

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

BETWEEN

ERINN KNOLL

APPELLANT

AND

HIS MAJESTY THE KING

RESPONDENT

AND

ATTORNEY GENERAL FOR SASKATCHEWAN

INTERVENER

MEMORANDUM OF ARGUMENT
THE ATTORNEY GENERAL FOR SASKATCHEWAN

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TABLE OF CONTENTS

TABLE OF CONTENTS	I
PART I: INTRODUCTION	1
PART II: JURISDICTION AND STANDARD OF REVIEW	2
PART III: SUMMARY OF FACTS	2
A. BACKGROUND TO THE PUBLIC HEALTH MEASURES	2
B. LEGISLATIVE BACKGROUND TO THE PHOS	3
C. THE APPELLANT’S TRIAL.....	5
(i) The rally	5
(ii) Procedural history	5
Related decisions	5
In the Provincial Court.....	6
In this Court	10
D. MOST TRANSCRIPTS ARE MISSING	10
PART IV: POINTS IN ISSUE	12
PART V: ARGUMENT	13
A. DOES THE COURT HAVE JURISDICTION TO HEAR THIS APPEAL?	13
The statutory scheme, in general	13
Section 813 of the Criminal Code prescribes this Court’s appellate jurisdiction on summary conviction appeals.....	15
Section 813 and the SOPA do not permit interlocutory appeals.....	15
The general policy against interim appeals in criminal matters	18
The decision under appeal is not a final decision	20
The Court has no jurisdiction to hear appeals from acquittals.....	22
B. “PUBLIC INTEREST” STANDING CANNOT CREATE JURISDICTION	22
Irrelevant arguments on standing.....	23
C. STANDARD OF REVIEW, AND REMEDIES.....	24

The standard of review is unknown.....	24
The remedies upon review are unknown	25
D. THE APPEAL IS WITHOUT MERIT.....	26
The trial judge handled the January 18, 2023 hearing appropriately.....	27
The PHO was compliant with the Code.....	30
PART VI: RELIEF	35
This appeal should be quashed or dismissed	35
Costs are available	35
PART VII: AUTHORITIES.....	37
STATUTES AND REGULATIONS	37
JURISPRUDENCE	38
COMMENTARY AND ARTICLES.....	42

PART I: INTRODUCTION

- [1] Ms. Erinn Knoll (the “**Appellant**”) was acquitted after trial of an offence under section 61 of *The Public Health Act, 1994*¹ (the “**Act**” or the “**PHA**”). Despite this, she seeks to appeal a decision made partway through the trial by the learned trial judge related to *The Saskatchewan Human Rights Code, 2018* (“**Code**”).²
- [2] Appeal rights only exist if they are expressly created by statute. Neither the *Criminal Code*³ nor *The Summary Offences Procedure Act, 1990*⁴ (“**SOPA**”) permits an accused to appeal from a decision made midway through a trial, or from an acquittal.
- [3] The Appellant’s appeal to “public interest” standing is misplaced. Standing is distinct from jurisdiction. The Appellant—*qua* accused—would have standing to argue an appeal arising from her trial, if the jurisdiction to appeal could be found in law. But no appeal lies from the learned trial judge’s decisions.
- [4] In substance, the appeal is without merit. The Appellant asserts that the rights enumerated in the *Code* are not subject to “reasonable limits,” contrasting the *Code* to the *Canadian Charter of Rights and Freedoms* (“**Charter**”). No Court has ever interpreted a statutory “Bill of Rights” in this extraordinary way, and the proposed interpretation does not accord with basic logic or constitutionalism.
- [5] The Attorney General of Saskatchewan (“**Attorney General**”) submits that this appeal must be quashed. In the alternative, it should be dismissed on the merits.

¹ [The Public Health Act, 1994](#), SS 1994, c P-37.1 [**PHA**].

² [The Saskatchewan Human Rights Code, 2018](#), SS 2018, c S-24.2 [**Code**].

³ [Criminal Code](#), RSC 1985, c C-46.

⁴ [The Summary Offences Procedure Act, 1990](#), SS 1990-91, c S-63.1 [**SOPA**].

PART II: JURISDICTION AND STANDARD OF REVIEW

- [6] The Appellant was acquitted of an offence under section 61 of the *PHA*. The *SOPA* governs the enforcement of such provincial offences, which integrates key elements of the *Criminal Code* and applies them to summary offences.
- [7] Jurisdiction is contested in this case. Accordingly, the Attorney General has briefed it below, at paras [54] to [102]. This Court has no jurisdiction to hear this appeal, so it must be quashed. All other issues raised in this appeal are secondary.

PART III: SUMMARY OF FACTS

A. BACKGROUND TO THE PUBLIC HEALTH MEASURES

- [8] It is difficult to overstate the gravity of the impact the COVID-19 pandemic had on communities globally, and in Saskatchewan. Everybody has lost something, and some have lost everything.
- [9] The science of COVID-19 transmission, and the details of the resulting global health crisis, are not exceedingly relevant to this appeal. But the following excerpt from this Court's decision in *Grandel v Saskatchewan*⁵ is helpful:

[31] COVID-19 is the disease caused by a new coronavirus called SARS-CoV-2. The World Health Organization [WHO] first learned of this novel virus on December 31, 2019, following reports of a cluster of atypical pneumonia cases in Wuhan, People's Republic of China. On March 11, 2020, WHO, in assessing the severity and the worldwide spread of COVID-19, characterized it as a "pandemic". A WHO report shows that as of October 22, 2021, there were 242,348,657 cases confirmed globally and 4,927,723 deaths caused by COVID-19. As of the same date, in Saskatchewan, there had been 75,842 people diagnosed with COVID-19 and 812 deaths related to the disease. Cumulatively, 4.5% of all polymerase chain reaction PCR-confirmed COVID-

⁵ *Grandel v Saskatchewan*, 2022 SKKB 209 [*Grandel KB*], appeal dismissed *Grandel v Government of Saskatchewan*, 2024 SKCA 53, [2024] 10 WWR 179 [*Grandel CA*], leave to appeal to SCC sought [41390](#).

19 cases in Saskatchewan have required hospitalization, and 1.1% PCR-confirmed COVID-19 patients have resulted in death.⁶

[10] In Saskatchewan, the first presumptive case of COVID-19 was reported publicly on March 12, 2020.⁷ On March 18, 2020 the Government of Saskatchewan declared a state of emergency in response to the pandemic, pursuant to section 18 of *The Emergency Planning Act*.⁸ The declaration was renewed from time to time⁹ and was in place at all material times.¹⁰

B. LEGISLATIVE BACKGROUND TO THE PHOS

[11] The *PHA* is Saskatchewan's foremost legal instrument pertaining to public health matters. Its provisions address a variety of matters related to public health, including the inspection of restaurants, the regulation of health hazards, and the control of noxious substances.

[12] Several distinct order-making powers are attributable to the *PHA*. One is created by section 38 of the *PHA*; one is created by section 45(1) of the *PHA*; and one is created by section

⁶ *Grandel KB*, *ibid* at paras 30 to 33. There is broad jurisprudential consensus on these points, both in Saskatchewan and elsewhere. See: *R v Keough*, 2022 SKPC 23; *R v Baraniski*, 2022 SKPC 33; and *R v Shorebird Investment Ltd.*, 2022 SKPC 41; *Beaudoin v British Columbia*, 2021 BCSC 512 at paras 8ff, [2021] 10 WWR 501 aff'd *Beaudoin v British Columbia (Attorney General)*, 2022 BCCA 427 leave to appeal to SCC refused 40622 (August 10, 2023); *Gateway Bible Baptist Church v Manitoba*, 2021 MBQB 219 at paras 53ff, 497 CRR (2d) 164, aff'd *Gateway Bible Baptist Church v Manitoba*, 2023 MBCA 56, leave to appeal to SCC refused 40903 (March 14, 2024); *Spencer v Canada (Health)*, 2021 FC 621 at paras 20ff, aff'd *Spencer v Canada (Health)*, 2023 FCA 8; *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453, principally paras 254 to 398; *Ontario v Trinity Bible Chapel*, 2022 ONSC 1344 at para 168, aff'd *Ontario (Attorney General) v Trinity Bible Chapel*, 2023 ONCA 134, leave to appeal to SCC refused 40711 (August 10, 2023).

⁷ *Grandel KB*, at para 38.

⁸ *The Emergency Planning Act*, SS 1989-90, c E-8.1.

⁹ Initially rescinded in July of 2021: *Renewal of Declaration of a State of Emergency Throughout the Province of Saskatchewan to Address the COVID-19 Public Health Emergency and Terminate Declaration of a State of Emergency*, OC 376/2021. It was reactivated in September of 2021 to respond to the increased cases and hospitalizations during the fourth wave, see *Declaration of a State of Emergency Throughout the Province of Saskatchewan to Address the COVID-19 Public Health Emergency*, OC 465/2021 (*The Emergency Planning Act*).

¹⁰ See *Renewal of Declaration of a State of Emergency Throughout the Province of Saskatchewan to Address the COVID-19 Public Health Emergency*, OC 219/2021.

25.2 of *The Disease Control Regulations* (the “**Regulations**”)¹¹ which was enacted pursuant to the regulation-making authority created by section 46(1) of the *PHA*.

[13] The ministerial powers in section 45(1) of the *PHA* and section 25.2 of the *Regulations* were, during the pandemic, delegated to the province’s Chief Medical Health Officer, Dr. Saqib Shahab, pursuant to section 2-34(2) of *The Legislation Act*.¹² The validity of section 25.2 of the *Regulations*¹³ and the delegation to Dr. Shahab was recently upheld in *R v Friesen*,¹⁴ which affirmed several related decisions of the Provincial Court.

[14] The Appellant was acquitted of a charge of violating an order made under the *PHA*. Specifically, on May 6, 2021, Dr. Shahab issued a *Provincial Order*¹⁵ (the “**PHO**”) under the auspices of sections 45(2) of the *PHA* and 25.2(2) of the *Regulations*. The PHO stated, *inter alia*:

4. [...] (c) In the Regina Region,¹⁶ public and private outdoor gatherings are permitted up to 10 persons. Persons in attendance must ensure that physical distancing of at least 2 metres between households is maintained.

[15] This specific PHO was repealed on May 17, 2021,¹⁷ and all related gathering limits have long since been repealed.

¹¹ [The Disease Control Regulations](#), RRS c P-37 Reg 11 [**Regulations**].

¹² [The Legislation Act](#), SS 2019, c L-10.2.

¹³ Since repealed, as of March 31, 2022. The provisions were set to automatically repeal when first enacted. The repeal date was changed a number of times, and finally fixed by section 3 of [The Disease Control \(Vaccination Programs\) Amendment Regulations, 2021](#), Sask Reg 118/2021.

¹⁴ [R v Friesen](#), 2024 SKKB 20, affirming each of [R v Friesen](#), 2023 SKPC 9; [R v Friesen](#), 2023 SKPC 20; [R v Wong](#), 2023 SKPC 7, 522 CRR (2d) 1.

¹⁵ [Provincial Order](#) (May 6, 2021) [**PHO**].

¹⁶ The “Regina Region” was a defined geographic area that included the Cities of Regina and Craven, plus the Rural Municipalities of Lajord, Edenwold, Sherwood, Pense, and Lumsden.

¹⁷ [Provincial Order](#) (May 13, 2021), which came into force on May 17, 2021.

C. THE APPELLANT’S TRIAL

(i) The rally

[16] The facts of this matter are simple. On May 15, 2021 an outdoor protest gathering was held in Victoria Park, in Regina, Saskatchewan. A PHO was then in force, limiting attendance at such gatherings to ten persons.¹⁸

[17] The Appellant was identified by both Cst. Wilkinson and Cst. Power, of the Regina Police Service, as being present on May 15, 2021.¹⁹

[18] The Appellant did not testify. Nonetheless, the trial judge found that the Crown had not proved beyond a reasonable doubt that the accused attended a gathering greater than ten people. The gathering had lasted three hours, and the size of the group fluctuated over time and periodically split into small, distant groups. The trial judge could not be certain that the Appellant was part of a gathering that had exceeded ten persons.²⁰

(ii) Procedural history

[19] The procedural history is less simple. The proceedings against the Appellant were one of many related trials held in Regina, arising from violations of pandemic-related PHOs. Given the common legal issues and the commonality of counsel, these matters were case managed carefully and extensively and often consolidated into common hearings on common issues.

Related decisions

[20] The trial judge issued seven decisions related to this information. In chronological order:

¹⁸ *R v Apodaca*, 2023 SKPC 37 at paras 10 to 13 [*Apodaca*].

¹⁹ *Apodaca*, at paras 33 – 37 and 53.

²⁰ *Apodaca*, at paras 70 and 72.

- [*R v Grandel*](#), 2022 SKPC 48 [*Grandel PC*] (December 2, 2022)– granting a *Vukelich* application, summarily dismissing *Charter* ss. 2(b), (c) and (d) claims.
- **R v Hagel et al* (oral decision) [*Hagel*] (January 18, 2023) – dismissing various *Code*-related arguments, including the Appellant’s.
- [*R v Friesen*](#), 2023 SKPC 18 (January 27, 2023) – upholding the *vires* of *The Disease Control Regulations*.
- [*Apodaca v Regina Police Service*](#), 2023 SKPC 26 (March 21, 2023) – dismissing an *O’Connor* application seeking police documents.
- *[*R v Knoll*](#), 2023 SKPC 29 [*Knoll*] (April 20, 2023)– dismissing the Appellant’s attempt to relitigate the January 18, 2023 (*Hagel*) decision.
- [*R v Slastukin*](#), 2023 SKPC 32 (May 3, 2023) – dismissing subsequent *Charter* ss. 2(c) and 7 challenges.
- *[*R v Apodaca*](#), 2023 SKPC 37 [*Apodaca*] (May 25, 2023)– acquitting the Appellant and two co-accused and convicting two other co-accused. The Crown stayed the remaining charges.

[21] Only the three decisions marked with an asterisk (*) are relevant to this appeal: *Hagel*, *Knoll* and *Apodaca*.

In the Provincial Court

[22] The Appellant was issued a summary offence notice on May 15, 2021 (#85492794).

[23] The Appellant was initially represented by Luke Coupal of Caritas Law. A notice of constitutional question was filed by Mr. Coupal on November 8, 2021, which erroneously referred to the gravamen of the charge as related to masking.

- [24] An amended notice of constitutional question was filed on February 1, 2022 by Mr. Coupal, correcting the content of the notice, now alleging that the PHO infringed section 2(c) and 7 of the *Charter* due to its impact on gathering limits.
- [25] On April 7, 2022, a long form information (#991192882) replaced the individual summary offence notices against the Appellant and nine other co-accused. On the same day, trial dates were set in March of 2023 for the Appellant and her co-accused.²¹
- [26] On September 20, 2022, the Court of King’s Bench decided the *Grandel KB* case.
- [27] On October 11, 2022, the Appellant filed with the Provincial Court a document entitled “*Charter Challenge Withdrawal & Change in Representation*” indicating that she intended to discharge Mr. Coupal and to proceed on her own with non-*Charter* arguments (see **Appendix A**).²²
- [28] On October 21, 2022, the Attorney General brought a *Vulelich* application²³ to summarily dismiss the *Charter* notices in the Provincial Court, post-*Grandel*.
- [29] On November 1, 2022, Mr. Coupal was given leave to withdraw.²⁴
- [30] Ms. Elaine Anderson of the Justice Centre for Constitutional Freedoms (JCCF) represented several co-accused on the consolidated information, but at no point did Ms. Anderson go record for the Appellant. It is unclear why the Appellant now purports to have been represented by the JCCF, but nothing turns on this.²⁵

²¹ *Knoll*, at para 3

²² See *Knoll*, at para 4. The document dated October 7 but was faxed on October 10, and apparently came to the Court’s attention on October 11. See also *Grandel PC*, at para 4.

²³ Per *R v Vukelich* (1996), 108 CCC (3d) 193, 37 CRR (2d) 237. This would now be styled a “*Haevischer*” application, due to the intervening decision in *R v Haevischer*, 2023 SCC 11, 480 DLR (4th) 577.

²⁴ *Knoll*, at para 7.

²⁵ Appellant’s Memorandum of Argument, at para 27

- [31] The *Vukelich* application was heard on November 10, 2022.
- [32] On December 2, 2022 the Attorney General’s *Vukelich* application was granted. By this point, the Appellant—and three other accused persons, on various Regina files—had discharged their counsel and were choosing to self-represent to raise non-*Charter* arguments.
- [33] On December 2, 2022, scheduling of Ms. Knoll’s application was discussed, to be heard alongside the other three similar applications. Ms. Knoll did not feel ready to proceed on a proposed December date that had been set aside for other issues on the trial.²⁶ The Court did not want Ms. Knoll to be “rushed,” and so the matter was set to the week of January 16, 2023 so she could prepare for the hearing.²⁷ Counsel for the Attorney General believed that a full day would be necessary to address the non-*Charter* arguments, given recent experience on similar files,²⁸ and so a full day on January 18, 2023 was set aside for those arguments.²⁹ The trial judge reiterated that he did not want the Appellant or the other applicants to feel rushed, specifically to ensure a fair hearing.³⁰ The Appellant was present and participated in scheduling. She was not merely “notified” of the January 18, 2023 date, as she now asserts.³¹ It was understood that the January 18, 2023 would be for her “full arguments.”³²
- [34] On January 18, 2023, the scheduled hearing was held for self-represented persons advancing non-*Charter* arguments in multiple cases, including the Appellant’s proposed arguments on information #991192882. The Appellant, and others, were given a chance to

²⁶ Transcript (December 2, 2022), T73, line 17 to T74, line 12 [**Appendix B**].

²⁷ Transcript (December 2, 2022), T78, line 14 to T74, line 4 [**Appendix B**].

²⁸ Transcript (December 2, 2022), T84, line 7 to T85, line 4 [**Appendix B**].

