's office for review. The Mayor's office, along with the Director of Community Services, reviewed the objections and concluded that the flag is not consistent with any nationally or provincially approved flag, which is unique to this group.
>
> "All groups have a fair opportunity to have their issues represented and as a democratic institution, the City has an interest in respecting the right for residents to express themselves," said Mayor Greg Dionne.
>
> "When speaking with people it was apparent that it was the picture on the flag that was at issue. We are prepared to grant the request, but we have asked that a new flag be submitted without this particular imagery which does not give them enough time for this year," said Mayor Dionne.
>
> "I would like to see our policy amended to include a requirement that a picture of the flag be submitted as part of the application."
>
> City Council approval for the Celebrate Life Week dates back to 1997, although this particular flag has only been flown in recent years.

30. The Mayor also spoke to the media about the flag, saying that PARLA's present flag would never again fly at City Hall, but saying that he would in future be open to flying a different pro-life flag, one that did not display a cartoon image of a fully-developed fetus. The Prince Albert Daily Herald reported:

> Never again will a cartoon fetus fly above Memorial Square, says Mayor Greg Dionne.

[24] Hettrick Affidavit, para 10, AB Tab 2, p. 8.
[25] Hettrick Affidavit, para 12, AB Tab 2, p. 8; Hettrick Affidavit, Exhibit "D", AB Tab 2.D, p. 30.
[26] Hettrick Affidavit, para 12, AB Tab 2, p. 8.
[27] Record Doc # 22, Tab 4.22, p. 233.

> Dionne said he has deferred Prince Albert Right to Life Association's application to fly an anti-abortion flag on the city's courtesy flagpole. But he said he'd be open to a different flag that doesn't portray a cartoon image of a fully developed fetus.
>
> "It hasn't been denied. It's been put on hold," Dionne said. "Once they come up with a new flag, that flag will fly."
>
> The mayor said there's no chance that a new design will be approved in time for this year's flag raising, which was scheduled for May 8. But he said he'll see what they come up with for next year's event.[28]

31. It is beyond doubt that the City did not permit PARLA *to fly the flag it applied to fly* on the Courtesy Flagpole at the time PARLA applied to fly it, and would not allow the flag to be flown at any other time, *because of what it portrayed*.

The decision below: assumptions of the chambers judge

32. The chambers judge commented on how she approached the mootness issue before her:

> [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.

33. The evidence before the Court below falls into two categories: evidence filed by the Appellants in support of their application for judicial review in late 2017, and a "Certified Record of Proceedings Filed by the Respondent", on the date of the hearing of the application, September 25, 2018.[29]

34. Disputes arising from the City's inattention to its obligation to provide a timely Record of Proceedings needn't be resolved for this appeal, either in the Appellants' favour, or at all.[30] The Appellants accept that the whole of the City's Record of Proceedings is part of the court record on this appeal. The chambers judge considered material properly in the Record in her decision.[31]

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[28] Hettrick Affidavit, Exhibit "F", AB Tab 2.F, pp. 34-35.
[29] See Affidavit of Michelle Gusdal, sworn September 20, 2018, for a description of the Appellants' attempts to agree on an appropriate Record of Proceedings in advance of the hearing. AB Tab 3, pp 57-60.
[30] We believe that the City's Record of Proceedings includes material that shouldn't be there. Nonetheless, this needn't be resolved for purposes of this appeal.
[31] See, e.g., Chamber Decision at para 7, AB Tab 6, p 303, where her Ladyship refers to the press release issued by the City on May 5, 2019, but not provided to Appellants in advance of the commencement of these proceedings.

35. Further, the City argued in the Court below (and argues in its Cross-Appeal) that the City's refusal to allow the Appellants to fly their proposed flag in the week they applied to fly it, or ever, was merely a "deferral" of a decision, and thus not really a decision subject to judicial review.[32] We are happy to reply to that argument, such as it is, if the City truly cares to engage the issue.

