Date: 20231010
Docket: CR 22-01-39203
CR 22-01-39204
CR 22-01-39236
CR 22-01-39237
CR 22-01-39241
(Winnipeg Centre)
Indexed as: R. v. Bohemier et al.
Cited as: 2023 MBKB 149

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

CR 22-01-39203	)	
	)	
HIS MAJESTY THE KING	)	
	)	Charles Murray
- and -	)	for the Crown
	)	
GERALD FRANCIS BOHEMIER,	)	Alex Steigerwald
accused	)	for the accused,
AND BETWEEN:	)	Gerald Bohemier,
CR 22-01-39204	)	Todd McDougall,
	)	Tobias Tissen,
HIS MAJESTY THE KING,	)	Sharon Vickner
	)	
- and –	)	Shelley Overwater
	)	for the accused,
TODD IAN MCDOUGALL,	)	Patrick Allard
accused	)	
	)	
AND BETWEEN:	)	
CR 22-01-39236	)	
	)	
HIS MAJESTY THE KING,	)	
	)	
- and -	)	
	)	
TOBIAS TISSEN,	)	
accused	)	
	)	

AND BETWEEN:	)	
	)	
HIS MAJESTY THE KING,	)	
	)	
- and -	)	
	)	
SHARON LEE VICKNER,	)	
accused	)	
	)	
AND BETWEEN:	)	
CR 22-01-39241	)	
	)	
HIS MAJESTY THE KING,	)	
	)	
- and -	)	
	)	
PATRICK JOSEPH ROBERT ALLARD,	)	
	)	Judgment Delivered:
accused.	)	October 10, 2023

TOEWS J.

Introduction

[1] This is a summary conviction appeal from the decision of a Provincial Court judge (the judge) summarily dismissing the appellants' notice of constitutional question prior to the trial of these five appellants (each appellant individually referred to as Allard, McDougall, Bohemier, Vickner and Tissen as these reasons may require, but collectively referred to as the appellants). Each appellant was charged with several counts of offences under s. 90(1)(b) of ***The Public Health Act***, C.C.S.M. c. P210. The offences concerned attending public gatherings in outdoor public places in numbers greater than those allowed under Public Health Orders (PHOs) issued under ***The Public Health Act***. The PHOs were issued in response to the Covid-19 pandemic. It is in the context of these

prosecutions for those alleged violations that the appellants alleged that the PHOs were unconstitutional.

[2] When these matters came on before the judge, the Crown took the position that Chief Justice Joyal of the Manitoba Court of King's Bench had already upheld the constitutionality of the PHOs, specifically as they applied to limits on outdoor gatherings. (See: ***Gateway Bible Baptist Church v. Manitoba***, 2021 MBQB 219, 2021 CarswellMan 601). Accordingly, the Crown argued that based on the doctrine of *stare decisis* these constitutional challenges had no reasonable prospect of success and would unnecessarily occupy judicial resources. Therefore, the Crown asked the judge to summarily dismiss the challenges.

The Facts

[3] There is no substantial disagreement by the Crown with the facts as set out in the Factum of Tissen with the exception of paras. 9 through 11. In that regard, and for the purposes of this appeal, it is important to note that the Crown states that pursuant to the case management in the Provincial Court, there had originally been an understanding between the parties that the facts were not in issue and would be put in by way of an agreed statement of facts. That would leave only the constitutional arguments to be argued on the days set for the hearing.

[4] However, as the date set for the hearing approached, the Crown states that after it filed the application for summary dismissal, the appellants refused to sign the agreed statement of facts. The appellants state that prior to the scheduled trial dates, they wished to present *viva voce* evidence and that they also wished to present further

documentary evidence. On August 2, 2022, and before that evidence could be considered at a trial of this matter, the judge granted the Crown's application to summarily dismiss the appellants' notice of constitutional question.