²⁹ Transcript (December 2, 2022), T85, line 29 to T86, line 3 [**Appendix B**].

³⁰ Transcript (December 2, 2022), T85, lines 29 to line 34 [**Appendix B**].

³¹ Appellant’s Memorandum of Argument, at para 29.

³² Transcript (December 2, 2022), T73, lines 17 to 24 [**Appendix B**].

make oral argument and file written materials,³³ and did so.³⁴ Similarly, the Attorney General provided a fifteen-page³⁵ brief of law on January 16, 2023, in accordance with a common filing deadline set by the Court.

[35] The trial judge heard arguments and dismissed the Appellant's application in an oral decision rendered the same day (*Hagel*).³⁶ The Appellant's charge was adjourned back to the March 20, 2023 trial date, to rejoin her co-accused on information #991192882.

[36] On February 7, 2023, the Appellant filed a "*Notice of Application and Quasi-Constitutional Issue*," purporting to raise the *Code* and *Charter* issues afresh.

[37] On March 17, 2023, the Appellant filed a "*Notice of Application and Constitutional Issue*," alleging that the trial judge or Crown had breached the Appellant's *Charter*, s 11(d) right to a fair trial in the conduct of the January 18, 2023 hearing.

[38] The section 11(d) application was heard on March 30, 2023.

[39] On April 20, 2023, the trial judge decided the section 11(d) application. He found that the *Charter* arguments remained foreclosed by *Grandel*, a finding which is not appealed.³⁷ He also found that the Appellant's section 11(d) *Charter* rights had not been violated by the conduct of the January 18, 2022 hearing, and that his earlier decision on the *Code* stood.³⁸

[40] On May 19, 2023, the Appellant purported to appeal the April 20, 2023 (*Knoll*) decision.

[41] On May 25, 2023, the accused was acquitted of the offence (*Apodaca*).

³³ Transcript (January 18, 2023), T17 to T37. See *Knoll*, para 10.

³⁴ *Knoll*, para 4.

³⁵ Only thirteen pages, minus the cover page and table of authorities. The Appellants style it a "92-page" brief, including in that number several appended cases and transcripts.

³⁶ Transcript (January 18, 2023), T60 to T63.

³⁷ *Knoll*, at paras 33-34.

³⁸ *Knoll*, at para 40.

In this Court

- [42] On December 14, 2023, the Crown Prosecutor applied to strike this appeal, for want of jurisdiction.
- [43] On January 9, 2024, the Appellant filed in response what purported to be a “*Notice of Constitutional Question*” asking this Court to strike the Crown’s application, and to grant the Appellant “public interest standing.”
- [44] On February 29, 2024, the Hon. Justice Keene noted that the Appellant, “being acquitted, is not entitled to appeal from a judge’s mid-trial ruling.”³⁹ But he declined to grant any relief, finding he had no jurisdiction in Chambers to decide the issue.
- [45] On November 5, 2024, the Hon. Justice Currie declined to sever the jurisdictional issue from the substance of the appeal, preferring to deal with the matter “once and for all.”
- [46] The appeal is set for hearing on February 27, 2025.

D. MOST TRANSCRIPTS ARE MISSING

- [47] The Appellant has furnished the Court with only a small portion of the full trial transcripts. Given the nature of the grounds of appeal and the Attorney General’s jurisdictional argument, nothing seems to turn on this omission. But the Court should be aware of what is *not* before it.
- [48] The December 2, 2022 hearing is missing, but was transcribed for another appeal and the Attorney General attaches it to this brief of law (**Appendix B**).
- [49] The trial proper was held on March 20, 21 and 23, 2023. Accordingly, the following transcripts from March 20 to 23 are *missing* from the appeal record.

³⁹ Fiat of Justice Keene (February 29, 2024) at para 3.

- Part of the morning of March 20, 2023, which was Crown evidence.
- The afternoon of March 20, 2023, which was also Crown evidence.
- The full day of March 21, 2023, which was more Crown evidence and the evidence of a co-accused, Tanya Apodaca.
- The afternoon of March 23, 2023, which was argument on the trial proper.

[50] As it stands, none of the trial evidence has been placed before the Court. Ordinarily, proceeding with an appeal on incomplete transcripts requires an order of the judge hearing the appeal.⁴⁰

[51] If the Court finds that it does have jurisdiction to hear the appeal and therefore engage with the merits of the *Code* argument, the absence of transcripts will be a serious obstacle to resolution, given how important a fulsome evidentiary record is to such assessments.⁴¹

⁴⁰ [R v Mackie](#), 2004 SKQB 202 at para 14 to 20, 248 Sask R 247 [*Mackie*].

⁴¹ See *Mackie*, at para 18. For the foundational principles, see e.g. [Mackay v Manitoba](#), [1989] 2 SCR 357 at 361, on the “essential need to establish the factual basis in *Charter* cases.” See also [R v Downes](#), 2023 SCC 6 at para 58, 479 DLR (4th) 579.

PART IV: POINTS IN ISSUE

[52] Two issues are raised in this appeal, though the Court needs only to deal with the first of the two issues:

Issue 1: Does this Court have jurisdiction to hear this appeal?

The SOPA and *Criminal Code* do not provide for appellate jurisdiction arising from interlocutory appeals. This appeal should be quashed.

Issue 2: If this Court does have jurisdiction to hear this appeal, should this court interfere with the trial judge's decisions in any way?

This Court appears to be asked to substitute one acquittal for another acquittal. The *Code* was not infringed by the PHO. And the trial judge conducted the hearings appropriately and carefully. The appeal should be dismissed, if it is not quashed.

PART V: ARGUMENT

A. DOES THE COURT HAVE JURISDICTION TO HEAR THIS APPEAL?

[53] This Court has no jurisdiction to hear this appeal. The Appellant was acquitted. The impugned decisions were interlocutory ones, made during a trial. The SOPA and the *Criminal Code* do not provide for appeals from such decisions. There is clear, consistent, and binding authority to the contrary.

The statutory scheme, in general

[54] As a foundational principle, all appeals are statutory, and do not exist at common law.⁴² Accordingly, the Appellant must positively situate her appeal in statute. Otherwise, no jurisdiction exists.

[55] Section 4(4)(b) of the SOPA states:

(4) Subject to this Act, any other Act or any regulation, Parts XXII, XXVI **and XXVII**, other than section 840, and sections 20, 21, 22, 484, 508.1 and 527 insofar as it relates to a witness, sections 718.3, 719, subsection 732(1) and section 734.8 of the *Criminal Code* apply, with any necessary modification, to:

(a) summary conviction proceedings before justices; and

(b) appeals from convictions, acquittals, sentencing **or other orders made under summary conviction proceedings**. [emphasis added]

[56] Part XXVII of the *Criminal Code* contains a procedure for summary convictions, including summary conviction appeals. That part is made applicable to summary conviction proceedings under provincial law, pursuant to section 4(4)(b) of the SOPA.

[57] The *Criminal Code* creates two distinct forms of summary conviction appeal, found in sections 813 and 830. The appeal court's powers differ depending on whether the appeal

⁴² *Payne v Saskatoon Housing Authority*, 2024 SKKB 92 at para 39; *Kourtessis v M.N.R.*, [1993] 2 SCR 53 at para 96; *R v Meltzer*, [1989] 1 SCR 1764 at 1774 [*Meltzer*]; *Ochapowace First Nation v Canada (National Revenue)*, 2007 SKCA 88 at para 8, [2007] 9 WWR 226 [*Ochapowace*].

is pursued pursuant to section 813 or 830, which makes the distinction important for certain purposes. The Appellant has, in her memorandum, particularized her appeal as falling under the procedure in section 813,⁴³ which is the broader of the two provisions. But as discussed below, the scope of both appeal provisions is the same, so far as the “finality” of orders is concerned.

[58] Section 813 of the *Criminal Code* provides the following appellate jurisdiction, for defendants:

813. Except where otherwise provided by law,

(a) the *defendant* in proceedings under this Part may appeal to the appeal court

(i) from a conviction *or order made against him*,

(ii) against a sentence passed on him, or

(iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder[.] [emphasis added]

[59] Section 812(1)(d) of the *Criminal Code* directs that summary conviction appeals brought pursuant to section 813 of the *Criminal Code* are, in Saskatchewan, to be determined by this Honourable Court.

[60] Other sections of the *Criminal Code*, ordinarily applicable to indictable offences, are integrated into section 813 appeals by reference. This includes section 686—by way of section 822—which prescribes the power of the Court upon hearing an appeal.⁴⁴ This is discussed further, below.

⁴³ Appellant’s Memorandum of Argument, at para 13.

⁴⁴ [R v Kocsis](#), 2010 SKQB 311 at para 10, 364 Sask R 19; [R v Schwartzberger](#), 2014 SKQB 378 at para 6; [R v McKnight](#), 2012 SKQB 482 at para 5; [R v Pierone](#), 2018 SKCA 30 at para 21, 361 CCC (3d) 217.

Section 813 of the Criminal Code prescribes this Court’s appellate jurisdiction on summary conviction appeals

Section 813 and the SOPA do not permit interlocutory appeals

[61] While section 92(14) of the *Constitution Act, 1867* permits a province to create a right to appeal interlocutory decisions arising from provincial offences, this has not been done in Saskatchewan. The SOPA does not authorize interlocutory appeals.

[62] The Supreme Court has reaffirmed that summary offence statutes do not, generally, authorize interlocutory appeals in the recent case of *Bessette v British Columbia (Attorney General)*.⁴⁵ Interpreting a provision of British Columbia’s provincial *Offence Act*. Côté and Martin JJ. wrote, for a unanimous Court:

[22] Superior courts generally do not intervene in ongoing criminal proceedings in the provincial courts. As was recently explained by this Court in [*Awashish*] criminal appeals are statutory and, with limited exceptions, there are no interlocutory appeals. Indeed, the *Offence Act* provisions governing appeals from “order[s]” (ss. 102 and 109) have been interpreted by the British Columbia courts as authorizing only appeals from **final** orders (see *R. v. Plummer*, 2018 BCSC 513, 25 M.V.R. (7th) 117, at para. 16). Criminal trials should not routinely be fragmented by interlocutory proceedings as these may be based on an incomplete record, take on a life of their own, or result in significant delay and the inefficient use of judicial resources (*Awashish*, at para. 10; *Johnson*, at p. 54). [emphasis original]

[63] In Saskatchewan, there is unambiguous and horizontally binding⁴⁶ King’s Bench authority on the question of appellate jurisdiction in SOPA matters.

[64] The Saskatchewan case of *R v Laviolette*⁴⁷ is directly on point. In that case, the putative appellant was disappointed with a ruling of the Provincial Court arising during a trial under

⁴⁵ [Bessette v British Columbia \(Attorney General\)](#), 2019 SCC 31, [2019] 2 SCR 535.

⁴⁶ *Per R v Sullivan*, 2022 SCC 19 at para 65, [2022] 1 SCR 460.

⁴⁷ [R v Laviolette](#), 2005 SKQB 61, 260 Sask R 121 [*Laviolette*].

The Fisheries Act (Saskatchewan), 1994,⁴⁸ which falls into the ambit of the SOPA. Kreuger J. found that section 813 and the SOPA together did not authorize interlocutory appeals:

[9] The Supreme Court of Canada made it clearly known in [*Kourtessis*] that appeal rights arise only through statute. [...] I agree that neither *The Fisheries Act* nor its regulations provide for an interlocutory appeal. Section 4 of *The Summary Offences Procedure Act* incorporates by reference the summary appeal sections contained in the *Criminal Code*. Under Part XXVII there is a right to appeal provincial court decisions to the Court of Queen's Bench.

[10] An appeal from summary conviction decisions under s. 813 of the Code may include questions of fact or law or both, whereas an appeal under s. 830 must be based on an error of law or jurisdiction. In 1985 legislative changes to s. 830 of the Code changed the wording permitting appeals against "conviction, order, determination or other proceeding" to "conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unit to stand trial or other final order or determination". [Emphasis added] Section 813 of the Code does not state what orders are referred to.

[11] The s. 785 definition of "order" is not particularly helpful. Part XXVII of the Code refers to "order" in several sections. Pursuant to s. 804 of the Code once the summary conviction court has heard from the prosecutor, defendant and witnesses, it must consider the matter and convict the defendant, discharge the defendant, make any order against the defendant or dismiss the information. That implies a final order. Section 806 of the Code speaks of a conviction order made in Form 35 or 36. Those are final orders.⁴⁹

[65] After reviewing academic commentary and case law on the issue, Kreuger J. concluded:

[18] Based on the academic authorities and the jurisprudence, I am of the view that the appeal court does not have jurisdiction to entertain an interlocutory appeal under s. 813 of the Code any more than it does under s. 830 while the trial is ongoing. In the circumstances of this case the trial judge's decision not to allow the appellant to introduce evidence regarding his status did not bring finality to the action. It was not a final order. In fact, it did not even disadvantage the appellant. [...]

⁴⁸ [*The Fisheries Act \(Saskatchewan\), 1994*](#), SS 1994, c F-16.1.

⁴⁹ *Lavolette*, at paras 9 to 11.

[21] I am satisfied that orders referred to in s. 813 of the Code are final orders. As there is no statutory provision permitting an appeal from an interlocutory order this court has no jurisdiction to hear the appeal.⁵⁰

[66] The body of case law on this question is consistent and coherent. In each of the following Saskatchewan King's Bench cases arising from SOPA prosecutions, interlocutory appeals were dismissed because they were outside the scope of section 813 of the *Criminal Code*:

- In *Nadeau v Saskatchewan*,⁵¹ Gabrielson J. found that an appeal from an interlocutory decision did not lie in a prosecution for violations of *The Natural Resources Act*.
- In *R v Agecoutay*,⁵² Whitmore J. found that an appeal from an interlocutory decision did not lie in a case involving *The Traffic Safety Act*.⁵³
- *R v Ironeagle*,⁵⁴ Scheibel J. found that an appeal from a finding that the accused did not have Aboriginal hunting and fishing rights in a particular area of the province could not be appealed, since the charges had been judicially stayed. The charges arose under *The Fisheries Act (Saskatchewan), 1994*, as in *Laviolette*.
- *R v Carpenter*,⁵⁵ Kreuger J. found that an appeal from an interlocutory decision did not lie in a case arising from *The Animal Protection Act, 1999*.⁵⁶

[67] The same result can also be seen in criminal appeals, where section 813 applies *ex proprio vigore* rather than by integration into the SOPA.⁵⁷ No Saskatchewan court has interpreted

⁵⁰ *Laviolette*, at paras 18 and 21.

⁵¹ *Nadeau v Saskatchewan*, 2008 SKQB 330 at paras 10 to 12, 325 Sask R 246.

⁵² *R v Agecoutay*, 2009 SKQB 220 at paras 12 to 15, 335 Sask R 246.

⁵³ *The Traffic Safety Act*, SS 2004, c T-18.1.

⁵⁴ *R v Ironeagle*, 2000 SKQB 553 at paras 20 to 24, 202 Sask R 268.

⁵⁵ *R v Carpenter*, 2005 SKQB 432 at paras 5 to 8, 272 Sask R 31.

⁵⁶ *The Animal Protection Act, 1999*, SS 1999, c A-21.1.

⁵⁷ *R v Jobb*, 2001 SKQB 74 at paras 10 to 14, 202 Sask R 194; *R v Leitner* (1998), 173 Sask R 269 at para 11 [*Leitner*]. See also *R v Frontier Photos Ltd.* (1986), 52 Sask R 310 (SK KB) [*Frontier Photo*].

“other orders made under summary conviction proceedings” in section 4(4)(b) of the SOPA to mean what the Appellant suggests. This Court’s jurisdiction to hear appeals from summary conviction matters is circumscribed by section 813 (or 830) of the *Criminal Code*, which are integrated into the SOPA. Appellate jurisdiction in SOPA matters is limited to final orders, as it is in the *Criminal Code*.

[68] The body of extra-provincial case law on this principle is also substantial. The same limitation on interlocutory appeals in summary conviction matters can be seen in Alberta,⁵⁸ Nova Scotia,⁵⁹ Manitoba,⁶⁰ British Columbia,⁶¹ Ontario,⁶² and probably others. This principle also extends to summary conviction appeals under federal statutes that integrate the *Criminal Code* procedure, such as federal taxing statutes.⁶³

The general policy against interim appeals in criminal matters

[69] This is a well-trod principle of criminal law. Interlocutory appeals are not allowed in criminal matters, both from summary convictions and indictable offences.⁶⁴

[70] This applies to summary conviction appeals with the same force as indictable appeals.⁶⁵ The risk that interim decisions, once subject to appeal, take on a “life of their own” and burden the Courts with irrelevant or unnecessary hearings is equally applicable to provincial summary offence matters as it is to criminal matters.⁶⁶

⁵⁸ *R v Adams*, 2001 ABQB 366 at para 14, 290 AR 316 [*Adams*].

⁵⁹ *R v Oickle*, 1994 CanLII 4234 (NS SC).

⁶⁰ *R v Sutherland* (2004), 182 Man R (2d) 85 at para 11, citing the Saskatchewan decision of *Leitner*.

⁶¹ *R v Verma*, 2016 BCCA 307 at para 23, 341 CCC (3d) 78; *R v Dougan*, 2016 BCSC 1815 at para 43; *R v Yang*, 2017 BCCA 349 at para 11.

⁶² *R v Mohammed*, 2001 OJ No. 2376, 50 WCB (2d) 254 (Ont. S.C.J.) [**Appendix C**].

⁶³ *R v Watson*, 2007 BCSC 1707 at para 17. See also *Ochapawace*.

⁶⁴ John Sopinka, Mark A. Gelowitz & W. David Rankin, *Sopinka, Gelowitz and Rankin on the Conduct of an Appeal* (5th ed) (LexisNexis Canada, 2022) at ¶3.7 and ¶3.60 [**Appendix D**].

⁶⁵ Sopinka, Gelowitz & Rankin, at ¶3.115 [**Appendix D**].