PART IV. POINTS IN ISSUE

36. The Appellants say that four issues arise on this appeal:

    a. The City limited the Appellants' freedom of expression.

    b. The City unreasonably limited the Appellants' freedom of expression.

    c. The declaration sought by the Appellants is "appropriate and just".

    d. This case is not moot.

PART V. ARGUMENT

The City limited the Appellants' freedom of expression.

37. The first, preliminary, issue to be decided is whether the City's refusal of PARLA's application to fly its flag on the Courtesy Flagpole impaired the Appellants' *Charter* rights.

38. In *Loyola* (SCC), Madam Justice Abella wrote for the majority:

> [39] The preliminary issue is whether the decision engages the *Charter* by limiting its protections. If such a limitation has occurred, then "the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play": *Doré*, at para. 57. A proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate. Such a balancing will be found to be reasonable on judicial review: *Doré*, at paras. 43-45.[33]

39. There is no doubt whatsoever that a refusal to allow people to express themselves in a public facility created and long used for that purpose limits their *Charter*-protected freedom of

[32] See Notice of Cross Appeal, para 3.a.ii, AB Tab 8, pp 329-330.

[33] *Loyola High School v Quebec (Attorney General)*, [2015] 1 SCR 613, 2015 SCC 12 **[Appellants' Authorities, TAB 11]**; See, also, *Law Society of British Columbia v Trinity Western University*, [2018] 2 SCR 293, 2018 SCC 32 at para. 58 **[Appellants' Authorities, TAB 10].**

expression. *Greater Vancouver Transportation Authority* v *Canadian Federation of Students* (SCC) [34] is squarely on point and dispositive.

40. That case considered a Transportation Authority policy that prohibited political advertising on the side of municipal buses, which the respondents wished to use for an issue-based campaign to encourage students to vote. Madam Justice Deschamps wrote for the majority:

> [37] In order to determine whether the transit authorities' advertising policies infringe s. 2(b) of the Charter, three questions must be asked: First, do the respondents' proposed advertisements have expressive content that brings them within the prima facie protection of s. 2(b)? Second, if so, does the method or location of this expression remove that protection? Third, if the expression is protected by s. 2(b), do the transit authorities' policies deny that protection? (City of Montréal, at para. 56). If the policies are found to have infringed s. 2(b) of the Charter, the analysis then shifts to determining whether the infringement is justified under s. 1 of the Charter.
>
> [38] The answer to the first question is not in issue. The proposed advertisements unquestionably have expressive content. The answer to the third question is also uncontroversial, although the question is not, as the trial judge suggested, whether all political speech is prohibited, but whether either the purpose or the effect of the government measures is to place a limit on expression. In the instant case, the very purpose of the impugned policies is to restrict the content of expression in the advertising space on the sides of buses. The wording of articles 2 and 7 clearly limits the content of advertisements. Article 9 is even more precise in excluding political speech. As the majority of the Court of Appeal stated, the transit authorities "sought to prohibit political advertising precisely because it was political" (para. 133).
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> …
>
> [41] The fact that the historical function of a place included public expression or that its current function includes such expression is a good indication that expression in that place is constitutionally protected. Thus, a podium erected in a park for public use would necessarily be regarded as having a function that does not conflict with the purposes s. 2(*b*) is intended to serve; in fact, the very purpose of this public place would be to enhance the values underlying s. 2(*b*). However, the use of public property for expression will very rarely be questioned on the basis of such facts. The circumstances will usually be more complex. The airport, utility poles and streets at issue in *Committee for the Commonwealth*, *Ramsden* and *City of Montréal* are examples of places whose primary function is not expression.
>
> [42] The question is whether the historical or actual function or other aspects of the space are incompatible with expression or suggest that expression within it would undermine the values underlying free expression. One way to answer this question is to look at past or present practice. This can help identify any incidental function that may have developed in relation to certain government property. Such was the case in the locations at issue in *Committee for the Commonwealth*, *Ramsden* and *City of*