[5] The judge's reasons for judgment are found at p. 151 and following of the Appeal Book filed by the Crown. As noted in those reasons, the judge held:

> The applicants say that the Public Health orders offend Sections 2, 7, and 15 of the *Charter of Rights and Freedoms* and that they are not saved by Section 1. They seek a stay of proceedings pursuant to Section 24(1) of the *Charter* as a remedy.
>
> The respondent in this matter, the Crown, has filed an application for summary dismissal citing that the issue of the constitutionality of the PHOs has already been decided by the Manitoba Court of Queen's Bench in a decision called *Gateway Bible Baptist Church et al v. Manitoba et al*, 2018 (sic), MBQB, 219, hereinafter referred to as Gateway in this decision.
>
> Further, Section 6.10(2) of the practice directives for contested applications in Provincial Court states that a judge of this court, if satisfied that the matter is frivolous, vexatious, or fails to disclose a reasonably arguable point, may summarily dismiss it.
>
> The issue that I must decide is whether this court is bound by the decision in *Gateway* such that the applications should be summarily dismissed. If I am satisfied that I am bound by the *Gateway* decision, are any of the narrow exceptions to *stare decisis* engaged?
>
> The Crown maintains that the issues raised in these applications were already litigated in *Gateway* and this Court is bound by the decision because of the doctrine of *stare decisis*. So what that doctrine means is that lower courts are bound to follow the decisions of higher courts. The Crown relies primarily on the decision in *Gateway* itself and the recent decision of the Supreme Court of Canada in *R. v. Sullivan*.
>
> The applicants argue that the motion to summarily dismiss is premature because I have not heard any evidence, and further, three reasons were articulated why this court is not bound by the decision in *Gateway*: first, there is new evidence that was not considered before; second, the decision in *Gateway* relating to Section 7 did not apply to outdoor gatherings; and third, the unequal application of the PHOs was not considered in relation to a Section 15 application.

[6] After reviewing the evidence, the judge concludes:

> The Section 15 argument articulated by the applicants also conflates their Section 2 protections with their Section 15 protections. Their political opinions and the right to express, share, and protest in support of those opinions are protected by Section 2 of the *Charter* and it has been acknowledged that the PHOs infringe those rights. However, the Court in *Gateway* justified the infringement on the basis of Section 1 of the *Charter*.
>
> The Section 15 argument raised in this case is not new, but rather a disguised rearticulation of the Section 2 and 7 arguments already analyzed in *Gateway* and, therefore, fails to disclose a reasonably arguable point.
>
> So I find that I am bound by the decision in *Gateway* and that the narrow exceptions to the rule of *stare decisis* outlined in *Bedford* and *Comeau* are not made out. As such, per the practice directives of this court, I am satisfied that the applicants have failed to disclose a reasonable basis for the order sought, and I therefore grant the respondent's application for a summary dismissal.

Points in issue

[7] This appeal raises one issue to be considered:

a) Did the judge err in granting the Crown's application for summary dismissal of the appellants' notice of constitutional question?

[8] The appellants' have abandoned all other grounds contained within the notice of appeal, and is not appealing the sentence imposed by the judge. This includes the additional grounds advanced in the factum of the appellant Allard, who is represented by separate counsel from the other appellants. (See Allard's factum paras. 77-79) In any event, I agree with the Crown's position set out in its factum that those issues are not properly before the court and will not be entertained.

Jurisdiction and Standard of Review

[9] The parties agree that the statutory jurisdiction to hear this matter flows from s. 79(1) of ***The Provincial Offences Act***, C.C.S.M. c. P160. In respect of the standard of review, I accept the Crown's position that the summary dismissal of a ***Charter*** application is a well-established discretionary exercise of a court's case management powers. As such, it is reviewable only on the basis that the judge failed to exercise their discretion judicially.