⁶⁶ *Adams*, at para 14. This was a purported interim appeal arising from a traffic matter.

[71] The foundational principle is derived from *R v Mills*,⁶⁷ where McIntyre J. wrote that it “has long been a settled principle that all criminal appeals are statutory and that there should be no interlocutory appeals in criminal matters.”⁶⁸

[72] Shortly thereafter, in *R v Metzger*, McIntyre J. built on his reasons in *Mills*, reiterating: “At common law there were no appeals. All appeals have been the creature of statute.”⁶⁹ He continued, writing for a unanimous Court, finding that an appeal from an interim decision related to a *Charter* remedy was without jurisdiction:

The refusal of an application for a remedy or relief based on the *Charter* may well raise a question of law which could be the basis of an appeal under the *Criminal Code* against conviction or acquittal. Accepting this principle, however, will not assist the appellants in this case. They do not seek to appeal against a conviction under the *Criminal Code* appeal provisions. They seek to launch an interlocutory appeal concerning the admissibility of evidence which may be adduced at a future trial. There is no statutory basis for such an appeal and the law, as expressed in *Mills v The Queen*, *supra*, and s. 602 of the *Criminal Code*, does not permit interlocutory appeals in criminal cases. I am, accordingly, satisfied that the Court of Appeal was correct in holding that it had no jurisdiction to entertain this interlocutory appeal.⁷⁰

[73] This remains the general policy of the Courts, including in Saskatchewan,⁷¹ where the rule against interlocutory *Charter* appeals in criminal matters arose separately but contemporaneously with *Mills*.⁷²

[74] Permitting interlocutory appeals in criminal matters risks “gravely slowing the criminal justice system.”⁷³ Criminal proceedings, once “fragmented” in this manner, tend to take on

⁶⁷ [Mills v The Queen](#), [1986] 1 SCR 863 [*Mills*].

⁶⁸ *Mills*, at para 271.

⁶⁹ *Metzger*, at 1773.

⁷⁰ *Metzger*, at 1774-75.

⁷¹ [R v Ferrari](#), 2002 SKCA 15 at para 5, 213 Sask R 288; [R v Sears](#), 2014 SKCA 72 at paras 4 to 6; [R v Yates](#), 2023 SKCA 47 at para 40.

⁷² See *Frontier Photo*.

⁷³ [R v Awashish](#), 2018 SCC 45 paras 2, 10 – 11, [2018] 3 SCR 87 [*Awashish*]; [R v J.J.](#), 2022 SCC 28 at para 108, 471 DLR (4th) 577 [*J.J.*].

a “life of their own.”⁷⁴ Interlocutory appeals in criminal matters are extremely inefficient, and can lead to an overall increase in trial delay.⁷⁵

[75] The Attorney General notes that, as with the *Charter* in *Mills* and *Metzer*, the *Code* is silent on the question of appeals, except in the case of complaints initiated by the Commission pursuant to Part 5 of the *Code*. Those can be appealed from this Court to the Court of Appeal.⁷⁶ Otherwise, the *Code* provides no right of appeal from determinations arising in other proceedings, and any appeal rights must be found in the SOPA or *Criminal Code*.

The decision under appeal is not a final decision

[76] The Appellant claims that, as a “question of law,” the trial judge’s decisions on January 18, 2023 (*Hagel*) or April 20, 2023 (*Knoll*) were “final orders” It is not clear whether this argument is made in the alternative, or if the Appellant agrees that orders must also be sufficiently “final” to be within the scope of her interpretation of section 4(4)(b) of SOPA.

[77] Interlocutory decisions can be matters of fact, law, or mixed fact and law. That a decision relates to a question of law does not transform it into a final order. Indeed, in the fountainhead case of *Mills*, McIntyre J. expressly stated that interlocutory questions *of law* cannot be independently appealed in criminal matters, even in the case of purported *Charter* breaches.⁷⁷ The same is true here.

[78] Moreover, the conception of a “final” order in criminal proceedings is different than in civil proceedings. The Appellant’s citation to *Poffenroth Agri Ltd v Brown*⁷⁸ is probably misplaced. The criminal law conception of final orders is narrow, given the strong policy preference against interlocutory criminal appeals. In *Carpenter*, Kreuger J. wrote:

⁷⁴ [R v DeSousa](#), [1992] 2 SCR 944 at 954.

⁷⁵ *Awashish*, at para 10.

⁷⁶ *Code*, s 42.

⁷⁷ See *Mills*, at para 270 and 271 (decision of McIntyre J.).

⁷⁸ [Poffenroth Agri Ltd. v Brown](#), 2020 SKCA 68, [2021] 2 WWR 302.

[6] Madam Justice Dawson in [*Leitner*] at para. 11 stated that “...an order under s. 813(a)(i) must be a final order in the sense it brings to an end that particular proceeding.” That definition was adopted by Scheibel J. in [*Ironeagle*]. In [*Lavolette*], it was noted that “order” under s. 813 of the Code encompasses only final orders. ***The law appears to now be settled that for an accused (appellant) to enjoy the right of appeal under s. 813(a)(i) the order must be final in the sense that it brings to an end the proceedings.*** [emphasis added; citations omitted].⁷⁹

- [79] This was echoed by Gabrielson J. in *Nadeau*, who noted that “Saskatchewan cases have held that a “final order” is one that determines the guilt or innocence of the accused or otherwise brings an end to the proceeding.”⁸⁰
- [80] The decision under appeal did not bring an end to the proceeding. Indeed, neither the January 18, 2023 (*Hagel*) nor the April 20, 2023 (*Knoll*) decisions were “orders” of any variety and were certainly not final orders. The trial judge concluded that the *Code* did not apply to the proceedings before him, and the trial continued apace.
- [81] To borrow from *Ironeagle*, a finding that a constitutional defense is unavailable is merely a “stepping stone”⁸¹ towards a final order, not a final order itself. Such findings cannot be independently appealed under 813(i)(a) of the *Criminal Code*.
- [82] The Provincial Court is a statutory court. It cannot issue declarations of invalidity, which is a remedy found in superior courts’ inherent jurisdiction.⁸² Even if the Appellant had been successful in all respects at trial, no declarations of invalidity would have issued: at highest, she would have been acquitted of the offence.
- [83] This can be contrasted with constitutional declarations of invalidity arising from courts of inherent jurisdiction. Such declarations, which arise from section 52 of the *Constitution Act, 1982*, may arise in an interlocutory manner during a criminal proceeding but are

⁷⁹ *Carpenter*, at para 6.

⁸⁰ *Nadeau*, at para 14.

⁸¹ *Ironeagle*, at para 24.

⁸² [R v Lloyd](#), 2016 SCC 13 at paras 15 to 19, [2016] 1 SCR 130.

arguably “final” decisions on the validity of legislation.⁸³ The Provincial Court has no jurisdiction to make such orders, and did not purport to do so.

[84] Neither the January 18, 2023 (*Hagel*) nor the April 20, 2023 (*Knoll*) decisions were final orders and cannot be appealed pursuant to 813(1)(a) of the *Criminal Code* or the SOPA.

The Court has no jurisdiction to hear appeals from acquittals

[85] The trial judge’s acquittal of the accused, on May 25, 2023 (*Apodaca*), was a “final order.” But it does not lie with a defendant to appeal from her acquittal.

[86] Section 813(a)(i) permits only appeals from orders made “*against*” the defendant. This does not include an acquittal, which is an order in the defendant’s favour.⁸⁴ Even conceived of as a final order, a defendant cannot appeal an acquittal.

B. “PUBLIC INTEREST” STANDING CANNOT CREATE JURISDICTION

[87] The Appellant’s request for “public interest standing” is misplaced.

[88] *First*, the Appellant’s submissions appear to confuse “standing” with “jurisdiction.” The two concepts are distinct. As the Supreme Court has stated: “Jurisdiction is about who has *competence* to decide what issues. Standing is about who can *participate* in the proceedings.”⁸⁵ Asking “Who can participate in proceedings?” presupposes valid proceedings. No appeal to this Court exists in these circumstances, so standing—whether private or public interest standing—is irrelevant. Furthermore, the Attorney General is not aware of any case where public interest standing has been used in criminal proceedings.

⁸³ *R v Boutilier*, 2016 BCCA 24 at paras 48 to 52, 332 CCC (3d) 315.

⁸⁴ See *Ironeagle*, at para 19. See also *R v Pierce*, 2007 CanLII 7408 (ON SC).

⁸⁵ *Québec (Procureure générale) c. Guérin*, 2017 SCC 42 at para 70, 412 DLR (4th) 103 (per Brown and Rowe JJ., concurring in the result) [emphasis added].

Standing is self-evident in a criminal appeal by an accused person.⁸⁶ If this Court has jurisdiction to hear an appeal arising from this trial, the Appellant has standing to bring it.

[89] **Second**, the Appellant alleges in several places that the dispute is not “moot,”⁸⁷ because other persons have been convicted of violating similar PHOs. She uses this as a lever into various standing arguments. Unless under appeal—and all appeal periods have long since expired—those convictions are *res judicata*. They are no longer “in the system.”⁸⁸ The Appellant cannot disturb those convictions even if she succeeds on this appeal. The issue is moot, and the Appellant would have to surmount the *Borowski*⁸⁹ threshold to proceed by way of public interest standing.

Irrelevant arguments on standing

[90] The Appellant makes several arguments that are irrelevant to the resolution of this appeal. The Attorney General nonetheless addresses a few of them, in brief:

[91] The Appellant claims that the January 18, 2023 hearing was somehow inutile because no notice of the *Code* application was served.⁹⁰ Section 13.1 of *The Constitutional Questions Act, 2012* was not in force on January 18, 2023. That section, which requires written notice to the Attorney General when *Code* issues are raised in court, came into force on April 6, 2023.⁹¹ The Appellant provided written notice of her *Code* arguments on October 11, 2022 in any event.

⁸⁶ *Cf.* cases where an appellant dies after filing the notice of appeal. The Court has jurisdiction to hear such appeals, since jurisdiction is created by the filing of a notice of appeal by a living person, but only on an exceptional basis: [R v Smith](#), 2004 SCC 14, [2004] 1 SCR 385.

⁸⁷ Appellant’s Memorandum of Argument, at para 14.

⁸⁸ [R v Wigman](#), [1987] 1 SCR 246 at paras 28 to 29; [R v Bissonnette](#), 2022 SCC 23 at para 136, 469 DLR (4th) 387.

⁸⁹ [Borowski v Canada \(Attorney General\)](#), [1989] 1 SCR 342.

⁹⁰ Appellant’s Memorandum of Argument, at paras 47 and 106.

⁹¹ See [The Constitutional Questions Amendment Act, 2023](#), SS 2023, c 3.

[92] The relevance of sections 3-1, 3-2 and 3-3 of *The King's Bench Act*⁹² is not clear.⁹³ The Attorney General notes that this Court's jurisdiction over criminal appeals is statutory and arises from the SOPA and the *Criminal Code*. The Court's designation as Saskatchewan's "court of original jurisdiction" in section 3-1 of the Act does not modify the scope of those appeal rights.

C. STANDARD OF REVIEW, AND REMEDIES

The standard of review is unknown

[93] Given that this appeal is brought pursuant to section 813 of the *Criminal Code*, the powers of an appeal court as found in section 686 of the *Criminal Code* are applicable to these proceedings. Section 686(1)(a) states the appeal court may allow an appeal "***against a conviction*** or against a verdict that the appellant is unfit to stand trial or not criminally responsible" where:

686(1)(a) [...]

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground [if] there was a miscarriage of justice[.]

[94] This, as always, is augmented by the "curative *provisio*" in section 686(1)(b)(iii) of the *Criminal Code*.

[95] Section 686(1) is specific to appeals "against convictions," which has not occurred here. The section does not apply.

⁹² *The King's Bench Act*, SS 2023, c 28.

⁹³ Appellant's Memorandum of Argument, at para 13.

[96] Had the Appellant been convicted, her arguments on the *Code* would map onto section 686(1)(ii). Whether the *Code* (or *Charter*) has been unjustifiably infringed by a measure is a question of law, though it may be informed by related findings of fact. The standard of review on questions of law is generally correctness.⁹⁴

[97] Again, had the Appellant been convicted, her arguments on the adjournment would map onto subsections 686(1)(ii) and (iii).⁹⁵ The standard of review differs slightly depending on the argument advanced, but in either case the burden is high. To establish that the decision should result in the conviction being set aside under section 686(1)(iii), an appellant must establish there was in fact a miscarriage of justice⁹⁶ or an irregularity “severe enough to render the trial unfair or to create the appearance of unfairness.”⁹⁷ If approached as a potential error of law under section 686(1)(a)(ii), the standard of review “is that of a discretionary decision of a trial judge,” which is exceptionally high.⁹⁸

The remedies upon review are unknown

[98] The Appellant, in her notice of appeal, asks for the following orders:

16. That the decision to dismiss the second application be overturned and the application allowed.

17. That the decision to refuse to revisit or otherwise reconsider the first application be overturned and the application allowed.

[99] In her memorandum of argument, the Appellant also requests an order for “public interest standing” and an order “striking” portions of the PHO as “inoperative,” given select provisions of the *Code*.⁹⁹

⁹⁴ *R v Helm*, 2011 SKQB 32, 368 Sask R 115.

⁹⁵ *R v Wesaquate*, 2022 SKCA 101 at paras 82 to 83, 418 CCC (3d) 225 [*Wesaquate*].

⁹⁶ *R v Hayter*, 2018 SKCA 65 at para 15, 365 CCC (3d) 413 [*Hayter*].

⁹⁷ *R v Khan*, 2001 SCC 86 at para 69, [2001] 3 SCR 823. See also *Wesaquate*, at para 76.

⁹⁸ *Hayter*, at para 15. *R v Regan*, 2002 SCC 12, [2002] 1 SCR 297 at para 17, cited in *Ochapawace*, at para 35.

⁹⁹ Memorandum of Argument, paras 108 and 109.

[100] The sum of these requests is not clear. But if the Court wished to grant the appeal, assuming subsection 686(1) was applicable, this Court would be limited to the orders described in section 686(2) of the *Criminal Code*:

686 [...] (2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall ***quash the conviction*** and

(a) direct a judgment or verdict of acquittal to be entered; or

(b) order a new trial. [emphasis added]

[101] None of the Appellant's proposed relief fits within section 686(2) of the *Criminal Code*. Perhaps most importantly, there is no conviction for this Court to quash. The Appellant was already acquitted at trial, which is the highest, best result she could achieve on appeal. Furthermore, section 686(2) of the *Criminal Code* does not permit the Court to substitute its opinions for the January 18, 2023 (*Hagel*) and April 20, 2023 (*Knoll*) decisions: the *Code* applications would have to be reheard in the course of a wholly new trial.¹⁰⁰ And the best result the Appellant could achieve on that new trial is an acquittal, which she has already obtained.

D. THE APPEAL IS WITHOUT MERIT

[102] Given the forgoing, the Attorney General makes only brief submissions on the merits of the underlying appeal. Fundamentally, the Appellant makes two arguments on appeal. ***First***, that the trial judge erred by insufficiently assisting her at the January 18, 2023 hearing and, by extension, by refusing to reopen the result of the January 18, 2023 hearing. ***Second***, that the PHO was invalid due to a conflict with the *Code*.

¹⁰⁰ See *R v Labadie*, 2011 ONCA 227 at paras 34 – 35 105 OR (3d) 98. Had this appeal been brought under section 830, the Court would have the power to remit the matter to the trial court for continuation, *per* section 834(1)(b). This is probably a holdover from the practice of appeals by way of stated case: see *R v Wilcox*, 2001 NSCA 45 at paras 127 to 129, 192 NSR (2d) 159.

The trial judge handled the January 18, 2023 hearing appropriately

- [103] As discussed above, this matter was one of several closely related matters arising from pandemic-era public health charges. These matters involved large trials with multiple co-defendants, often involving multiple defense counsel and Crown counsel at once and multiple self-represented accused. Scheduling and management required close attention.
- [104] Prior to November 1, 2022, the Appellant was represented by counsel, and no concerns are raised about the adequacy of that representation.
- [105] Only after November 1, 2022, was the Appellant notionally self-represented. At various times, the Appellant attempted to impose procedural requirements onto the trial judge on the basis that she was self-represented, *e.g.* by refusing to make arguments orally or to answer questions posed by the trial judge,¹⁰¹ asserting a right of reply to the trial judge’s decision,¹⁰² attempting to record court proceedings,¹⁰³ and requesting extra written submissions after the completion of hearings.¹⁰⁴ It soon became clear that these procedures were intended facilitate the participation of a non-lawyer ghost-writer, who assisted with drafting the Appellant’s materials in whole or part.¹⁰⁵
- [106] On December 2, 2022 the Appellant indicated that she wished to proffer a “notice to dismiss” under non-*Charter* instruments, and wanted extra time to prepare.¹⁰⁶ The Court agreed, and set the matter into January for that purpose, rather than setting the matter into December.¹⁰⁷ The Appellant was content with that schedule.¹⁰⁸ There was no confusion or

¹⁰¹ Transcript (March 20, 2023) at T3, line 7; T4, lines 3 to 41; T5, lines 20 to 23.

¹⁰² Transcript (March 20, 2023) at T3, lines 29 to 38.

¹⁰³ Transcript (March 23, 2023) at T14, line 14 to T15, line 37.

¹⁰⁴ This request was accommodated: Transcript (March 23, 2023) at T48, line 29 to T49, line 40.

¹⁰⁵ One “Chris Weisdorf,” apparently from Ontario. Transcript (March 20, 2023) at T17, line 23 to T19, line 28.

¹⁰⁶ Transcript (December 2, 2022) at T73, lines 17 to 24 [**Appendix B**].

¹⁰⁷ Transcript (December 2, 2022) at T78, lines 14 to 19 [**Appendix B**].