[34] 2009 SCC 31, [2009] 2 SCR 295 **[Appellants' Authorities, TAB 8]**

Montréal, where the Court found the expressive activities in question to be protected by s. 2(*b*). While it is true that buses have not been used as spaces for this type of expressive activity for as long as city streets, utility poles and town squares, there is some history of their being so used, and they are in fact being used for it at present. As a result, not only is there some history of use of this property as a space for public expression, but there is actual use - both of which indicate that the expressive activity in question neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression.

…

[45] In sum, this is not a case in which the Court must decide whether to protect access to a space where the government entity has never before recognized a right to such access. Rather, the question is whether the side of a bus, as a public place where expressive activity is already occurring, is a location where constitutional protection for free expression would be expected.

[46] I do not see any aspect of the location that suggests that expression within it would undermine the values underlying free expression. On the contrary, the space allows for expression by a broad range of speakers to a large public audience and expression there could actually further the values underlying s. 2(b) of the *Charter*. I therefore conclude that the side of a bus is a location where expressive activity is protected by s. 2(b) of the *Charter*.

[47] Consequently, I conclude that since the transit authorities' policies limit the respondents' right to freedom of expression under s. 2(*b*), the government must justify that limit under s. 1 of the *Charter*.

41. *Greater Vancouver Transportation Authority* cannot be distinguished from the present case on the issue of whether the Appellants' freedom of expression was impaired. We follow the questions asked and answered by Madam Justice Deschamps in paragraph 38 of that case, quoted above:

    a. PARLA's proposed flag "unquestionably [has] expressive content."

    b. "The question is … whether either the purpose or the effect of the government measures is to place a limit on expression". PARLA was not permitted to fly its proposed flag because of what it portrayed, a cartoon fetus.

    c. No "aspect of the location that suggests that expression within it would undermine the values underlying free expression. On the contrary, the space allows for expression by a broad range of speakers to a large public audience and expression". Expression is the *intended use* of the Courtesy Flagpole: the City provided it to non-profit interest groups and charitable organizations to increase public awareness of their causes and activities

for many years. Moreover, PARLA had itself used the flagpole for nearly twenty years, and had flown the very flag it applied to fly in May 2017 for seven.

The City *unreasonably* limited the Appellants' freedom of expression.

42. There is thus no serious question that the City limited the Appellants' *Charter*-protected freedom of expression. "[T]he question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play."[35]

43. In the present case, this question appears to answer itself: the City's decision does *not* "reflect a proportionate balancing of the *Charter* protections at play" *because* it "was neither the product of a transparent process nor was it supported by intelligible reasons."[36] The decision the City *actually made* unreasonably restricted the Appellants' freedom of expression.

44. Section 1 of the *Charter* provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

45. In *Doré v. Barreau du Québec*, Madam Justice Abella, for a unanimous Court, commented generally on puzzles that arise when we assimilate an analysis of a discretionary administrative decision based on reasonableness to the burden Section 1 generally places on state actors:

> [3] This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the Oakes test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.
>
> [4] It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of Charter guarantees is a fundamental and pervasive obligation, no matter

[35] *Doré v Barreau du Québec*, [2012] 1 SCR 395, 2012 SCC 12, at para. 57 **[Appellants' Authorities, TAB 6]**
[36] Chambers Decision, para 39, AB Tab 6, p 315.

> which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?
>
> [5] We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection -- meaning its guarantees and values -- we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.