[10] In ***R. v. Giesbrecht***, 2019 MBCA 35, 373 C.C.C. (3d) 70 (QL), the court commented on the basis of the Provincial Court's authority to deal with contested applications, noting at para. 126:

> **126** The Provincial Court of Manitoba does not have formal rules of court to govern criminal proceedings made pursuant to section 482(2) of the *Code*. The judges of the Provincial Court have, however, issued practice directives for contested applications (see Manitoba, Provincial Court, "Practice Directives for Contested Applications in the Provincial Court of Manitoba" (4 November 2013), online(pdf): *ManitobaCourts*<www.manitobacourts.mb.ca/site/assets/files/1175/notice_nov4_2013.pdf> (the Provincial Court Practice Directives)). The fundamental objective of the practice directives is to ensure contested proceedings are "dealt with justly and efficiently" (at p 1). Subject to the presiding judge's power to dispense with compliance with the practice directives "in the interests of justice" (Practice Directive 2.01 at p 6), the filing and service requirements for a moving party are set out in Practice Directive 6.04(1) (at p 14)…"

[11] As further stated by the court in ***Giesbrecht***, at paras. 134 and 136:

> **134** Dismissal of *Charter* arguments, without a full hearing and on a preliminary basis because of failure to meet the governing threshold, is a well-established exercise of a trial judge's case-management powers (see *R v Kutynec* (1992), 1992 CanLII 7751 (ON CA), 70 CCC (3d) 289 at 301-2 (Ont CA); *R v Vukelich* (1996), 1996 CanLII 1005 (BC CA), 108 CCC (3d) 193 at para 26 (BC CA), leave to appeal to SCC refused, [1996] SCCA No 461; *Winnipeg Child and Family Services v A (J) et al*, 2003 MBCA 154 at para 31; *R v Nixon*, 2011 SCC 34 at para 61; and *Cody* at para 38). As Dickson JA observed in *R v Simmonds*, 2018 BCCA 205, in order to ensure the orderly administration of justice and to minimise delay, judges have

> the responsibility to "ensure that only those applications which should proceed do proceed" (at para 104).
>
> . . .
>
> **136** Preliminary screening of a *Charter* argument is an exercise of judicial discretion that will not be lightly interfered with on appeal unless the discretion was not exercised judicially (see *R v Pires; R v Lising*, 2005 SCC 66 at paras 46-47; *R v MB*, 2016 BCCA 476 at paras 45-47; and *R v Vickerson*, 2018 BCCA 39 at para 60).

[12] In addition, ***Giesbrecht*** at para. 158 holds:

> **158** At the screening stage of a *Charter* motion, counsel are required to put their best foot forward as to the particulars and merits of a motion. While only a skeleton of the argument is necessary, none of the substantive features of it can be held back. Counsel cannot circumvent a proper screening of the *Charter* argument based on the submission that all will be revealed if the time and effort is spent on a formal hearing. If counsel cannot, at the screening stage, articulate a basis on which the motion could succeed, it is within the discretion of the Court to dismiss the motion without proceeding with further inquiry (see *Vukelich* at para 25). The exercise of such a discretion is a function of the trial judge's right to control proceedings. As Moldaver J explained in *R v Jesse*, 2012 SCC 21, "Judicial resources are scarce and they ought to be used constructively, not wasted on pointless litigation" (at para 63; see also *R v Durette* (1992), 1992 CanLII 2779 (ON CA), 72 CCC (3d) 421 at 435-36 (Ont CA), rev'd on other grounds 1994 CanLII 123 (SCC), [1994] 1 SCR 469).

[13] The Supreme Court of Canada endorsed this approach to the review of a trial judge's decision, also commenting on the policy basis underlying this deferential standard in ***R. v. Pires***; ***R. v. Lising***, 2005 SCC 66, [2005] 3 S.C.. 343 (QL), at paras. 46 and 47:

> **46** On reviewing a trial judge's decision to permit or deny leave to cross-examine, an appellate court is not entitled to simply substitute its view for that of the trial judge. The trial judge's determination of whether the proposed cross-examination is reasonably likely to elicit evidence of probative value to the issues for consideration involves an exercise of discretion. The trial judge is in a better position to assess the material, the submissions of counsel and the evidence, if any, in the context of the particular *voir dire* and trial. The need for a deferential standard of appellate review was recognized in *Garofoli*. Sopinka J. stated that "[t]he discretion of the trial judge should not be interfered with on appeal except in cases in which it has not been judicially exercised" (p. 1465).