¹⁰⁸ Transcript (December 2, 2022) at T78, line 23 and T79, lines 3 to 4 [**Appendix B**].

uncertainty about the purpose of the January 18, 2023 hearing, which was to be a hearing on the assortment of non-*Charter* arguments:

THE COURT: Yes. I think we should reserve the full day of the 18th of January for argument on that. The reason I say that is while you all may be making a similar argument, you may want to make it an argument yourself, you know, each in your own way. And I don't want to restrict that by saying I'm pointing at my watch saying your time is up, that's not a fair hearing. So, I want you to have the time you need.

So, we'll make that then on January 18th starting at 9:30, and that'll be in number 10, and we'll call that the applicants' arguments on the *Canadian Bill of Rights*, *Saskatchewan Bill of Rights*, and the Human Rights Code.

And that'll involve you, Mr. Seitz; you, Ms. Knoll, you, Ms. Apodaca once you get your notice in on that; and then I believe Ms. Lavoie, which we'll give her notice of that as well. And if there is any other individual who gives notices of this type of argument then we'll make sure that that is the day for that type of argument, okay?¹⁰⁹

[107] In advance of or at the January 18, 2023 hearing, the Appellant filed several documents, including affidavits, a notice of application, and a statement of legal argument on each of her two tickets.¹¹⁰ The Attorney General also filed a brief of law, in accordance with a January 16, 2023 filing deadline given by the Court.¹¹¹

[108] The hearing proceeded uneventfully. At no point on January 18, 2023 did the Appellant request more time to prepare for the hearing, express confusion at the purpose of the hearing, or request more time to submit materials. There was no obligation for the Attorney General to put any argument in writing prior to the January 18, 2023 hearing, and doing so was not prejudicial to the Appellant.

[109] The Appellant was free to make whatever arguments she wished, and she did so. It is unclear what further guidance the Court could have provided to her. Any self-represented

¹⁰⁹ Transcript (December 2, 2022) at T85, line 29 to T86, line 3 [**Appendix B**].

¹¹⁰ *Knoll*, at para 4. The Appellant also had a ticket related to masking, which is not before the court on appeal.

¹¹¹ *Knoll*, at paras 14 to 15.

accused person in any case would theoretically benefit from more time to prepare, or from external assistance. This fact alone does not render a hearing unfair.

[110] The Appellant is entitled to a fair trial, not “the most favourable procedure imaginable.”¹¹² And fairness is to be considered from the perspective of the criminal justice system at large, not the accused person’s subjective perspective.¹¹³ In the Attorney General’s submission, the right to answer and defence does not require a specific right to respond to legal arguments in writing, nor require the judge to proffer adjournments for this purpose *sua sponte*. This is consistent with the Supreme Court decision in *R v Rose*,¹¹⁴ where L’Heureux-Dube J. wrote, about *Criminal Code* provisions that required defendants to make closing submissions in advance of Crown submissions:

[61] Nor can it be said that the provisions violate the right to make full answer and defence. The appellant alleges that he has a constitutional right to respond to the interpretation of the evidence put forward by the Crown. [...] While it may be more difficult to formulate a defence to the Crown’s inferences drawn from the evidence without knowing in advance what will be said, this knowledge is not fundamental to the ability to defend oneself effectively against a criminal charge which must be proven, on the facts, beyond a reasonable doubt. Though the “spin” on the evidence may be unexpected, and a closing address may be easier to formulate if counsel knows what the other side will say in its address, it is not fundamental to trial fairness that the defence’s address come after the Crown’s in the same way that it is essential that the defence’s evidence be introduced after the prosecution has put forward its evidence and opening arguments.

[62] Were the right to full answer and defence to include the right to “answer” everything the Crown said, the defence would have the constitutional right to have the Crown’s jury address take place before the defence introduced any evidence. Such a change is not constitutionally necessary nor desirable. [...] ¹¹⁵

¹¹² *R v Lyons*, [1987] 2 SCR 309 at para 88; *J.J.*, at para 125.

¹¹³ *J.J.*, at para 121.

¹¹⁴ *R v Rose*, [1998] 3 SCR 262 [*Rose*].

¹¹⁵ *Rose*, at paras 61 to 62.

[111] The January 18, 2023 hearing was procedurally fair. Certainly, it was not so unfair as to amount to a *Charter* breach or to require appellate intervention.

The PHO was compliant with the Code

[112] The Appellant's second argument is that the trial judge erred in dismissing her challenge to the PHO based on the *Code*. She asks the Court to find a conflict, and to declare the PHO inoperative based on this conflict. Even if this Court has jurisdiction to do so, it should not.

[113] The Court of Appeal has concluded that the same PHO is consistent with the *Code*'s sister guarantees in the *Charter*, and this conclusion is determinative.

[114] Fundamentally, the Appellant misunderstands the *Code*, and the nature of statutory "Bills of Rights" generally. Sections 4 to 6 of the *Code* read:

Right to freedom of conscience

4. Every person and every class of persons has the right to freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship.

Right to free expression

5. Every person and every class of persons has the right to freedom of expression through all means of communication, including the arts, speech, the press or radio, television or any other broadcasting device.

Right to free association

6. Every person and every class of persons has the right to peaceable assembly with others and to form with others associations of any character under the law.

[115] These are substantially similar to sections 2(a), (b), and (c) of the *Charter*, which were the subject of the *Grandel* decisions. Section 52 of the *Code* is a supremacy provision, which provides that "[every] law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act."

- [116] The argument proffered in the court below, though not explained in detail in the recent Memorandum of Argument, is that the Bill of Rights within the *Code* does not have an equivalent to section 1 of the *Charter*, or an easy equivalent to the *Oakes*¹¹⁶ test. In the absence of section 1, it is asserted that the *Code* does not permit *any* justifications. On this theory, once a right protected by the *Code* has been impeded for *any* reason or to *any* extent, the measure is inoperative, even if the infringement is slight or the justification profound.
- [117] This is not the law, as very recently confirmed by this Court in *R v Repo*¹¹⁷ and by the Alberta Court of King’s Bench in the detailed and lengthy decision in *Ingram*.
- [118] The precursor to the Bill of Rights in the *Code* was first enacted in 1947.¹¹⁸ At the time, it was the first Bill of Rights enacted in the Commonwealth since 1688.¹¹⁹ In 1979, *The Saskatchewan Bill of Rights Act, 1947* was combined with other human rights instruments,¹²⁰ and now forms Part 2 of the *Code*.
- [119] There are very few statutory Bills of Rights remaining in Canada, and outside of Quebec’s unique system, only Saskatchewan, Alberta¹²¹ and the federal government¹²² maintain them. They have become largely anachronistic, in the era of *Charter*-based judicial review.
- [120] The paucity of jurisprudence on these statutes and the primacy of the *Charter* post-1982 has led the Courts to treat Bills of Rights with the same general approach as the *Charter*,

¹¹⁶ [R v Oakes](#), [1986] 1 SCR 103.

¹¹⁷ [R v Repo](#), 2024 SKKB 46. An appeal has been filed but not yet argued.

¹¹⁸ [The Saskatchewan Bill of Rights Act, 1947](#), SS 1947, c 35.

¹¹⁹ Thomson Irvine, “[Saskatchewan, the Patriation of the Constitution and the Enactment of the Charter: Looking Back and Looking Forward](#)” (2015) 4:2 Can J Hum Rts 261 at 264.

¹²⁰ [The Saskatchewan Human Rights Code](#), SS 1979, c S-24.1.

¹²¹ [Alberta Bill of Rights](#), RSA 2000, c A-14.

¹²² [Canadian Bill of Rights](#), SC 1960, c 44.

both in Saskatchewan,¹²³ Alberta,¹²⁴ and federally.¹²⁵ This is consistent with Supreme Court of Canada direction that human rights-protecting instruments should be read harmoniously and consistently, where possible.¹²⁶ This is also consistent with pre-*Charter* jurisprudence in Saskatchewan, where internal limits were readily inferred.¹²⁷

[121] A recent spate of COVID-19 related jurisprudence confirms this principle. In *Lewis v Alberta Health Services*, a person waiting for organ transplant refused to receive a COVID-19 vaccination. This rendered her ineligible for that transplant, given the likelihood that COVID-19 infection would compromise the transplant and waste the organ. The Court dismissed a *Charter* argument that policy, and turned to the *Alberta Bill of Rights*:

[46] Since the advent of the *Charter*, Courts have looked to the *Charter* to determine if constitutionally protected rights are affected as the *Charter* can be interpreted more generously than Provincial *Bills of Rights*. There is no need to consider the claim under the *Alberta Bill of Rights* because if the *Charter* claims fail, her claim under the *Alberta Bill of Rights* will necessarily fail as well.¹²⁸

[122] In the lengthy case of *Ingram v Alberta*, a wide-ranging set of *Charter* and *Alberta Bill of Rights* challenges were levelled against Alberta's COVID-19 related public health measures. The Court was directly confronted with the question of whether the *Alberta Bill*

¹²³ *Geller v Reimer* (1994), 21 CHRR 156, 1994 CanLII 10759 (SK HRT); *Community Awareness Project v Saskatoon Downtown Business Improvement Dist.*, 1995 CanLII 10836 (SK HRT).

¹²⁴ *Goddard v Day*, 2000 ABQB 942 at para 60, [2001] 5 WWR 651; *Peter v Public Health Appeal Board of Alberta*, 2019 ABQB 989 at para 86; *Lewis v Alberta Health Services*, 2023 ABCA 123, leave to appeal to SCC refused, June 8, 2023 (40549).

¹²⁵ *Robertson and Rosetanni v The Queen*, [1963] SCR 651; *The Queen v Beauregard*, [1986] 2 SCR 56; *R v Burnshine*, [1975] 1 SCR 693.

¹²⁶ *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571 at para 6. See also *Ontario (Human Rights Commission) v Ontario*, 1994 CanLII 1590 (ON CA).

¹²⁷ *R v Naish*, [1950] 1 WWR 987 (Sask Prov Ct). A bylaw prohibiting religious handbills was invalid, provided the person distributing the handbills did so in an “orderly, quiet and peaceful manner and the contents of such handbills do not contain any unlawful material.”

¹²⁸ *Lewis*, at para 46.

of Rights contained an “internal limit” that mimicked section 1 of the *Charter*.¹²⁹ In a detailed analysis,¹³⁰ the Court found that these internal limits must exist, for three reasons:

- a) analogous bills of rights, such as the *Canadian Bill of Rights*, have internal limits;
- b) the modern approach to statutory interpretation rejects interpretations that lead to absurd consequences or that violate constitutional norms; and
- c) duplicative provisions must be subject to a *Charter* analysis.¹³¹

These limits are internal to the right itself, rather than “external” in the manner of section 1 of the *Charter*, but are no less potent. If anything, internal limits found in the *Code* and other statutory Bills of Rights are likely to impose a *less strict* burden on the Government than the express proportionality test found in *Oakes*.¹³²

[123] This was recently affirmed in *Repo*, a decision of this Court. In *Repo*, Scherman J. rejected the argument that the absence of section 1 in the *Code* meant that *Grandel* was not binding on the issue of the *Code* compliance of the PHOs.¹³³ He noted that even the U.S. Constitution contains internal limits on enumerated rights—famously, yelling “fire” in a crowded theatre can be prohibited—and so too must the *Code*.¹³⁴ The “literal and inflexible” interpretation implicitly advanced by the Appellant is simply “impossible,” and the *Code* must be interpreted “purposively.”¹³⁵

[124] With this in mind, the Court of Appeal’s decision in *Grandel* is determinative of the *Code* arguments. In *Grandel*, the Court found that the capacity limits on *Charter*-protected protests were reasonable and demonstrably justified under section 1 of the *Charter*, despite

¹²⁹ *Ingram*, at para 465.

¹³⁰ *Ingram*, at paras 469 to 509.

¹³¹ *Ingram*, at para 469

¹³² See *Ingram*, paras 485 to 487.

¹³³ *Repo*, at para 23.

¹³⁴ *Repo*, at paras 30 to 31.

¹³⁵ *Repo*, at para 34.

the limitation on *Charter* rights. The same is true of the *Code*, which demands no higher a justification than the *Charter*.

[125] On the merits, this appeal can be dismissed. The PHO was consistent with the *Code*.

PART VI: RELIEF***This appeal should be quashed or dismissed***

[126] Given the forgoing, the Attorney General submits that this appeal should be quashed. The purported appeal is without jurisdiction.

[127] The PHO was consistent with the *Charter*. It was also consistent with the *Code*. If the appeal is not quashed, it should be dismissed on the merits.

Costs are available

[128] The Attorney General notes that costs against defendants are available in summary conviction appeals, pursuant to section 826 of the *Criminal Code*.

[129] Costs against defendants are rare but have been used in the past to sanction unorthodox legal arguments made by “agents” acting in summary proceedings.¹³⁶

[130] The Attorney General makes no specific request for costs, but it is within the Court’s discretion to award costs in the case if it believes it is “just and reasonable.”

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 11th day of February, 2025.



Theodore J. C. Litowski
Crown Counsel

¹³⁶ [R v Reddick](#), 2002 SKCA 89, 54 WCB (2d) 646.

This document was delivered by:

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Email: theodore.litowski@gov.sk.ca

PART VII: AUTHORITIES

† The footnote where the authority appears should identify the section or paragraph relied on for each authority. The footnote, or the text which refers to that footnote, will identify the legal principle relied on for each authority. These cross-references are provided in compliance with Rule 13-38.1(1).

STATUTES AND REGULATIONS

Case	Footnote where authority appears†
<i>Alberta Bill of Rights</i> , RSA 2000, c A-14.	121
<i>The Animal Protection Act, 1999</i> , SS 1999, c A-21.1.	56
<i>The Constitutional Questions Amendment Act, 2023</i> , SS 2023, c 3.	91
<i>Canadian Bill of Rights</i> , SC 1960, c 44.	122
<i>Criminal Code</i> , RSC 1985, c C-46.	<i>passim</i>
<i>The Disease Control (Vaccination Programs) Amendment Regulations, 2021</i> , Sask Reg 118/2021.	11
<i>The Disease Control Regulations</i> , RRS c P-37 Reg 11.	11
<i>The Emergency Planning Act</i> , SS 1989-90, c E-8.1.	8
<i>Declaration of a State of Emergency Throughout the Province of Saskatchewan to Address the COVID-19 Public Health Emergency</i> , OC 465/2021 (<i>The Emergency Planning Act</i>).	9
<i>Renewal of Declaration of a State of Emergency Throughout the Province of Saskatchewan to Address the COVID-19 Public Health Emergency and Terminate Declaration of a State of Emergency</i> , OC 376/2021.	9
<i>Renewal of Declaration of a State of Emergency Throughout the Province of Saskatchewan to Address the COVID-19 Public Health Emergency</i> , OC 219/2021.	9
<i>The Fisheries Act (Saskatchewan), 1994</i> , SS 1994, c F-16.1.	48
<i>The King's Bench Act</i> , SS 2023, c 28.	92

Case	Footnote where authority appears†
<i>The Legislation Act</i> , SS 2019, c L-10.2.	12
<i>The Public Health Act, 1994</i> , SS 1994, c P-37.1.	1
<i>Provincial Order</i> (May 6, 2021).	15, 16
<i>Provincial Order</i> (May 13, 2021).	17
<i>The Queen v Beauregard</i> , [1986] 2 SCR 56.	125
<i>The Saskatchewan Bill of Rights Act, 1947</i> , SS 1947, c 35.	118
<i>The Saskatchewan Human Rights Code, 2018</i> , SS 2018, c S-24.2.	<i>passim</i>
<i>The Saskatchewan Human Rights Code</i> , SS 1979, c S-24.1.	120
<i>The Summary Offences Procedure Act, 1990</i> , SS 1990-91, c S-63.1.	<i>passim</i>
<i>The Traffic Safety Act</i> , SS 2004, c T-18.1.	53

JURISPRUDENCE

Instrument	Footnote where authority appears†
<i>Beaudoin v British Columbia</i> , 2021 BCSC 512, [2021] 10 WWR 501 aff'd <i>Beaudoin v British Columbia (Attorney General)</i> , 2022 BCCA 427 leave to appeal to SCC refused 40622 (August 10, 2023)	6
<i>Bessette v British Columbia (Attorney General)</i> , 2019 SCC 31, [2019] 2 SCR 535.	45
<i>Borowski v Canada (Attorney General)</i> , [1989] 1 SCR 342.	45
<i>Community Awareness Project v Saskatoon Downtown Business Improvement Dist.</i> , 1995 CanLII 10836 (SK HRT).	123
<i>Gateway Bible Baptist Church. v Manitoba</i> , 2021 MBQB 219, 497 CRR (2d) 164, aff'd <i>Gateway Bible Baptist Church v Manitoba</i> , 2023 MBCA 56, leave to appeal to SCC refused 40903 (March 14, 2024).	6
<i>Geller v Reimer</i> (1994), 21 CHRR 156, 1994 CanLII 10759 (SK HRT).	123