46. Applying administrative principles in the context of a decision impairing *Charter* rights, Madam Justice Abella indicated that it is the statutory decision maker that has the burden of justifying a decision that impairs *Charter*-protected rights and freedoms:

> Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion.[37]

47. The Ontario Divisional Court echoed that burden of justification is on the administrative decision maker:

> The onus is first on the Applicant to establish that its constitutionally enshrined freedom has been limited. The onus then shifts to the Respondent to establish that the limit was imposed in pursuit of its statutory objectives and that the Applicant's freedom of expression was not limited more than reasonably necessary given those statutory objectives.[38]

48. No Supreme Court of Canada majority has further elaborated on how the burden of proof contained in Section 1 is to be applied in the context of a discretionary administrative decision that limits *Charter*-protected rights and freedoms. *Law Society of British Columbia* v *Trinity Western University*[39] contains concurring and dissenting judges' comments and reservations on the problem of how Section 1 is to be respected in this context, which did not provoke a response from the majority that clarifies the issue.[40]

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[37] *Doré*, at para. 63 **[Appellants' Authorities, TAB 6]**
[38] *Canadian Centre for Bio-Ethical Reform v Peterborough (City)*, 2016 ONSC 1972, para 15. **[Appellants' Authorities, TAB 3]**
[39] [2018] 2 SCR 293 **[Appellants' Authorities, TAB 10]**
[40] *Law Society of British Columbia* v *Trinity Western University*, [2018] 2 SCR 293, at paras. 117 (per McLachlin C.J.C., concurring), para. 206 (per Rowe J., concurring), paras. 312-314 (per Brown J. and Cote J., dissenting) **[Appellants' Authorities, TAB 10]**.

49. In the absence of contrary authoritative guidance by the Supreme Court of Canada, Section 1 should be taken to mean what it says: the burden of showing that a limitation on a *Charter*-protected right or freedom falls on the state actor that does the limiting. Once it is shown that a discretionary administrative decision restricts freedom of expression, a reviewing court must look to the reasons given for the limitation, to determine whether the limit is reasonable. Where no intelligible or reviewable reasons are given for a demonstrated limitation of a protected freedom, as here, *it follows that* the limitation is not reasonable.[41]

50. A court's inquiry into whether this discretionary administrative decision "reflects a proportionate balance between the *Charter* value of freedom of expression and the City's legitimate municipal objectives"[42] is properly an inquiry into the decision that was actually made. It is not an inquiry into whether, on another occasion, the City might have other or better reasons to refuse an application to fly the same flag on a municipal flagpole provided for that purpose, which might render a restriction of freedom of expression reasonable. That is not this case.

51. The chambers judge recognized that the subject of judicial review is the decision the City in fact made. She correctly rejected the City's invitation to "connect the dots" and to speculate on the reasons the City might have had or given for refusing to fly the Appellants' flag[43]:

> [40] Despite the documents provided by the City and the submissions of its counsel, a reviewing court should not be called upon to speculate as to the reasons that might have been given or the findings of fact that may have been made had the prescribed decision-maker put his or her mind to the application and the underlying Policy.

The declaration sought by the Appellants is "appropriate and just".

52. Section 24(1) of the *Charter* provides:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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[41] See *Christian Heritage Party of Canada v Hamilton (City)*, 2018 ONSC 3690, 143 OR (3d) 207 **[Appellants' Authorities, TAB 5]** at para 57: "Failure to balance said interests will, by definition, render a decision unreasonable as per *Doré v Barreau du Quebec*".

[42] Chambers Decision at para 46, AB Tab 6, p 317.

[43] See, generally, *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, 2018 BCCA 344 **[Appellants' Authorities, TAB 4]**

53. The City restricted the Appellants' freedom of expression for no transparent, intelligible or reviewable reason. The restriction is *for that reason alone* unreasonable, and the Appellants' have sufficient grounds to support the relief they now seek: a declaration pursuant to section 24(1) of the *Charter* that their freedom of expression was unreasonably infringed.