> **47** This deferential standard is important. If not adhered to, trial judges, out of an abundance of caution, are likely to embark upon many unnecessary hearings rather than risk vitiating an entire trial. The trial court's power to control the proceedings then becomes more illusory than real…"

Law and Argument

The Position of the Appellants

[14] The appellants acknowledge that the basis upon which a notice of constitutional question can be summarily dismissed is found in the "Practice Directives for Contested Applications in the Provincial Court of Manitoba" (November 4, 2013) (the Practice Directives). These are the Practice Directives referred to by the court in Giesbrecht.

[15] The Practice Directives at directive 6.10 provide, in part:

> **Summary dismissal of application**
> **6.10(2)** Upon application by a respondent that a Notice of Application is frivolous or vexatious or does not show a reasonable basis for the order sought, a judge of the court may, if satisfied that the matter is frivolous or vexatious or fails to disclose a reasonably arguable point, dismiss the application summarily.
>
> **Summary dismissal not final**
> **6.10 (3)** A summary dismissal of an application pursuant to this Practice Directive shall not preclude a trial judge from hearing a renewed application seeking the same or substantially similar relief where the trial judge is satisfied that to do so would be in the interests of justice.
>
> **Applicable to *Charter* matters**
> **6.10(4)** Practice Directives 6.10(1),(2) and (3) are applicable to applications described in Practice Directives 9 and 10.

[16] The applicable portion of Practice Directive 10 provides:

> APPLICATION OF THE PRACTICE DIRECTIVE
>
> **10.01** This Practice Directive applies in any proceeding where an accused
> (a) challenges the constitutional validity, applicability or operability of any statute, regulation or principle of common law; and/or
> (b) makes an application for a remedy under s. 24(1) of the *Charter*.

[17] The judge framed the issue before the court in the following manner (Appeal Book at p. 152 at T2, lines 4 through 7):

> The issue that I must decide is whether this court is bound by the decision in Gateway such that the application should be summarily dismissed. If I am satisfied that I am bound by the Gateway decision, are any of the narrow exceptions to *stare decisis* engaged?

[18] The appellants submit that in framing the issue before the court the judge conflated the principle of *stare decisis* with her application of the test in s. 6.10(2) of the Practice Directives. In this context the appellants rely on the proposition set out in ***R. v. M.B.***, 2016 BCCA 476, 345 C.C.C. (3D) 239 (QL), which states at para. 48:

> A trial judge who exercises her discretion on the basis of an incorrect legal conclusion does not exercise that discretion judicially. …

[19] The appellants argue that the judge incorrectly found that the s. 15 ***Charter*** argument put forth by the appellants was not new and therefore failed to disclose a reasonably arguable point. This the appellants state amounted to a failure to exercise her discretion judicially and that she reached an incorrect legal conclusion on that basis.

[20] While the appellants acknowledge that the judge properly recognized that a new legal issue that was not raised in earlier cases is an exception to *stare decisis,* they state that she erred in finding that the arguments set out and litigated in ***Gateway*** were factually similar to the case at bar.

[21] In particular, the appellants state that the following comments by the judge in her reasons for judgment demonstrate the error:

> Two individuals made personal observations about non-enforcement of PHOs during certain outdoor gatherings. While detailed statistical evidence is not always required to establish a Section 15 complaint, it certainly must require more than a

> sworn statement that an individual did not see anybody arrested or ticketed at an event.
>
> The Section 15 argument articulated by the applicants also conflates their Section 2 protections with their Section 15 protections. Their political opinions and the right to express, share, and protest in support of those opinions are protected by Section 2 of the *Charter* and it has been acknowledged that the PHOs infringe those rights. However, the Court in *Gateway* justified the infringement on the basis of Section 1 of the *Charter*.
>
> The Section 15 argument raised in this case is not new, but rather a disguised rearticulation of the Section 2 and 7 arguments already analyzed in *Gateway* and, therefore, fails to disclose a reasonably arguable point.

[22] The appellants submit that this legal analysis is flawed with respect to the test for summary dismissal and therefore deference is not owed to the judge's findings.

[23] The appellants state that in this case their s. 15 ***Charter*** rights have been violated in the context of the differential treatment of attendees at public gatherings. This, the appellants submit, is not a conflation of the s. 2 and s. 7 of the ***Charter*** arguments raised in ***Gateway***. The appellants argue that by finding that *stare decisis* applied because of her mischaracterization of their ***Charter*** argument, a palpable and overriding error was committed by the judge.