Instrument	Footnote where authority appears†
<i>Goddard v Day</i> , 2000 ABQB 942, [2001] 5 WWR 651.	124
<i>Gould v Yukon Order of Pioneers</i> , [1996] 1 SCR 571.	126
<i>Grandel v Saskatchewan</i> , 2022 SKKB 209, appeal dismissed <i>Grandel v Government of Saskatchewan</i> , 2024 SKCA 53, [2024] 10 WWR 179, leave to appeal to SCC sought 41390 .	5, 6, 7
<i>Ingram v Alberta (Chief Medical Officer of Health)</i> , 2023 ABKB 453.	6, 129, 132
<i>Kourtessis v M.N.R.</i> , [1993] 2 SCR 53.	42
<i>Lewis v Alberta Health Services</i> , 2023 ABCA 123, leave to appeal to SCC refused, June 8, 2023 (40549).	124, 128
<i>Mackay v Manitoba</i> , [1989] 2 SCR 357.	41
<i>Mills v The Queen</i> , [1986] 1 SCR 863.	67, 68, 77
<i>Nadeau v Saskatchewan</i> , 2008 SKQB 330, 325 Sask R 246.	51, 80
<i>Ochapowace First Nation v Canada (National Revenue)</i> , 2007 SKCA 88, [2007] 9 WWR 226.	42, 98
<i>Ontario (Human Rights Commission) v Ontario</i> , 1994 CanLII 1590 (ON CA).	126
<i>Ontario v Trinity Bible Chapel</i> , 2022 ONSC 1344, aff'd <i>Ontario (Attorney General) v Trinity Bible Chapel</i> , 2023 ONCA 134, leave to appeal to SCC refused 40711 (August 10, 2023).	6
<i>Payne v Saskatoon Housing Authority</i> , 2024 SKKB 92.	42
<i>Peter v Public Health Appeal Board of Alberta</i> , 2019 ABQB 989.	124
<i>Poffenroth Agri Ltd. v Brown</i> , 2020 SKCA 68, [2021] 2 WWR 302.	78
<i>Québec (Procureure générale) c. Guérin</i> , 2017 SCC 42, 412 DLR (4th) 103.	85
<i>R v Adams</i> , 2001 ABQB 366, 290 AR 316.	58, 66
<i>R v Agecoutay</i> , 2009 SKQB 220, 335 Sask R 246.	52
<i>R v Apodaca</i> , 2023 SKPC 37.	18, 19, 20

Instrument	Footnote where authority appears†
<i>R v Awashish</i> , 2018 SCC 45, [2018] 3 SCR 87.	73, 75
<i>R v Baraniski</i> , 2022 SKPC 33.	6
<i>R v Bissonnette</i> , 2022 SCC 23, 469 DLR (4th) 387.	88
<i>R v Boutilier</i> , 2016 BCCA 24, 332 CCC (3d) 315.	83
<i>R v Burnshine</i> , [1975] 1 SCR 693.	125
<i>R v Carpenter</i> , 2005 SKQB 432, 272 Sask R 31.	55, 79
<i>R v DeSousa</i> , [1992] 2 SCR 944.	74
<i>R v Dougan</i> , 2016 BCSC 1815.	61
<i>R v Downes</i> , 2023 SCC 6, 479 DLR (4th) 579.	41
<i>R v Ferrari</i> , 2002 SKCA 15, 213 Sask R 288.	71
<i>R v Friesen</i> , 2023 SKPC 20.	14
<i>R v Friesen</i> , 2023 SKPC 9.	14
<i>R v Friesen</i> , 2024 SKKB 20.	14
<i>R v Frontier Photos Ltd.</i> (1986), 52 Sask R 310 (SK KB).	22, 57
<i>R v Grandel</i> , 2022 SKPC 48.	22
<i>R v Haevischer</i> , 2023 SCC 11, 480 DLR (4th) 577.	23
<i>R v Hayter</i> , 2018 SKCA 65, 365 CCC (3d) 413.	96, 98
<i>R v Helm</i> , 2011 SKQB 32, 368 Sask R 115.	92
<i>R v Ironeagle</i> , 2000 SKQB 553, 202 Sask R 268.	54, 81, 84
<i>R v J.J.</i> , 2022 SCC 28, 471 DLR (4th) 577.	73, 112, 113
<i>R v Jobb</i> , 2001 SKQB 74, 202 Sask R 194.	57
<i>R v Keough</i> , 2022 SKPC 23.	6
<i>R v Khan</i> , 2001 SCC 86, [2001] 3 SCR 823.	97

Instrument	Footnote where authority appears†
<i>R v Knoll</i> , 2023 SKPC 29.	21, 22, 24, 34, 37, 38, 110, 111
<i>R v Kocsis</i> , 2010 SKQB 311, 364 Sask R 19.	44
<i>R v Labadie</i> , 2011 ONCA 227, 105 OR (3d) 98.	100
<i>R v Laviolette</i> , 2005 SKQB 61, 260 Sask R 121.	47, 49, 50
<i>R v Leitner</i> (1998), 173 Sask R 269.	57
<i>R v Lloyd</i> , 2016 SCC 13, [2016] 1 SCR 130.	82
<i>R v Lyons</i> , [1987] 2 SCR 309.	112
<i>R v Mackie</i> , 2004 SKQB 202, 248 Sask R 247.	40, 41
<i>R v McKnight</i> , 2012 SKQB 482.	44
<i>R v Meltzer</i> , [1989] 1 SCR 1764.	42, 69, 70
<i>R v Mohammed</i> , 2001 OJ No 2376, 50 WCB (2d) 254 (Ont. S.C.J.) Appendix C.	62
<i>R v Naish</i> , [1950] 1 WWR 987 (Sask Prov Ct).	127
<i>R v Oakes</i> , [1986] 1 SCR 103.	116
<i>R v Oickle</i> , 1994 CanLII 4234 (NS SC).	59
<i>R v Pierone</i> , 2018 SKCA 30, 361 CCC (3d) 217.	44
<i>R v Pierce</i> , 2007 CanLII 7408 (ON SC).	84
<i>R v Reddick</i> , 2002 SKCA 89, 54 WCB (2d) 646.	136
<i>R v Regan</i> , 2002 SCC 12, [2002] 1 SCR 297.	98
<i>R v Repo</i> , 2024 SKKB 46.	117, 133, 134, 135
<i>R v Rose</i> , [1998] 3 SCR 262.	114, 115
<i>R v Schwartzberger</i> , 2014 SKQB 378.	44

Instrument	Footnote where authority appears†
<i>R v Sears</i> , 2014 SKCA 72.	71
<i>R v Shorebird Investment Ltd.</i> , 2022 SKPC 41.	6
<i>R v Smith</i> , 2004 SCC 14, [2004] 1 SCR 385.	86
<i>R v Sullivan</i> , 2022 SCC 19, [2022] 1 SCR 460.	46
<i>R v Sutherland</i> (2004), 182 Man R (2d) 85.	60
<i>R v Verma</i> , 2016 BCCA 307, 341 CCC (3d) 78.	61
<i>R v Vukelich</i> (1996), 108 CCC (3d) 193, 37 CRR (2d) 237.	23
<i>R v Watson</i> , 2007 BCSC 1707.	63
<i>R v Wesaquate</i> , 2022 SKCA 101, 418 CCC (3d) 225.	95, 97
<i>R v Wigman</i> , [1987] 1 SCR 246.	88
<i>R v Wilcox</i> , 2001 NSCA 45, 192 NSR (2d) 159.	100
<i>R v Wong</i> , 2023 SKPC 7, 522 CRR (2d) 1.	14
<i>R v Yang</i> , 2017 BCCA 349.	61
<i>R v Yates</i> , 2023 SKCA 47.	71
<i>Robertson and Rosetanni v The Queen</i> , [1963] SCR 651.	125
<i>Spencer v Canada (Health)</i> , 2021 FC 621, aff'd <i>Spencer v Canada (Health)</i> , 2023 FCA 8.	6

COMMENTARY AND ARTICLES

Document	Footnote where authority appears†
Irvine, Thomson. “ Saskatchewan, the Patriation of the Constitution and the Enactment of the Charter: Looking Back and Looking Forward ” (2015) 4:2 Can J Hum Rts 261.	119

Document	Footnote where authority appears†
Sopinka, John. Gelowitz, Mark A. & Rankin, W. David. <i>Sopinka, Gelowitz and Rankin on the Conduct of an Appeal</i> (5th ed) (LexisNexis Canada, 2022) Appendix D	64, 65

ATTN: TRAFFIC

Attn: Regina Prosecutions Office

Fax: 306-787-8168

Re: Charter Challenge Withdrawal & Change in Representation

Court File/Ticket Number: 85492794

Location: Regina, SK

Defendant: Erinn Knoll

Please note, I, Erinn Knoll, effective October 7th, 2022 will no longer be proceeding with a Charter Challenge under the legal representation of Luke Coupal in the case pertaining to ticket number 85492794.

I have withdrawn the Charter Challenge with both the Attorney General of Canada and the Attorney General of Saskatchewan, as I will now be proceeding as a self represented woman, whose rights were violated, of which those rights are protected under both the Canadian Bill of Rights and the Saskatchewan Bill of Rights via the Human Rights Code.

Please direct all further correspondence in regards to this matter to myself.

Regards,

Erinn Knoll

306-541-7074

1346 McVeety Drive

Regina, SK S4N 7C8

eknoll1976@yahoo.ca

IN THE PROVINCIAL COURT OF SASKATCHEWAN
REGINA, SASKATCHEWAN

BETWEEN

HIS MAJESTY THE KING

and

MARK FRIESEN, JASMIN RAYANN GRANDEL,
TAMARA LEE LAVOIE, and JONATHAN J. WIPF

Accused

TRIAL
Volume 1
(Pages T1 - T145)

November 10, December 2, 2022
January 3, 4, 19, 27, February 13, 2023
Regina, Saskatchewan

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1 December 2, 2022 Afternoon Session
2
3 The Honourable Judge The Provincial Court of Saskatchewan
4 M. Hinds
5
6 B. Carter For the Crown
7 E. Anderson (remote appearance) For the Accused Friesen
8 E. Anderson (remote appearance) For the Accused Grandel
9 E. Anderson (remote appearance) For the Accused Hagel
10 (No Appearance) For the Accused Lavoie
11 E. Anderson (remote appearance) For the Accused Wintringham
12 N. Wernikowski For the Constitutional Law Branch
13 K. Brown Court Clerk

14
15

16 **Discussion**

17

18 THE COURT: All right. Good afternoon.

19

20 MR. CARTER: Good afternoon, Your Honour.

21

22 **Ruling (Application for Summary Dismissal)**

23

24 THE COURT: Now, today was the date that I reserved to
25 provide my decision on the Attorney General of Saskatchewan's application for
26 summary dismissal of certain accused's notice of constitutional questions relating to
27 outdoor gathering restrictions based on 2(b) Freedom of Expression, 2(c) Peaceful
28 Assembly, and 2(d) Freedom of Association of the *Charter*.

29

30 And as counsel are aware, I have provided that decision in writing. And,
31 Ms. Anderson, you have a copy of that decision?

32

33 MS. ANDERSON: Yes, Your Honour, I do.

34

35 THE COURT: All right. That's fine. Now, if there are any
36 of the defendants present, if they want a copy of that decision, they are welcome to
37 it, as is the media or any other interested party. I'll just briefly summarize or read
38 brief parts of the written decision for the record.

39

40 The actual decision, of course, is confined to the corners of the decision itself,
41 anything I say is really just summarizing for the purposes of court today, but the

1 decision as a whole is encompassed within the four corners of the written decision.

2
3 So, Jasmin Grandel, Mark Friesen, Jonathon Wipf, Maxine Bernier, Brenda Kriese,
4 Richard Brent Wintringham, John Slastukin, Chris Saccocia, Tanya Apodaca,
5 Gerald Ferguson, Christina Hagel, Conrad Goodsir, Cindy Gall, and Edward
6 Palchinski are charged with various offences contrary to public health orders issued
7 pursuant to *The Public Health Act* 1994.

8
9 And a large number of those offences involved alleged violations of restrictions on
10 outdoor gatherings imposed in 2020 and 2021 by public health orders. And I have
11 set out the particulars of those offences regarding those individuals in Appendix 1
12 of my decision.

13
14 Now, between October 18th, 2021 and August 2nd, 2022 several notice of
15 constitutional questions were filed with this court by the accuseds alleging that
16 certain outdoor gathering limits were contrary to Sections 2(b), (c), and (d) of the
17 *Charter*.

18
19 And at a case management conference on April 22nd, 2022, it was agreed that all of
20 the aforementioned notices of constitutional questions on the *Charter* would
21 proceed by a way of a combined *Charter voir dire*, which is currently scheduled for
22 April 16th through 20th, 2023.

23
24 In a separate legal proceeding on April 7th, 2021, counsel on behalf of Jasmin
25 Grandel and Darrell Mills filed a notice of application in the Court of Queen's
26 Bench. And these applicants alleged that the 10-person gathering limits then
27 enforced, pursuant to public health orders, were contrary to Sections 2(b), (c), and
28 (d) of the *Charter*. And in addition, they argued that any limits on those *Charter*
29 rights could not be justified under Section 1 of the *Charter*.

30
31 That application, as I've noted in paragraph 9 of my decision, was argued before
32 Justice Konkin of the Court of Queen's Bench on June 29th, 2022. And on
33 September 20th, 2022, Justice Konkin provided his decision in *Grandel and Mills*
34 versus Saskatchewan and Dr. Saqib Shahab and he dismissed the application.

35
36 And he concluded, at paragraph 117 as follows. first question he poses is: "Did the
37 public health orders violate Section 2(b) of the *Charter*"? "Yes", was his answer.
38 Section 2: "Did the public health orders violate 2(c) and 2(d) of the *Charter*"? And
39 he stated that "2(c) and (d) are subsumed into the analysis of subsection 2". And
40 finally, he poses the question: (as read)

41

1 Has Saskatchewan provided sufficient evidence to
2 demonstrably justify the public health orders under Section
3 1 of the *Charter*?

4
5 To which Justice Konkin stated yes. And, of course, an appeal of that decision was
6 filed with the Saskatchewan Court of Appeal on October 20th, 2022, but still
7 remains good law to this date, subject to whatever outcome of that appeal.

8
9 As a result of the decision in *Grandel and Mills*, on October 21st, 2022, the Attorney
10 General of Saskatchewan provided a notice of intention asking this Court to
11 summarily dismiss the portions of the notice of constitutional questions relating to
12 outdoor gathering restrictions based on 2(b), (c), and (d) of the *Charter*.

13
14 Now, in my analysis, I mean, the sole issue really before this Court is whether this
15 Court is bound by the decision in *Grandel and Mills*, such if the *Charter* applications
16 should be summarily dismissed.

17
18 And my first part of my analysis deals with whether this Court has the jurisdiction
19 to dismiss *Charter* applications summarily. And my conclusion, based on the
20 leading case on preliminary screening of *Charter* applications in *Bougalich*, a
21 decision of the British Columbia Court of Appeal and *Wesaquate*, which recently
22 affirmed and restated the conclusions of *Bougalich*, is that indeed this Court has the
23 jurisdiction to summarily dismiss the present *Charter* challenge if it concludes it has
24 no reasonable prospect of success.

25
26 The next question I posed is whether the *Grandel* decision decided the legal question
27 in issue in this application. And I'm of the view that Justice Konkin addressed the
28 Section 2 *Charter* applications before this Court in *Grandel and Mills*.

29
30 In particular, I found that the Court in *Grandel and Mills* was asked to rule on the
31 constitutionality of the public health orders respecting restrictions and outdoor
32 gatherings which limited the outdoor gatherings to 10 persons during the period
33 December 17th, 2020 through to May 30th, 2021.

34
35 And this clearly included a consideration of the public health orders at issue in this
36 case barring one, which I have referenced in a footnote on page 6, which I think the
37 reasonings apply equally to. And then as well, *Grandel and Mills* clearly considered
38 Section 1, as I'd mentioned before.

39
40 And then, as I've said in my decision, Justice Konkin considered Section 1 after
41 there was a concession by the government that there was a breach of Section 2(b).

1 And he applied the four-part test in *R. v. Oakes*, a Supreme Court of Canada
2 decision, which would be the same test that this Court would be required to apply.

3
4 And in doing so, Justice Konkin concluded as follows at paragraph 116 of *Grandel*
5 *and Mills*:

6
7 I find that Saskatchewan's public health orders which
8 imposed outdoor gathering restrictions violated the *Charter*
9 right of freedom of expression as articulated in Section
10 2(b). I find that Saskatchewan has met its burden to
11 establish the outdoor gathering restrictions are reasonable,
12 demonstrably justifiable in a free and democratic society
13 and are therefore saved pursuant to Section 1 of the
14 *Charter*.

15
16 So, I am of the view that the legal issues decided by Justice Konkin in *Grandel and*
17 *Mills* are identical to those at issue in this application. And then I considered the
18 issue of whether *stare decisis* applies, that is particular the vertical *stare decisis*,
19 which is to stand by things decided which requires lower courts to follow the
20 precedents on the same or closely related issues from higher courts. And
21 accordingly, of course, provincial court, such as mine, are bound by authoritative
22 decisions of the Court of King's Bench.

23
24 I then go through some of the law as outlined in *R. v. Comeau* and *R. v. Sullivan* on
25 these points of *stare decisis*. And, of course, at paragraph 29, I indicate the decision
26 of *Grandel and Mills* is a constitutional ruling from a higher court on the same issues
27 before this court. (As read)

28
29 I find it is binding on this Court unless the applicant
30 establishes one of the two exceptional circumstances set out
31 in the *Bedford* decision of the Supreme Court of Canada.

32
33 And, so, in my decision, I consider, beginning at page 9, whether the *Bedford*
34 exceptions to *stare decisis* are applicable. And, as I stated in paragraph 32, (as read)

35
36 I am of the view that a new legal issue has not been raised
37 in the present case. The decision in *Grandel and Mills*
38 determined the government's public health orders which
39 imposed outdoor gathering restrictions violated the *Charter*
40 right of freedom of expression, but was saved under Section
41 1.

1
2 And these are the very same legal issues that are before this Court. And, of course,
3 there is no new *Charter* issues that have been raised. So, I am of the view that the
4 law has not undergone significant developments since the *Grandel and Mills*
5 decision occurred on September 22nd, 2022.

6
7 The next consideration is have the fundamental parameters of debate been shifted
8 by new circumstances or evidence? And in this part of my analysis, I cite quite
9 extensively the decision of the Supreme Court of Canada in *Comeau* on pages 10
10 and 11.