54. We thus say that the chambers judge mistakes the legal implications of her conclusion that the City's decision lacked intelligible or reviewable reasons. The chambers judge writes:

> [46] That aside, within the limited context of determining the issue of mootness, even if I leave aside the question as to whether this was the kind of expression to which constitutional protections apply (see also Greater Vancouver), and assuming the applicants can meet the burden of proving their s. 2(b) rights were infringed, I would nevertheless be unable to determine if the City's decision was reasonable so far as it reflects a proportionate balance between the *Charter* value of freedom of expression and the City's legitimate municipal objectives: Doré, Loyola.
>
> …
>
> [50] The present case is not a situation in which it could be said that any decision refusing the application to fly this particular flag would be unreasonable, nor that the prescribed decision-maker could not be trusted to conduct a proper analysis under the prescribed Policy. A proper application of the Policy does not automatically confer entitlement to use the Courtesy Flagpole, but rather the right to apply to use the flagpole and the legitimate expectation that the Policy regulating its use will be applied reasonably and fairly. Once again, the appropriate relief would be to refer the matter back to the City for a proper and fair determination.

55. The chambers judge mistakes the analogy between a failure to give intelligible reasons when restricting *Charter*-protected rights and freedoms and a failure to give reasons for other administrative decisions. The chambers judge concludes that the only available remedy, if she were to hold that the City's decision was defective, would be to refer the issue of whether the Appellants should be able to fly their proposed flag back to the City.

56. That is not the problem posed by this case, however. The Appellants' freedom of expression was unreasonably restricted by the City's decision. It is no longer useful to refer the decision back to the City, because the time they applied to fly their flag has passed and because the City no longer offers a Courtesy Flagpole for community use. The Appellants no longer ask to be allowed to fly the flag they proposed. The issue is now, what remedy is just and appropriate for the City's unreasonable limitation of their freedom of expression?

57. The only candidate for an "appropriate and just" remedy in this case is authoritative judicial recognition that the City's handling of the Appellants' application completely fell short of what

is required of a statutory decision-maker that has discretion to limit someone's *Charter*-protected rights and freedoms. The fact that the decision cannot be remitted to the City makes it more – not less – important that declaratory relief be granted. The absence of relief that can repair the wrong the Appellants suffered *shows the importance* of the declaratory relief that is now sought by the Appellants.

58. In this case, in response to demands that the City not permit a pro-life flag to be flown, the City floundered, looking for words to say – citing a need for a "national flag" or "nationally recognized flag" – that would give cover for a refusal to fly the Appellants' proposed flag as it had in the past. The people who complained succeeded in "deplatforming" the Appellants with the City's acquiescence or co-operation and without any or serious attention to the significance of what the City was doing to the Appellants' freedom of expression. Over a year after those events, the City eliminated the Courtesy Flagpole altogether, thus avoiding any similar issue regarding the Courtesy Flagpole in future.

59. This case illustrates the continuing need for dialogue between the courts and the executive branch on how it may restrict access to public facilities on grounds that affect *Charter*-protected rights and freedoms. We draw the Court's attention to the Supreme Court's comments on the *Charte*r-era relationship between our courts and the legislative and executive branches:

> [135] [C]ourts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen. All of this is implied in the power given to the courts under s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982*.
>
> [136] Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.
>
> [137] This mutual respect is in some ways expressed in the provisions of our constitution as shown by the wording of certain of the constitutional rights themselves. For example, s. 7 of the *Charter* speaks of no denial of the rights therein except in accordance with the principles of fundamental justice, which include the process of law

> and legislative action. Section 1 and the jurisprudence under it are also important to ensure respect for legislative action and the collective or societal interests represented by legislation. In addition, as will be discussed below, in fashioning a remedy with regard to a *Charter* violation, a court must be mindful of the role of the legislature. Moreover, s. 33, the notwithstanding clause, establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts (see P. Hogg and A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997), 35 Osgoode Hall L.J. 75).
>
> [138] As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some (see e.g. Hogg and Bushell, supra). In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, supra, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.
>
> [139] To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the Charter). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.[44]

60. Declaratory relief is discretionary. The chambers judge held that this case is moot because the only relief available to the Appellants is to have the decision returned to the City, but that is not so. In this case, a *Charter* breach has been *demonstrated* on the facts found by the chambers judge. No remedy is available for that *Charter* breach if a court is unwilling to now say that the breach occurred and identify its character. In these circumstances, the declaratory relief sought by the Appellants is "appropriate and just".