[24] The appellants submit that the judge misapprehended the evidence in respect of *inter alia* the distressing personal circumstances and the disproportionate impact of the PHOs for the individuals charged. In finding that there was no new evidence before the court and by misapprehending the evidence, the judge failed to consider the new legal issues being raised. (See the Factum of Tissen, K.B. Document 6 at pp. 21 and 22)

<u>The Position of the Respondents</u>

[25] The Crown acknowledges that while a constitutional ruling by a court will bind a lower court through the doctrine of vertical *stare decisis*, sometimes prior constitutional

rulings can be departed from on the basis of new issues or new evidence. In this regard, the Crown refers to the decision of the court in ***R. v. Comeau***, 2018 SCC 15, [2018] 1 S.C.R. 342 (QL), at paras. 29 – 31, where the court defined the nature and scope of this exception:

> **29** In *Bedford*, this Court held that a legal precedent "may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate": para. 42. The trial judge, relying on the evidence-based exception identified in that excerpt from *Bedford*, held that the historical and opinion evidence he accepted "fundamentally shifts the parameters of the debate" over the correct interpretation of s. 121, referring to this Court's treatment of the question in *Gold Seal*.
>
> **30** The new evidence exception to vertical *stare decisis* is narrow: *Bedford*, at para. 44; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 44. We noted in *Bedford*, at para. 44, that
>
> > a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. . . . This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.
>
> **31** Not only is the exception narrow — the evidence must "fundamentally shif[t] the parameters of the debate" — it is not a general invitation to reconsider binding authority on the basis of *any* type of evidence. As alluded to in *Bedford* and *Carter*, evidence of a significant evolution in the foundational legislative and social facts — "facts about society at large" — is one type of evidence that can fundamentally shift the parameters of the relevant legal debate: *Bedford*, at paras. 48-49; *Carter*, at para. 47. That is, the exception has been found to be engaged where the underlying social context that framed the original legal debate is profoundly altered.

[26] The Crown submits that the exceptions to *stare decisis* are narrow and requires a significant development in the law which changes the legal issues or radically different evidence which fundamentally shifts the parameters of the debate. Notwithstanding the jurisdiction of a lower court to revisit a legal precedent, the Crown states that the

appellants here brought their challenges in the face of the decision in ***Gateway*** that continues to bind the Provincial Court and its judges.

[27] The Crown states that the scope of the ***Gateway*** decision is clear from the following paragraphs, noting that the same ***Charter*** sections were at issue in relation to the same manner of restriction on public outdoor gatherings:

> **6** The applicants challenge by way of application, the constitutionality of specific sections of Manitoba's Emergency Public Health Orders made on November 21, 2020, December 22, 2020, and January 8, 2021 (the "impugned PHOs"). They also challenge subsequent orders of a substantially similar or identical nature, including the order dated April 8, 2021, which were in effect at the time of the hearing of the application in May 2021. The applicants contend that the identified and specific sections of the impugned PHOs and the restrictions on public gatherings, gatherings in private residences and the temporary closure of places of worship, all infringe ss. 2(a), 2(b), 2(c), 7 and 15 of the ***Canadian Charter of Rights and Freedoms*** ("***Charter***"). They have also as already mentioned, challenged the impugned PHOs on administrative law grounds and under the division of powers (paramountcy).
>
> 7 Specifically, the applicants request that this Court determine and declare that Manitoba's Emergency Public Health Orders, which prohibit and/or restrict religious, private in-home and public outdoor gatherings, violate their ss. 2(a), 2(b), 2(c), 7 and 15 ***Charter*** rights and that those violations cannot be saved under s. 1 of the ***Charter***.

[28] The judge rejected the arguments made by the appellants as to why an exception to *stare decisis* should be made out. The Crown states that the judge determined that the affidavits relied on by the appellants revealed similar complaints to those made in ***Gateway***, that ***Gateway*** did address and apply to outdoor gatherings and that the expert evidence here is strikingly similar to that considered in ***Gateway***.