11
12 And at page 12, paragraph 37, I state that, (as read)

13
14 In this case, the accused applicants take the position they
15 will present new evidence at the *Charter voir dire*,
16 currently scheduled for January 16th through 20th, 2023,
17 that will fundamentally shift the parameters of the debate.
18 They plan on calling Dr. Shahbaz, an expert in public
19 health, who will testify, 1) that coercion should be the last
20 resort and only used in the most extreme circumstances,
21 and, 2) that enforcement of restrictions will only undermine
22 public confidence and public health.

23
24 Dr. Shahbaz is said to have worked 40 years in public health. The Court, however,
25 was not advised or provided of any information regarding the education, training, or
26 experience of Dr. Shahbaz.

27
28 Now, I cite then the case of a couple of decisions both in the province of Manitoba
29 and in Saskatchewan where there was similar approaches that have occurred here
30 where there is an attempt to avoid *stare decisis* by calling different evidence. And
31 I'll turn specifically to a more recent decision here in Saskatchewan, as I've read
32 from paragraph 40 on page 13.

33
34 The Attorney General of Saskatchewan made a similar application for summary
35 dismissal of eight defendants' Section 2 *Charter* challenges regarding public health
36 orders which imposed outdoor gathering restrictions before Judge Martinez of the
37 Saskatchewan Provincial Court in Outlook, Saskatchewan.

38
39 And in that matter, the defendants were charged on May 10th, 2021, with violating
40 a public health order that limited outdoor gatherings to no more than 10 people. And
41 on September 10th, 2021, counsel for one of the defendants, Ms. Brown, filed a

1 notice of constitutional question challenging the validity of the relevant public
2 health order on the basis it unjustifiably infringed her Section 2(b) and (c) *Charter*
3 rights to freedom of expression and peaceful assembly.
4

5 And then subsequently, on January 17th, counsel for seven other defendants filed a
6 notice of constitutional question alleging that the relevant public health order
7 unjustifiably infringed their Section 2(b), (c), and (d) freedoms of -- under the
8 *Charter*.
9

10 And on April 25th, 2022, a blended trial and *voir dire*, Judge Martinez heard the
11 Crown's evidence against all the defendants. The *voir dire* involving the testimony
12 of expert witnesses on the notices of constitutional question was adjourned to be
13 heard for three days in October. But, of course, on September, the decision in
14 *Grandel and Mills* took place, prompting the A.G.'s application for summary
15 dismissal of the defendant's Section 2 *Charter* challenges.
16

17 Now, on November 17th, 2022, Judge Martinez provided an oral decision on this
18 application. Unfortunately, a transcript of that proceeding is not available at this
19 time. However, I note that the proceeding was recorded. And I had an opportunity
20 to listen to it on the For The Record court recording system used by the Provincial
21 Court of Saskatchewan.
22

23 And in granting the application for summary dismissal of the defendant's Section 2
24 *Charter* challenges, Judge Martinez stated as follows, (as read)
25

26 So, the legal issue before me is the same issue that was
27 before the Court in *Grandel*. There has certainly not been
28 any significant development in the relevant law in the two
29 months since Justice Konkin released his decision. The
30 only question is whether any new evidence the defence
31 intends to proffer in this *voir dire* will fundamentally shift
32 how jurists understand the legal question in issue.
33

34 According to the defence counsel's submissions in the *voir*
35 *dire*, the defendants intend to call a second defence expert
36 in addition to the defence expert who testified in *Grandel*.
37 From what I understand, the new defence expert is one who
38 possesses expertise in epidemiology, prevention and
39 control of diseases at a population level, and in the
40 development and implementation of related public health
41 policy, something which Judge Konkin would not allow the

1 other expert to testify about because it was not within their
2 area of expertise.

3
4 However, the only evidence defence counsel identified to
5 me as being different from or at least that would add to the
6 evidence heard by the Court in *Grandel* is that the second
7 expert would testify in the realm of public health policy
8 development, design, and implementation. In that realm,
9 coercion is the last resort.

10
11 He went on to say, (as read)

12
13 Now, I don't have an affidavit from an expert, I don't have
14 a full view of what the expert might say, but the difference
15 in my view is minor and the evidence would not move the
16 goalposts in this case. In other words, I find the new or
17 perhaps, more accurately, the additional evidence that
18 defence hopes to tender in the *voir dire* before me on the
19 Section 2 issue, and whether it's justified under Section 1
20 of the *Charter* of rights and freedoms would not
21 fundamentally shift in any way how jurists understand the
22 legal question in issue.

23
24 So, for those reasons, I grant the Crown's application and I
25 am dismissing the defendant's *Charter* challenges under
26 Section 2 of the *Charter of Rights and Freedoms*.

27
28 Now, in this case, the accused's *Charter* applicants seek to elicit some different
29 expert evidence from Dr. Shahbaz in the area of public health. I note in the first
30 place that given the little information I have with respect to Dr. Shahbaz, I have
31 some concerns whether he could -- or can or should opine on the topics that he is
32 being put forward for.

33
34 Secondly, I'm of the view that the proposed new evidence of Dr. Shahbaz does not
35 meet the very high standard that the new evidence would have to meet to satisfy the
36 *Bedford* test. And in particular, I'm of the view that the proposed new evidence of
37 Dr. Shahbaz does not fundamentally shift how jurists understand the legal question
38 and issue.

39
40 I'm also reminded by the Supreme Court of Canada decision in *Comeau* that it's not
41 enough to find an alternative perspective on existing evidence might change how

1 jurists would answer the same legal question.

2

3 And in addition, I am of the view that the doctrine of *stare decisis* -- horizontal *stare*
4 *decisis* applies in this case given the similarities of this application and that facing
5 Judge Martinez, I choose to follow his decision as a matter of judicial comity.

6

7 So, I find the new evidence or circumstance exception doesn't apply here. So, in
8 summary, I find that I am bound by the decision in *Grandel and Mills* and the narrow
9 exceptions to the rule of *stare decisis* set forward in *Bedford* and *Comeau* are not
10 made out. I am satisfied that the *Charter* applications filed by the accused persons
11 have no reasonable prospect of success.

12

13 And as a result, the A.G. of Saskatchewan's application for summary dismissal of
14 any notice of constitutional questions or portions thereof before this Court relating
15 to Sections 2(b), (c), or (d) of the *Charter* is granted. So, I thank all counsel for their
16 assistance on these matters. And I note that I have drawn from the written
17 submissions of counsel for A.G. in preparing this decision.

18

19 THE COURT CLERK: (INDISCERNIBLE)

20

21 THE COURT: Oh, okay. So, that's my decision and
22 counsel's been provided with it. And this will form part of the court file. So, that
23 should free up the 16th through the 20th of January. That won't have to go ahead
24 with those dates that had been reserved for that time period. Are there any other
25 matters we can deal with today?

26

27 **Discussion**

28

29 MR. CARTER: Yes, Your Honour. Thank you for your
30 decision. There are a couple of matters that I would like to deal with. If I am not
31 mistaken, there are two accused persons present, this is -- are you -- is Tanya
32 Apodaca here?

33

34 MS. APODACA: I'm -- yeah.

35

36 MR. CARTER: Could you come forward? So, Your
37 Honour, this is Tanya Apodaca, who is representing herself.

38

39 THE COURT: Right.

40

41 MR. CARTER: It's my understanding that Ms. Apodaca

1 would like to have the multimedia disclosure provided to her.
2
3 THE COURT: Okay.
4
5 MR. CARTER: And the Crown is agreeable to that, but
6 we would ask that the Court issue a *Muirhead* order to permit that to happen.
7
8 THE COURT: And as I recall this occurred with
9 Mr. George Seitz --
10
11 MR. CARTER: Yes, Your Honour. And --
12
13 THE COURT: -- on an earlier occasion.
14
15 MR. CARTER: -- I do have a draft form of order here if
16 that would be helpful?
17
18 THE COURT: Okay. Have you seen this order,
19 Ms. Apodaca?
20
21 MS. APODACA: No.
22
23 THE COURT: Okay. Maybe just show it to her. Just give
24 her a moment to read the draft order. Ms. Apodaca, do you have any questions about
25 what's being proposed in the order?
26
27 MS. APODACA: No.
28
29 THE COURT: Do you have any concerns?
30
31 MS. APODACA: No. I think this was what I was asking for
32 last time.
33
34 THE COURT: Right. Right. I was hoping that it could be
35 done in a different way, although it matters not as long as you get the disclosure and
36 were able to --
37
38 MS. APODACA: Yeah. It was actually the prosecutor's
39 office that told me to do it this way opposed to me coming down there.
40
41 THE COURT: Well, sometimes these things happen. In

- 1 any event, I'll just have a look at it. And this is, again, for this, I guess, video
2 evidence?
3
- 4 MR. CARTER: Yes. And I'm going from memory, but if
5 I'm not mistaken, there is several hours of video. And that's why we thought it
6 impractical for Ms. Apodaca to be at our office.
7
- 8 THE COURT: Right, okay. Well, I approve of that order,
9 so, I'll have madam clerk sign the order on behalf of the Court and then we'll get
10 Ms. Apodaca to sign it and we'll make a copy.
11
- 12 MR. CARTER: Thank you, Your Honour.
13
- 14 THE COURT CLERK: (INDISCERNIBLE) for someone to sign,
15 or go sign it first and then they'll copy it?
16
- 17 THE COURT: If you could go copy -- make --
18
- 19 THE COURT CLERK: Sure.
20
- 21 THE COURT: -- two copies, please.
22
- 23 MR. CARTER: And additionally, I believe Erin Knoll is
24 present?
25
- 26 MS. KNOLL: Yes.
27
- 28 THE COURT: Oh, okay.
29
- 30 MR. CARTER: Could you please come forward?
31
- 32 MS. KNOLL: It's a similar situation, Your Honour. I'll
33 give the order to her to review for a moment here.
34
- 35 THE COURT: Sure. So, Ms. Knoll, do you have any
36 concerns about the order being proposed?
37
- 38 MS. KNOLL: No, not about the order. But I did have a
39 concern about my next court appearance.
40
- 41 THE COURT: Well, let's deal with that separately. The

1 whole idea of this order is just that it all has to do with you keeping the disclosure
2 in your possession --

3

4 MS. KNOLL: Oh.

5

6 THE COURT: -- and not distributing it elsewhere or
7 giving it out to anyone, and then returning it at the conclusion of the case. All right,
8 well, I'll authorize the order. I make the order. And again, I'll have madam clerk sign
9 it on behalf of the court and have Ms. Knoll sign it and then we'll make a copy --

10

11 MS. KNOLL: Yes, Your Honour.

12

13 THE COURT: -- copies, I should say. And then in a
14 moment, I'll take up any concerns you have. All right, so, Ms. Knoll, you had some
15 concerns about your upcoming trial?

16

17 MS. KNOLL: Since I wasn't able to get in to obtain this
18 *Muirhead* order until today, I have a court appearance on December 9th to present
19 my full arguments for both of my tickets. And that leaves me only a week to review
20 nine hours' worth of disclosure, video, photos, et cetera.

21

22 I don't feel that that's going to be enough time for me to have reviewed all that in
23 time for December 9th. So, I'd like to ask for an adjournment for that date and have
24 a different date picked in order to come back in and present my legal arguments.

25

26 THE COURT: Oh, I see. Now, as I understand it though,
27 let me just go back a step, as I understand it, December 9th was going to be reserved
28 for what I call the legal argument on the *vires* or the validity of the legislation giving
29 rise to these public health orders and the alleged violations thereof. Were you
30 planning on making argument that day on your own on that?

31

32 MS. KNOLL: Maybe I misunderstood, but I was of the
33 understanding that that would be my opportunity to present my own arguments.
34 And, so, I'm not -- since I'm self-representing and I'm not doing a *Charter* challenge.

35

36 THE COURT: Right. Well, that's a -- as I recall, yes, your
37 counsel withdrew; was that Ms. Anderson or Mr. Coupal?

38

39 MS. KNOLL: It was Luke Coupal.

40

41 THE COURT: Okay, right. And then it wasn't altogether

1 clear to me whether you were going to make argument on that yourself or whether
2 Mr. Coupal was. But you wanted to make argument on that, on the validity of the
3 underlying legislation, or was it on some other matters?
4

5 MS. KNOLL: I'm actually going to be bringing in my
6 notice to dismiss under the *Canadian Bill of Rights*.
7

8 THE COURT: Oh, I see, yes, because, I mean, you did,
9 in your notice of withdrawal essentially where you asked that you no longer wished
10 to be represented by Mr. Coupal, you also gave notice that you were going to be
11 self-represented, you were going to argue I think the *Bill of Rights*, the
12 *Saskatchewan Bill of Rights* and the Human Rights Code?
13

14 MS. KNOLL: Right.
15

16 THE COURT: Okay. All right.
17

18 MS. KNOLL: Did I say the *Canadian Bill of Rights*?
19

20 THE COURT: I think you did say the Canadian Bill
21 of --
22

23 MS. KNOLL: And the *Saskatchewan Bill of Rights*, the
24 other Human Rights Code.
25

26 THE COURT: Right, that's how it was worded, you're
27 exactly right. I'm just going from my rough memory of it.
28

29 MS. KNOLL: Yeah.
30

31 THE COURT: Okay. I want to park that issue for a
32 moment, okay, I'm going to return to it. So, just have a seat and I want to talk to the
33 lawyers about that.
34

35 So, we do have coming up this, a week from today, the arguments on the *vires* of
36 the legislation. And I want to thank Ms. Anderson, got her brief of law in on that on
37 November 30th and I think you have one to submit next week, Mr. Wernikowski.
38

39 The one thing that struck me though on that particular issue is Judge Hendrickson
40 from the provincial court judge in Moose Jaw gave a decision on that very topic,
41 that very issue, on November 17th. That decision has not yet been published and nor

1 have I received a transcript of that, I gather you haven't either, Mr. --

2

3 MR. WERNIKOWSKI: Thank you, Your Honour. I can advise
4 that I have requested a transcript on an expedited basis.

5

6 THE COURT: Right.

7

8 MR. WERNIKOWSKI: And I expect it returned, I think its return
9 date is December 6th, which is, if I understand correctly, the day before my brief is
10 due. And I will provide that with -- with the Court once -- once I receive that.

11

12 At the time the decision was -- was rendered, it did not -- the Court at that point was
13 not sure whether a published decision would result or not. And I haven't heard
14 otherwise. There may be a published decision coming, but if there is not, the -- we
15 are in the process of obtaining the transcript and I will provide the Court with that
16 as soon as I am able to.

17

18 THE COURT: And I want to -- to get you in on this
19 conversation, Ms. Anderson. Until that, and I know that in your brief you made
20 reference to it, but, of course, that's all you could do because it wasn't reduced to
21 writing, that is the Judge Hendrickson decision.

22

23 But I've been considering that and I just wanted some input from counsel, I mean,
24 December 9th date is looming, it's a week away. The Hendrickson decision that may
25 happen by way of -- maybe in a transcript that will be typed up and ready perhaps
26 on the 6th is awfully tight to the 9th, being the day that we're going to hear this. And
27 I think there is a good chance that decision might be published by Judge
28 Hendrickson in any event within perhaps short order as well.

29

30 What I'm thinking is maybe we should wait to have that Hendrickson decision
31 decided and in a written form so that I can look at it for myself in addition to any
32 portions or comments that counsel may wish to make on it. What's your thinking?

33

34 MR. WERNIKOWSKI: Thank you, Your Honour. If -- if the Court
35 would like a copy of the Hendrickson's decision -- Judge Hendrickson's decision in
36 advance, more than a couple days in advance of the argument date on the 9th, that's
37 something that I, of course, will not stand in the way of.

38

39 THE COURT: Right.

40

41 MR. WERNIKOWSKI: Speaking for myself, I can advise that --

1 and -- and Ms. Anderson as well, we were present when the decision was rendered.

2

3 THE COURT: Right.

4

5 MR. WERNIKOWSKI: The clerk did provide us with Judge
6 Hendrickson's notes from that decision, which I have been working off of for the
7 purpose of preparing my written materials. And they also were made available to
8 Ms. Anderson in the -- in the same order. So, speaking for myself, I'm -- my
9 preparation for the 9th is on hold pending that -- pending the receipt of that decision.

10

11 THE COURT: Okay.

12

13 MR. WERNIKOWSKI: And I am prepared to file the brief as
14 expected on the 7th and proceed with argument on the 9th without seeing the -- the
15 official transcript in advance of the 5th or 6th, whenever it's due back, because I
16 have -- I was present from when it was rendered orally and then I also do have Judge
17 Hendrickson's notes with respect to that decision.

18

19 THE COURT: And, I mean, I wasn't there, you were
20 there, or at least you heard Judge Hendrickson give his oral judgment. Did he stay
21 pretty close to what his notes said, or was it quite different?

22

23 MR. WERNIKOWSKI: Yes, Your Honour. Listening to the oral
24 decision at that point, it seemed almost as if Judge Hendrickson were reading a
25 written decision. The -- the notes are very similar to what was expressed orally.

26

27 THE COURT: Okay.

28

29 MR. WERNIKOWSKI: And -- and I expect that the transcript will
30 be very similar as well. And a written published decision should follow I also expect
31 will -- will be very similar.

32

33 THE COURT: Right. Well, I think it would be very
34 helpful to me because, as you can see in this past decision, I was hoping to have a
35 transcript of what Judge Martinez had to say on the Section 2 issues. And I had to
36 make due; I wanted to get this decision done.

37

38 I made due by going to For The Record, which is a very accurate account of things
39 and I'm confident I captured exactly what Judge Martinez said in that portion of the
40 judgment. But it's not an ideal way of doing business.

41

1 And what about you, Ms. Anderson? As I recall in your brief, you made just a
2 reference to the fact that Judge Hendrickson made a decision, but I don't think there
3 was much -- I can't recall, I just skimmed your brief, but it seems to be you didn't
4 reference it in any great detail.

5
6 MS. ANDERSON: No, not without a -- an official document
7 to reference, I -- I did not. But I -- I agree with my friend that I think, you know, we
8 have sufficient time to, in oral arguments, then reference it. Because we do have a
9 very good sense of what -- what the decision is based on the fact that the written
10 notes are very, very, very similar to what was said in court.