61. If the City, or other public decision-makers, may postpone a decision regarding use of public facilities past the time that they may be used for no intelligible reason, and thus avoid a conversation with the superior and appellate courts regarding its obligation to proportionately consider the Appellants' freedom of expression, there is gap in the protections the *Charter* offers.

This case is not moot.

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[44] *Vriend* v *Alberta,* [1998] 1 SCR 493 **[Appellants' Authorities, TAB 15]**

62. The declaratory relief sought by the Appellants is an appropriate and just response to the City's unreasonable restriction of their freedom of expression in these circumstances. It is now the only way for the Court to authoritatively communicate to the City that it failed in its constitutional obligations and that it must attend to the *Charter* rights and freedoms of those who wish to use public facilities that enable free expression. It is for that reason a sufficient "live controversy and concrete dispute" for the Court to now decide the case,[45] and make the order the Appellants seek.

63. *Trang* v *Alberta (Edmonton Remand Centre),*[46] originated as an application for *habeas corpus* and declaratory relief under the *Charter* relating to conditions in the Edmonton Remand Centre. As charges were stayed over time and applicants were released, it became a stand-alone application for a declaration of a *Charter* breach. The Alberta Court of Appeal held:

> [5] In our view, the proceedings are not moot. There is clearly a live controversy between the parties as to whether or not the respondents' charter rights were breached while they were incarcerated. An action for a declaration may proceed in the absence of a claim for any other remedy. Given our findings on that issue it is unnecessary for us to consider the second stage of the *Borowski* v. *Canada (Attorney General),* [1989] l S.C.R. 342 (S.C.C.) analysis, that is whether the chambers judge properly exercised his discretion in allowing the proceedings to continue.

64. In subsequent litigation,[47] the same Court exercised its discretion to refuse declaratory relief and brought the proceeding to an end. It did not decide that the case was not moot, but declined to further consider declaratory relief when faced with the prospect of a wide-ranging inquiry into conditions at the Edmonton Remand Centre.

65. No similar concern arises here. The declaration sought by the Appellants is fully available, based on the findings of the chambers judge. We ask this Court to make it, as it is the only way to vindicate and protect the *Charter* rights and freedoms.

PART VI. RELIEF SOUGHT

66. The Appellants request:

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[45] See *Borowski v Canada (Attorney General),* [1989] 1 SCR 342, 353-357 **[Appellants' Authorities, TAB 1]**.
[46] [2005] AJ No. 157, 2005 ABCA 66 **[Appellants' Authorities, TAB 13]**
[47] *Trang* v *Alberta (Edmonton Remand Centre),* [2007] AJ No 907, 2007 ABCA 263 **[Appellants' Authorities, TAB 14]**

a. A Declaration pursuant to section 24(1) of the *Charter* that the Respondent's denial of the Appellants' application to fly their requested flag was an unreasonable violation of the Appellants' *Charter* freedom of expression guaranteed under section 2(b) of the *Charter*; and

b. The costs of this appeal; and

c. Such further and other relief as this Honourable Court deems just and equitable.

Respectfully submitted, August 30, 2019

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Counsel for the Appellants

Marty Moore
Counsel for the Appellants

PART VII. AUTHORITIES

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Christian Heritage Party of Canada v Hamilton (City), 2018 ONSC 3690, 143 OR (3d) 207	5
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Legislation	
Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, §1, 2, 24	16
The Court of Appeal Act, 2000, SS 2000, c C-42.1, § 7(2)(a), 10	17
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