[29] Furthermore, the Crown states the judge assessed the evidence and found that the evidence was insufficient to make out a s. 15 ***Charter*** discrimination claim and that the s. 15 ***Charter*** argument was not new but rather a re-articulation of the ***Charter***

sections already analyzed in ***Gateway***. Accordingly, the Crown submits no exception to *stare decisis* has been made out.

[30] Furthermore, the Crown argues that the judge did not conflate the legal tests for summary dismissal and *stare decisis*. The Crown states the judge found that ***Gateway*** was binding on her and the exceptions to the rule of *stare decisis* did not apply. Accordingly, the ***Charter*** challenges had no reasonable prospect of success and were therefore properly dismissed by the judge. This, the Crown submits was a correct application of the applicable legal principles.

Analysis and Decision

[31] In concluding that the judge did not err in granting the Crown's application for summary dismissal of the appellants' notice of constitutional question, I accept the Crown's argument that the decision of this court in ***Gateway*** is binding on the judge in the Provincial Court and that the narrow exceptions to *stare decisis* do not apply here.

[32] As a result, the judge was bound to accept the conclusion of the Chief Justice in ***Gateway*** that while Manitoba has limited fundamental rights and freedoms in implementing the PHOs, it has done so in a constitutional manner. The scope of the ***Gateway*** decision is clear from the following passages which provide at paras. 6 and 7:

> **6** The applicants challenge by way of application, the constitutionality of specific sections of Manitoba's Emergency Public Health Orders made on November 21, 2020, December 22, 2020, and January 8, 2021 (the "impugned PHOs"). They also challenge subsequent orders of a substantially similar or identical nature, including the order dated April 8, 2021, which were in effect at the time of the hearing of the application in May 2021. The applicants contend that the identified and specific sections of the impugned PHOs and the restrictions on public gatherings, gatherings in private residences and the temporary closure of places of worship, all infringe ss. 2(a), 2(b), 2(c), 7 and 15 of the ***Canadian Charter of Rights and Freedoms*** ("***Charter***"). They have also as already mentioned,

> challenged the impugned PHOs on administrative law grounds and under the division of powers (paramountcy).
>
> **7** Specifically, the applicants request that this Court determine and declare that Manitoba's Emergency Public Health Orders, which prohibit and/or restrict religious, private in-home and public outdoor gatherings, violate their ss. 2(a), 2(b), 2(c), 7 and 15 ***Charter*** rights and that those violations cannot be saved under s. 1 of the ***Charter***. In the alternative, the applicants request a determination and declaration that the PHOs are *ultra vires* s. 3 of ***The Public Health Act***. In the further alternative, the applicants request that this Court find that the PHOs, which prohibit and restrict religious gatherings, are inoperative because they conflict with s. 176 of the ***Criminal Code of Canada***.

[33] The applicants in ***Gateway*** specifically impugned the restrictions on outdoor gatherings. ***Charter*** ss. 2(a), 2(b), 2(c), 7 and 15 were raised by the applicants there. Based on the submissions and evidence before him, the Chief Justice in ***Gateway*** upheld the outdoor gathering restrictions as being justifiable limits under s. 1 of the ***Charter***. Although Manitoba conceded *prima facie* limits of subsections 2(a), (b) and (c) of the ***Charter*** in ***Gateway***, the court there specifically held that the impugned PHOs did not breach either s. 7 or s. 15 of the ***Charter***. In that respect, the Chief Justice held at para. 245 as follows:

> **245** I have considered carefully the applicants' position and arguments respecting s. 7 of the ***Charter***. For the reasons that follow, I have determined that the impugned PHOs do not breach s. 7 of the ***Charter*** as alleged by the applicants.

[34] In respect of s. 15 of the ***Charter*** he held at para. 270:

> **270** As I explain in the paragraphs that follow, the applicants have inaccurately described Manitoba's use of the adjective "essential" as it relates to churches and religious gatherings just as they have also failed to appreciate that the distinction in question (between what is permitted to remain open and what must remain closed) is not based on religion. Accordingly, I have determined that the impugned PHOs do not discriminate contrary to s. 15 of the ***Charter***.