11
12 So, I -- I think that is enough time, that is enough time from the perspective of the
13 Court, that is enough time from my perspective as well.

14
15 THE COURT: Well, I think we'll have to see how the
16 week goes. I mean, I want something in writing in front of me, I don't want to work
17 from Judge Hendrickson's notes. I would like a transcript of the proceeding, or if
18 Judge Hendrickson publishes that would be fine.

19
20 But I think that's something I need to have a proper hearing. I may have questions
21 concerning his decision to each of the parties.

22
23 MR. WERNIKOWSKI: Yes, Your Honour. I -- I can advise that I
24 did follow-up with Transcript Services. I requested the transcript the day the -- the
25 decision was -- was issued on an expedited basis. I did follow-up with Transcript
26 Services earlier this week and - and was advised that the transcript would be
27 completed or is expected back by the 5th or the 6th, I can't remember the exact day,
28 but I'm fully expecting to have the transcript attached to my brief when I submit it.

29
30 THE COURT: Okay.

31
32 MR. WERNIKOWSKI: So that -- that it will be in -- in Your
33 Honour's hands in advance of -- in advance of the 9th.

34
35 THE COURT: All right. What we can do then is we'll go
36 ahead and make use of the 9th as we planned. I think we had planned on 9:30 start.
37 How long do counsel expect to be, is another question? Do we need the day?

38
39 MS. ANDERSON: Well, in my opinion, Your Honour, it was
40 definitely a half-day application before, but now that -- given that there is an adverse
41 decision from my perspective, I think it could take longer. So --

- 1
2 THE COURT: Okay.
3
- 4 MS. ANDERSON: -- I wouldn't want to be restricted to just a
5 half-day.
6
- 7 THE COURT: All right. Well, that's fine. Well then, we'll
8 make it the full day, beginning at 9:30 and I can't recall the courtroom, it may well
9 be 10.
10
- 11 MR. CARTER: I have it noted as courtroom number 8,
12 Your Honour.
13
- 14 THE COURT: Number 8? Okay. Now, I'm going to
15 return to you, Ms. Knoll. You are welcome to be here on the 9th, this is on the *vires*
16 argument, it's a technical legal argument that it doesn't form part of your argument
17 which you want to make I believe as you've said based on the *Saskatchewan Bill of*
18 *Rights* as incorporated into the Human Rights code. But I'd certainly be willing to
19 hear that argument. Now, let's -- but not on the 9th so you're not rushed.
20
- 21 MS. KNOLL: Okay.
22
- 23 THE COURT: So then, let's look ahead a bit. First of all,
24 when are you scheduled to go to trial? I think I have just a summary of when
25 different things are scheduled and I think your first court date may be February 6th
26 to 13th?
27
- 28 MS. KNOLL: Yes, I believe that's correct.
29
- 30 THE COURT: And then I think another one where you
31 are involved in the proceeding March 20th to 27th?
32
- 33 MS. KNOLL: Yes.
34
- 35 THE COURT: Okay. So, I'm wondering on your
36 arguments on *Sask. Bill of Rights* and then the Human Rights Code, would January
37 16th work for you, or that week?
38
- 39 MS. KNOLL: Sorry, did you say the week of
40 January 16th?
41

1 THE COURT: Yes, we could pick a day.
2
3 MS. KNOLL: Yeah, I think something should work in
4 there.
5
6 THE COURT: Okay. Now, as I recall, there is a few other
7 people in your position. And it seems to me Mr. Seitz, Mr. Seitz you're here.
8
9 MR. SEITZ: I can barely hear.
10
11 THE COURT: Oh, okay.
12
13 MR. SEITZ: I have hearing problems as it is.
14
15 THE COURT: Okay. Well, Mr. Seitz, you're here, you
16 want to make similar arguments, although you may want to -- similar arguments to
17 Ms. Knoll, as I understand it; would the week of January 16th be good for you?
18
19 MR. SEITZ: Yes, except not the Monday.
20
21 THE COURT: Not the Monday?
22
23 MR. SEITZ: No.
24
25 THE COURT: So, could we look to maybe reserving
26 January, is it, 17th, the Tuesday? Okay.
27
28 MS. KNOLL: Yeah.
29
30 THE COURT: And we could make that at -- do you want
31 it at 9:30; would that work?
32
33 MS. KNOLL: Yeah.
34
35 THE COURT: Okay. And we'll make that in courtroom
36 number 10.
37
38 MR. CARTER: Your Honour.
39
40 THE COURT: Yes.
41

1 MR. CARTER: Sorry to interject. I rise only because
2 Ms. Knoll's matter is one that I -- I have to maintain carriage of as opposed to
3 Mr. Brule.
4
5 THE COURT: Okay.
6
7 MR. CARTER: And I'm not available on the 17th.
8
9 THE COURT: Okay.
10
11 MR. CARTER: But I -- I could do the 18th, Your Honour.
12
13 THE COURT: Oh, okay. That's fine. Does the 18th work
14 for the both of you?
15
16 MR. SEITZ: Yeah.
17
18 MS. KNOLL: I mean, I guess I can make it work. I
19 mean, I'm having to miss a lot of work for these things, so, it will be another work
20 morning for me, so. The afternoon, if anything was available the afternoon that date,
21 but if not, then I'll try and make the morning work.
22
23 THE COURT: Well, I think we could accommodate the
24 afternoon of the 18th. Does that work better for you? That works better for you,
25 Ms. Knoll?
26
27 MR. CARTER: If it's going to be the afternoon, I could do
28 the 17th.
29
30 THE COURT: Oh.
31
32 MR. CARTER: I just can't do the morning of the 17th.
33
34 MS. KNOLL: Oh.
35
36 THE COURT: Okay. Well, then let's go back to the 17th.
37
38 MS. KNOLL: Okay.
39
40 THE COURT: At 2:00 in --
41

1 MS. KNOLL: Yeah, that works --
2
3 THE COURT: -- number 10.
4
5 MS. KNOLL: -- for me.
6
7 THE COURT: Okay. And I think what we're going to do
8 is there is a few other defendants that have similar arguments. And I believe that
9 would be Tamara Lavoie, who is not here I appreciate, and can counsel think of any
10 other that gave -- I'll have to think of the other individuals. And I'll have -- go ahead
11 Ms. Apodaca.
12
13 MS. APODACA: I haven't spoken to Ms. Anderson, but I
14 am wanting to withdraw my counsel because I don't want to do a *Charter* challenge.
15 So, I would be doing the same thing.
16
17 THE COURT: Well, the *Charter* challenge has come and
18 gone, I've made a decision on that.
19
20 MS. APODACA: Yeah, no --
21
22 THE COURT: And it involved you, because your name
23 was on it, okay?
24
25 MS. APODACA: Yeah. So, I'm -- I'm letting go of my
26 counsel.
27
28 THE COURT: Well, you'll have to -- okay, let's deal with
29 that now. Have you had any notice of this, Ms. Anderson?
30
31 MS. ANDERSON: No, I -- I was not aware of that. It -- was I
32 sent an email or anything?
33
34 THE COURT: I don't think Ms. Apodaca sent you
35 anything, I think she is advising you and me for the first time.
36
37 MS. APODACA: Yeah, I've been emailing her asking her a
38 few other questions.
39
40 THE COURT: Yes.
41

- 1 MS. APODACA: But, yeah, the *Charter* challenge is not a
2 way I want to go.
3
- 4 THE COURT: Well, as I say, the *Charter* challenge has
5 come and gone.
6
- 7 MS. APODACA: Yeah.
8
- 9 THE COURT: Okay? And you were a part of that and the
10 application wasn't successful, as you've heard.
11
- 12 MS. APODACA: Well, I -- I couldn't hear, but, yeah.
13
- 14 THE COURT: Oh, I'm sorry. Do you have a copy of the
15 decision?
16
- 17 MS. APODACA: I -- no.
18
- 19 THE COURT: Well, we'll get you a copy of the decision,
20 okay? Because you should know what's happened. So, dealing with Ms. Apodaca, I
21 don't like to do things on-the-fly in the courtroom as we are right now. I think, Ms.
22 Anderson, you can please have a conversation with Ms. Apodaca and then if you
23 want to withdraw from any and all matters with respect to Ms. Apodaca, you could
24 do so next -- December the 9th, if that's all right with you?
25
- 26 MS. ANDERSON: Okay, yes, I can do that. And then, of
27 course, then Tanya would be -- Ms. Apodaca would be appearing at court as well
28 on December 9th if -- if we are withdrawing from -- as counsel.
29
- 30 THE COURT: Right, yeah.
31
- 32 MS. ANDERSON: Okay.
33
- 34 THE COURT: Yeah. Because I don't like having -- this
35 is a private conversation you should have with your lawyer. And then if she wants
36 to formally withdraw, that's how it's done. So, that can occur the 9th at 9:30, number
37 8.
38
- 39 MS. KNOLL: Okay.
40
- 41 THE COURT: Now, is that going to require you to take

1 some time off work?

2

3 MS. KNOLL: It will.

4

5 THE COURT: Oh. I still think you should talk with your
6 lawyer. What we could do is you could appear by phone that morning; do you work?
7 Do you have access to a phone from work?

8

9 MS. KNOLL: Well, yes and no. I would be the one
10 answering phones, so.

11

12 THE COURT: Well, you have access to a phone, you
13 could phone in, or we could get your phone, we could phone you at 9:30 on the dot
14 on Friday. So, that means you don't have to be personally present in court and if Ms.
15 Anderson withdraws you hear it; it occurs before me in court and then we could take
16 it from there.

17

18 MS. KNOLL: That would work, yeah.

19

20 THE COURT: Okay. So, you're going to have to give
21 madam clerk your telephone number where you can be reached next Friday.

22

23 MS. KNOLL: Thank you.

24

25 THE COURT: Okay. So, what's your number for madam
26 clerk.

27

28 MS. KNOLL: 306-539-6323.

29

30 THE COURT CLERK: Thank you.

31

32 THE COURT: Okay. And you're aware then what's
33 happening, Ms. Anderson, on that front?

34

35 MS. ANDERSON: Yes, I am. Yes, I will deal with that.
36 Thank you.

37

38 THE COURT: All right. So, we'll put off then the
39 applications by Mr. Seitz and Ms. Knoll. And if you choose to put some -- give the
40 court some notice of what your intentions, if you want to argue something similar,
41 Ms. Apodaca then you're going to have to give a written notice to the Court.

1
2 MS. APODACA: Okay.
3
4 THE COURT: And then that could always be adjourned
5 to January 17th, '23, for argument.
6
7 MR. WERNIKOWSKI: Your Honour.
8
9 THE COURT: Yes.
10
11 MR. WERNIKOWSKI: So far, we -- we have Ms. Knoll,
12 Mr. Seitz, Ms. Lavoie, and anticipates -- anticipate, is it, Apodaca -- Ms. Apodaca?
13
14 MS. APODACA: Apodaca.
15
16 THE COURT: Ms. Apodaca, yeah.
17
18 MR. WERNIKOWSKI: Raising *Bill of Rights* challenges to be
19 adjudicated in the afternoon of the 17th. It's possible that -- that more will be taking
20 a similar path.
21
22 THE COURT: Yes.
23
24 MR. WERNIKOWSKI: I do wonder whether we might be able --
25 I do wonder whether there is sufficient time in the afternoon of the 17th to -- to go
26 through all of that, depending on the level of participation.
27
28 I -- I am sensitive to what I'm hearing about work commitments on -- during the
29 morning, but -- but it is something that I anticipate requiring a full day. That could
30 perhaps be split over two afternoons, but I -- I also can advise the Court that I went
31 through a similar process in traffic court yesterday and that it took several hours.
32
33 THE COURT: Oh, I see.
34
35 MR. WERNIKOWSKI: And based on --
36
37 THE COURT: Similar arguments?
38
39 MR. WERNIKOWSKI: For argument, yes.
40
41 THE COURT: Okay.

1

2 MR. WERNIKOWSKI: And it may be a different process here, but
3 I think it might be prudent to set aside more than a half-day for -- for these
4 challenges.

5

6 THE COURT: Okay. So, just so everybody understands,
7 Mr. Wernikowski is a little more familiar with these kind of arguments; they've been
8 raised in the past, than I am. And he says it may take longer than just a half-day. So,
9 let's go back to the arguments on the Canadian and Sask *Bill of Rights* and the
10 Human Rights Code.

11

12 We had talked about January 17th at 2 P.M., but I think he's really saying this should
13 have a full day, we have the week of January 16th to 20th. Is there a day that -- we
14 know the 16th doesn't work and the 17th only a half-day, but is there a full day that
15 week that works for people? Anyone?

16

17 MS. APODACA: We could return to the 18th if need be for
18 the full day if that's needed.

19

20 THE COURT: Well --

21

22 MS. APODACA: Because, I -- I -- as I understand,
23 January 17th, the morning wasn't an option --

24

25 THE COURT: Right.

26

27 MS. APODACA: -- correct?

28

29 THE COURT: Yes. I think we should reserve the full day
30 of the 18th of January for argument on that. The reason I say that is while you all
31 may be making a similar argument, you may want to make it an argument yourself,
32 you know, each in your own way. And I don't want to restrict that by saying I'm
33 pointing at my watch saying your time is up, that's not a fair hearing. So, I want you
34 to have the time you need.

35

36 So, we'll make that then on January 18th starting at 9:30, and that'll be in number 10,
37 and we'll call that the applicants' arguments on the *Canadian Bill of Rights*,
38 *Saskatchewan Bill of Rights*, and the Human Rights Code.

39

40 And that'll involve you, Mr. Seitz; you, Ms. Knoll, you, Ms. Apodaca once you get
41 your notice in on that; and then I believe Ms. Lavoie, which we'll give her notice of

1 that as well. And if there is any other individual who gives notices of this type of
2 argument then we'll make sure that that is the day for that type of argument, okay?
3 Are there any other matters we can deal with at this time?

4

5 MR. CARTER: Simply a procedural matter, Your
6 Honour.

7

8 THE COURT: Yes.

9

10 MR. CARTER: Mr. Seitz is here I think in part because
11 the Crown summonsed him to be here.

12

13 THE COURT: Okay.

14

15 MR. CARTER: Because he's an accused person on the
16 two new Informations that have been laid.

17

18 THE COURT: Oh yes.

19

20 MR. CARTER: So, I would just like it noted that he is
21 present --

22

23 THE COURT: Right.

24

25 MR. CARTER: -- so the Court does have jurisdiction over
26 him when it comes to those two new Informations.

27

28 THE COURT: Okay, let me just go to those if I can find
29 them.

30

31 MR. CARTER: Or, no, sorry, with respect to Mr. Seitz, it's
32 only one Information, which I can give you the number, it's ending 3623.

33

34 THE COURT: And it's Information ending in 3623?

35

36 MR. CARTER: 3623.

37

38 THE COURT: Oh yes, okay. Now -- right. So, Mr. Seitz,
39 it's somewhat confusing but I'll try and explain it as best I can. Originally, there was
40 a ticket issued to you in relation to an event on May 8th, 2021, for failing to comply
41 with a public health order by attending a gathering greater than -- exceeding 10

1 people.

2

3 It then found its way into an Information, this is just -- that's, sort of, paperwork the
4 court deals with, ending in 2864. And it's now -- all people have been joined,
5 including yourself, in a new Information ending in 3623. It has always involved an
6 offence involving your attendance at a gathering exceeding 10 people on May 8th,
7 okay; you're aware of that?

8

9 MR. SEITZ: Yes.

10

11 THE COURT: Okay. Now, could the Crown, maybe the
12 best way to do it is could you give him a copy of that new Information? We can
13 make a copy for him now if you want.

14

15 MR. CARTER: I -- I think, if I'm not mistaken, it's already
16 been included in the -- in the disclosure we provided to him.

17

18 THE COURT: Oh, has it?

19

20 MR. SEITZ: I don't know for sure.

21

22 MR. CARTER: We -- may I address him directly?

23

24 THE COURT: Yes, of course.

25

26 MR. CARTER: Mr. Seitz, did you receive a -- a package
27 of papers from us with all the police reports and everything?

28

29 MR. SEITZ: Yes, two of them.

30

31 MR. CARTER: So, in -- in that package, the Information
32 should have been in there. Do you have it with you?

33

34 MR. SEITZ: No.

35

36 THE COURT: Do you have that -- we can just adjourn.
37 I'm sure we can retrieve that Information, make a copy for him --

38

39 MR. CARTER: Yes, that would be --

40

41 THE COURT: -- and make sure that he gets a copy. So,

1 we can do that right now, all right? So, and then I thought I was asked to bring an
2 Information forward today dealing with Mark Friesen for a ticket? Maybe I'm in
3 error on that.

4

5 MR. CARTER: Yes, Your Honour. I -- I did ask that that
6 one Information be brought forward simply because the -- the decision you rendered
7 today applied to that ticket, so I thought it should be on the bench.

8

9 THE COURT: Oh, I see. Right. Okay.

10

11 MR. CARTER: That's a matter that was originally set for
12 trial November 23rd but then was adjourned to December 16th.

13

14 THE COURT: Right. Yes, okay, yes, you're quite right,
15 it does apply to that decision --

16

17 MR. CARTER: And --

18

19 THE COURT: -- as referenced in Appendix 1.

20

21 MR. CARTER: -- I -- I do think as well that
22 Ms. Anderson's application with respect to the *vires* also applies to that -- to that
23 ticket as well.

24

25 THE COURT: Okay. All right. That's fine. Well, that will
26 be dealt with next week. So, then why don't we adjourn for a few minutes? We'll
27 retrieve the new long form Information for which Mr. Seitz is named and we'll get
28 a copy to him, all right?