[35] The judge here correctly found that she was bound by the constitutional determinations of the court in ***Gateway*** in respect of limiting outdoor public health orders in the context of the COVID-19 pandemic. The legal issues before her were the same and as the Crown has set out in its brief, not only is the evidence substantially the same, but the expert witnesses called to support the application are the same. I agree that since the decision in ***Gateway***, the law has not developed in a way that has changed the legal issues nor is the factual context of ***Gateway*** radically different from the present case.

[36] The judge correctly rejected the appellants' arguments that there is new evidence that was not considered before, that the decision in ***Gateway*** relating to s. 7 did not apply to outdoor gatherings, and that the court in ***Gateway*** had not considered there was an unequal application of the PHOs in relation to a s. 15 ***Charter*** application. The judge properly found that ***Gateway*** did address and apply to outdoor gatherings and found that the expert evidence was "strikingly similar" to that considered in ***Gateway***. She was entitled to assess the evidence in this way and made no error in doing so.

[37] I also agree that there is no error in the judge finding that the evidence which the appellants' proposed to advance at trial was insufficient to make out a discrimination claim under s. 15 of the ***Charter*** and that the s. 15 ***Charter*** argument was not new, but rather a re-articulation of the ss. 2 and 7 ***Charter*** arguments already considered in ***Gateway***. It therefore failed to disclose a reasonably arguable point in that no exception to *stare decisis* had been made out.

[38] The operative legal consideration for summary dismissal of a ***Charter*** application is whether it has a reasonable prospect of success. If a summary of the anticipated evidence reveals no basis upon which the application could succeed, it should be dismissed. In this respect, the court in ***R. v. Cody***, 2017 SCC 31, [2017] 1 S.C.R. 659 (QL), at paras. 38 and 39 summarized this legal principle as well as articulating the policy consideration behind the principle:

> **38** … trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous" (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence — should take appropriate opportunities to ask trial judges to exercise such discretion.
>
> **39** Trial judges should also be active in suggesting ways to improve efficiency in the conduct of legitimate applications and motions, such as proceeding on a documentary record alone. This responsibility is shared with counsel.

[39] On that basis the judge did not err in her articulation and application of the correct legal principles in dismissing the appellants' application.

[40] Furthermore, I agree with the Crown's position that had the judge not dismissed the s. 15 ***Charter*** argument as lacking foundation, or alternatively as being a re-articulation of the ss. 2 and 7 ***Charter*** claims, she could have summarily dismissed it for other reasons. However, given the conclusions set out in these reasons in respect of the ***Charter*** arguments raised by the appellants, it is not necessary for me to comment on any additional grounds other than to briefly state that the arguments advanced by the

appellants do not identify a law or other state action creating a distinction that infringes an enumerated or analogous s. 15 ***Charter*** ground.

[41] In this respect the test for a s. 15 ***Charter*** infringement was recently reaffirmed by the Supreme Court of Canada in ***R. v. Sharma***, 2022 SCC 39, [2022] S.C.J. No. 39 (QL), at para. 28 where the court held:

> **28** The two-step test for assessing a s. 15(1) claim is not at issue in this case. It requires the claimant to demonstrate that the impugned law or state action:
>
> (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
>
> (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*R. v. C.P.*, 2021 SCC 19, at paras. 56 and 141; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 27; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20).

[42] In reviewing the arguments of the appellants, I cannot identify any enumerated or analogous ground in their material which creates "a distinction based on enumerated or analogous grounds, on its face or in its impact", much less a distinction which "… imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage …".

Conclusion

[43] In conclusion, I find that the judge here exercised her well-recognized, discretionary case management powers to summarily dismiss the challenges advanced by the appellants. There is no basis to successfully challenge her findings of fact or the consideration and application of legal and constitutional principles in her findings that the decision of this court in ***Gateway*** was binding and that there were no exceptions to *stare*

decisis applicable here. She properly found that the ***Charter*** challenges had no arguable merit. Accordingly, the appeal is dismissed.

_____ J.