29

30 THE COURT CLERK: All rise. Court is adjourned.

31

32 (ADJOURNMENT)

33

34 THE COURT: Mr. Seitz, what I have is a copy of all the
35 charges that you face. Three of these documents relate to the same charge from May
36 8th, okay, 2021, they're just in different forms, but you're only charged with one
37 offence. And that's this, you know, going to -- being part of a public gathering
38 exceeding 10 people.

39

40 And then there is a separate offence which you're charged on April 24th, 2021, okay?
41 I hope that doesn't come as any surprise to you?

1
2 MR. SEITZ: No.
3
4 THE COURT: No? Okay. So, this new Information is at
5 the top ending in 3623, all right? If you could just hand that to Mr. Seitz.
6
7 THE COURT CLERK: There's a copy for Mr. Carter as well.
8
9 THE COURT: Mr. Carter can look at it, but he doesn't
10 need it.
11
12 MR. CARTER: I don't need it.
13
14 THE COURT: All right. So, you can only be prosecuted
15 on two charges: one from the 8th and one from the 24th. But the Crown has
16 proceeded in this way, but when the day comes for trials, we'll have to -- they're
17 going to have choose which two documents they are going to rely on, okay?
18
19 And as I recall, you're up looks like March 6th to 13th and you're also up February 3
20 to 13?
21
22 MR. SEITZ: February 3rd (INDISCERNIBLE)?
23
24 THE COURT: February 6th to the 13th? And the --
25
26 MR. SEITZ: And March 6th to the 13th?
27
28 THE COURT: That's right.
29
30 MR. SEITZ: Okay.
31
32 THE COURT: Yeah. All right, is there anything else we
33 need Mr. Seitz for?
34
35 MR. CARTER: Not for today, Your Honour.
36
37 THE COURT: Okay. Thank you, Mr. Seitz. And then I'll
38 be looking forward to seeing you, sir, on January 18th.
39
40 MR. SEITZ: Okay.
41

1 THE COURT: Thank you. And what would you like
2 done with this summons for Mr. Seitz?
3
4 MR. CARTER: If it could just be attached to the -- the
5 court file on --
6
7 THE COURT: Okay.
8
9 MR. CARTER: -- 3623.
10
11 THE COURT: Right. Okay. Very well. Now, is there
12 anything else we can do today, counsel, or needs to be done today?
13
14 MR. CARTER: Not from my perspective, Your Honour.
15
16 THE COURT: No? All right. Thank you.
17
18 THE COURT CLERK: All rise.
19
20 THE COURT: You can close court.
21
22 THE COURT CLERK: Court is closed.
23
24 _____
25
26 PROCEEDINGS ADJOURNED UNTIL 9:30 A.M., JANUARY 19, 2023
27 _____
28

T303
FORM D
[Section 4]

IN THE MATTER OF THE KING v. MARK FRIESEN, JASMIN RAYANN
GRANDEL, TAMARA LEE LAVOIE AND JONATHAN J. WIPF

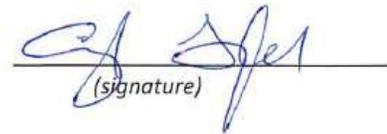
Certification of Transcript

I, Cindy Taylor, court transcriber appointed pursuant to *The Court Officials Act, 2012*, certify that:

1. To the best of my knowledge, skill and ability, I transcribed the record that was recorded by a sound recording device.
2. The foregoing typewritten pages numbered T One (T1) to T Ninety-One (T91), and T One Hundred Ninety-Seven (T197) to T Two Hundred Sixty-Seven (T267) inclusive, are a complete and accurate transcript of the contents of the recording marked as Regina Provincial Court, November 10 and December 2, 2022 and January 19, 2023, which has been certified in (*check one*):

- Form A – Court Official’s Written Certification of Recording.
- Form B – Alternate Court Official’s Written Certification of Recording.
- Form C – Oral Certification of Recording.

Dated this 29th day of August, 2023, at Regina, Saskatchewan.


(signature)

Ontario Superior Court of Justice

Juriansz J.

Heard: May 25, 2001.

Judgment: June 11, 2001.

Court File No. 244/00

[2001] O.J. No. 2376 | [2001] O.T.C. 458 | 50 W.C.B. (2d) 254

Between Akim Mohammed, applicant/appellant, and Her Majesty the Queen, respondent

(30 paras.)

Case Summary

Practice — Judgments and orders — Interlocutory or interim orders or judgments — In criminal proceedings — Appeals — Quashing or dismissal of appeals — Grounds for — Moot issues.

Application by the Crown to dismiss Mohammed's appeal for want of prosecution or lack of jurisdiction. Mohammed was charged with assaulting his children. He was self-represented. The Crown successfully applied for an order prohibiting Mohammed from cross-examining his children. Mohammed brought a pre-trial motion for relief under the Canadian Charter of Rights and Freedoms, which he later withdrew. However, the trial judge considered the motion notwithstanding his withdrawal and found that his rights under section 11(b) of the Charter had been violated. The judge stayed the charges against him. She refused to seal the court records. Mohammed appealed several decisions of the judge, including the decision not to seal the court records and the decision staying the proceedings. He also sought an order for court appointed counsel on the appeal.

HELD: Application allowed in part.

The appeal was quashed. Mohammed could not appeal these matters under the Criminal Code, as they were interlocutory matters. The issues were also moot, given that the proceedings had been stayed. Although the order staying the proceedings was a final order, Mohammed did not have the right to appeal from that order, as he did not assert that there had been any error of law or jurisdiction. The purported withdrawal of the application by Mohammed did not remove the trial judge's jurisdiction to consider the Charter issue.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982.

Criminal Code, ss. 486(2.3), 684(1), 813, 813(a)(ii), 822(1), 830.

Ontario Rules of Civil Procedure, Rules 6.15, 40.10(2), 40.16.

Counsel

Thomas Goddard, for the Crown. Akim Mohammed on his own behalf.

JURIANSZ J.

1 Mr. Mohammed, who is not represented by counsel, filed this appeal on December 15, 2000, but has done nothing to move it forward. The Crown set the matter down to be spoken to and argues that the appeal should be dismissed for want of prosecution or because the court has no jurisdiction to deal with it. The history of the matter follows.

2 Mr. Mohammed was charged with assaulting two of his children in January of 1999. At the first set date appearance, February 22, 1999, Mr. Mohammed indicated that he wished to represent himself. When the matter came on for trial on October 18, 1999, the Crown brought an application for an order under s. 486(2.3) of the Criminal Code of Canada to prohibit Mr. Mohammed from cross-examining his children. Mr. Mohammed, who had not received prior notice that such an application would be made, strenuously opposed it. The result was that the trial did not take place and several additional court dates were necessary in order to deal with the application. On January 18, 2000, the Crown's application was granted. Eventually, the trial was set to take place beginning on November 22, 2000. Mr. Mohammed brought a pretrial motion under s. 11(b) of the Charter. On the day before the decision on the Charter application was to be delivered, Mr. Mohammed notified the trial judge that he was withdrawing his application and wished that the charges be tried on their merits. The trial judge ruled that, where a Charter violation had been alleged and argued, she had an obligation to consider it notwithstanding Mr. Mohammed's new position. She found that Mr. Mohammed's s. 11(b) rights had been violated and ordered the charges stayed. Mr. Mohammed made a request for an order sealing the court records, which the trial judge refused.

3 Mr. Mohammed filed a notice of appeal that states he seeks to appeal "... to the Ontario Superior Court of Justice from the decision made at Toronto dated November 17, 2000 staying the charges but failed to issue an Order sealing the Court records or other relief requested by the Appellant. This appeal is also from other prior orders ... and other prior rulings ... in respect to the issue of speedy trial, transcripts, forced counsel under s. 486(2.3) of the Criminal Code of Canada, the denial of right to represent oneself, and the denial of right to witness confrontation for purposes of cross-examination and the constitutionality of various provisions of laws."

4 The notice of appeal states that Mr. Mohammed is seeking, among other relief, "court appointed counsel to prepare and argue this appeal", "transcripts in forma pauperis", and a declaration that s. 486(2.3) of the Criminal Code is unconstitutional.

5 The Crown submitted that Mr. Mohammed could not appeal the orders staying the proceedings as they amounted to a disposition in his favour, and that the refusal to seal the court file was "interlocutory" in nature.

The Request For Court Appointed Counsel

6 It would be unfair to deal with the substance of the Crown's argument without first considering Mr. Mohammed's request for court appointed counsel to prepare and argue his appeal. After all, if Mr. Mohammed had counsel, that counsel might make arguments that would affect the disposition of the substantive issues.

7 At the hearing, I advised Mr. Mohammed that if information about his financial circumstances or the medical condition from which he claimed to suffer were needed to decide his application for court appointed counsel, he would be afforded an opportunity to file further material. However, I invited him to make submissions that his appeal had prima facie merit. In *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.), Doherty J.A. for the unanimous Court found at p. 126: "In deciding whether counsel should be appointed, it is appropriate to begin with an inquiry into the merits of the appeal. Appeals which are void of merit will not be helped by the appointment of counsel." He went on to state that the inquiry into the merits should go no further than to determine whether the appeal is arguable.

The merits of the appeal

8 Mr. Mohammed's notice of appeal did not indicate whether it is filed pursuant to s. 813 or s. 830 of the Criminal Code of Canada. I will consider both sections. Section 684(1), which s. 822(1) makes applicable to summary conviction appeals under s. 813, is statutory authority for this court to assign counsel to act for an appellant. I will assume the Court has inherent jurisdiction to do so in appeals under s. 830.

9 Subsection 813 of the Code provides the accused with a general right of appeal in summary conviction matters:

813. Except where otherwise provided by law,

- (a) the defendant in proceedings under this Part may appeal to the appeal court
 - (i) from a conviction or order made against him,
 - (ii) against a sentence passed upon him, or
 - (iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder;

10 Grounds under s. 813 may include questions of fact or law or both, as noted by Lacourcière J.A. in *R. v. Wilke* (1980), 56 C.C.C. (2d) 61 (Ont. C.A.) at p. 64:

We agree with the submission of Mr. Koziebrocki that an appeal by the Attorney-General under part XXIV of the Criminal Code is not limited to a question of law alone. The Crown may appeal on questions of fact and the appeal Court may make its own determination of facts: see also *R. v. Nelson*, [1979] 3 W.W.R. 97, 3 Sask. L.R. 45, and *R. v. Purves and Purves* (1979), 50 C.C.C. (2d) 211, 12 C.R. (3d) 362, [1980] 1 W.W.R. 148.

11 Section 830(1) provides:

A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgement, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that

- (a) it is erroneous in point of law;
- (b) it is in excess of jurisdiction; or
- (c) it constitutes a refusal or failure to exercise jurisdiction.

12 An appeal under s. 830 must be based on an error of law or jurisdiction.

Interlocutory Matters

13 Section 830 specifically indicates that it applies to final orders and determinations. It states that an accused may appeal "against a conviction, judgement, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court". In commenting on the identical former s. 762 of the Code, Arnup J.A., in *R. v. B & B Stone Ltd. (No. 2)* (1977), 34 C.C.C. (2d) 464 (Ont. C.A.), found at pp. 472-3:

I would respectfully agree that an "order or determination" must be "final" in the sense that it brings to an end that particular proceeding, before an appeal will lie. But I am unable to agree that the order or determination must be final in the sense of "determining the issue raised in the information". This, in my view, is another way of saying that the order sought to be appealed must be in substance an acquittal, which could be pleaded in bar of any later charge, on a plea of *autrefois acquit*. An order quashing an information brings to an end the proceeding which that information began. Such an order is "final", and appealable by stated case.

14 While s. 813 does not expressly indicate that its application is limited to final orders, the right of appeal it

provides is limited to a conviction or "final" order as well. As recognized by Sopinka and Gelowitz in *The Conduct of an Appeal*, 2d ed. (Toronto: Butterworths, 1999) at p. 130:

The availability of an appeal against a "conviction or order" is not an invitation to interlocutory appeals, and the general rule against interlocutory criminal appeals applies. In *R. v. Frontier Photos Ltd.*, [1986] S.J. No. 855, the Saskatchewan Court of Queen's Bench declined to permit an appeal, in the course of a trial, from a decision of the summary conviction trial judge dismissing a motion attacking the constitutional validity of the charging section.

15 A "final" order must amount to an order dismissing an information. See: *R. v. Moore* (1987), 38 C.C.C. (3d) 471 (Ont. C.A.).

16 As noted, Mr. Mohammed seeks to appeal several prior orders and other prior rulings. They are for the most part interlocutory, concerning matters such as the decision to prohibit him from cross-examining his children, the manner of appointing counsel to conduct such cross-examinations, and his bail conditions. It is beyond doubt that he cannot appeal such interlocutory matters under either s. 813 or 830. These issues, and the constitutional challenge to s. 486(2.3) of the Criminal Code of Canada, are also moot given that the proceedings against Mr. Mohammed are stayed.

17 Mr. Mohammed argued that the trial judge's refusal to order the file "sealed" is a final order as its effect persists after the close of proceedings. That may be, however the authorities are clear that it does not amount to a "final" order within the meaning of ss. 813 and 830, as it did not end the proceedings. I am of the view that Mr. Mohammed cannot appeal the refusal to seal the file to this Court under either section.

The Stay of Proceedings

18 Clearly, the order that the proceedings be stayed amounts to a "final" order, as it effectively ends the proceedings against the accused. However, there does not seem to be a case where an accused has chosen to appeal a "favourable" order on summary conviction appeal.

19 Such an appeal may not be filed under ss. 813(a)(i), as that section clearly states that the accused may only appeal from "a conviction or order made against him" [emphasis added].

20 On a plain reading of s. 830, the phrase "A party to the proceedings" does not distinguish between the accused and the Crown. However, on the facts of this case, I do need to consider the novel question whether an accused can appeal a final order that is favourable under s. 830, as any appeal under that section must be based on an error of law or jurisdiction. Mr. Mohammed asserts neither.

21 Mr. Mohammed had made a s. 11(b) application before the trial judge and, after it was argued, but before it was disposed of, he decided that he would prefer to have a trial in order to vindicate himself. He is appealing because the trial judge refused to give effect to the "withdrawal" of his s. 11(b) application. As an appeal on this basis does not challenge the trial judge's application of the law, or the scope of her jurisdiction, it falls outside the ambit of s. 830.

22 If I have misunderstood Mr. Mohammed and his intent is to argue that the trial judge lost jurisdiction to decide the s. 11(b) issue when he purported to withdraw the application, then I remain of the view that the appeal has no merit.

23 In *R. v. Arbour* (1990), 4 C.R.R. (2d) 369 (Ont. C.A.), the Court found, at p. 372:

We are of the view that once there was admissible uncontradicted evidence before the court, indicating that there had been an infringement of the appellant's rights under s. 10(b) of the Charter it was incumbent on the trial judge to enter upon an inquiry to ascertain whether such an infringement had occurred. This was not done. Accordingly, the statement should not have been admitted in evidence or, having been admitted, should not have been considered as evidence in the circumstances.

24 In this case, the purported withdrawal of the application could not have removed the trial judge's jurisdiction to consider and decide the Charter issue that was raised. This is especially true when the nature of the withdrawal is considered: Mr. Mohammed did not concede the merits of the Crown's position, but rather had a "change of heart" with respect to conducting a full trial.

25 In *R. v. Sanchez-Flores* (1992), 75 C.C.C. (3d) 23, the Ontario Court of Appeal held that a party to a criminal proceeding cannot dispense with the court's inherent jurisdiction and duty to consider Charter issues disclosed by the evidence. In *Sanchez-Flores*, counsel for the accused initially sought to exclude a statement made to the police pursuant to s. 10(b) of the Charter. Counsel later sought to withdraw the application, to which the trial judge responded (at p. 46):

I am of the view that, the matter having been raised, the matter having been put before me, I must proceed now with this *voir dire* to make a determination, which of course includes the opportunity of both counsel to call further evidence on the *voir dire*, should they so choose.

Therefore, despite [defence counsel's] indications on the record (a) that his client no longer wishes to pursue this, and (b) that there was a minimal understanding, and (c) that he wanted to continue to talk to the police, it seems to me, the matter having been raised, that I have to make a decision legally as to whether or not this evidence is inadmissible, and I intend to do so.

26 The Court of Appeal found that the trial judge had a duty to assess the Charter application, regardless of the accused's abandonment of the issue, at p. 48:

We think that the trial judge, notwithstanding the withdrawal of the challenged application, may have some responsibility to safeguard the integrity of the judicial process: cf. *Korponey v. A.-G. Can.* (1982), 65 C.C.C. (2d) 65 at p. 73, 132 D.L.R. (3d) 354, [1982] 1 S.C.R. 41 (S.C.C.). Accordingly, we think that the issue should be decided by applying s. 24(2) to the facts of this case.

Conclusion re Request For Counsel

27 I decline to make an order that counsel be assigned to act on behalf of Mr. Mohammed because his appeal has not been properly brought before this Court, and hence cannot be assisted by the appointment of counsel.

Should The Appeal be Dismissed?

28 I understood the Crown to submit that the appeal should be dismissed either under rule 40.16, because Mr. Mohammed has not moved it forward, or under rule 6.15, because it is entirely without merit. I was not persuaded by the Crown's submission that I may summarily dismiss this appeal under rule 6.15, as that rule applies to applications and this purports to be an appeal.

29 The Crown has not complied with the procedural requirements of rule 40.16, which contemplates that applications may be made "upon notice to all other parties by the respondent, or on notice given by the clerk to each party, and upon proof that notice of hearing of the appeal has been given under rule 40.10(2) ..." In this case, the Crown merely set the matter down to spoken to and did not give Mr. Mohammed notice of what position would be taken before the Court.

30 However, as Mr. Mohammed's appeal has not been properly brought before this Court under either s. 813 or s. 830, it is appropriate that it be quashed rather than dismissed, and I order accordingly.

JURIANSZ J.

**SOPINKA, GELOWITZ
AND RANKIN
ON THE
CONDUCT OF AN APPEAL**

FIFTH EDITION

John Sopinka

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THE CONDUCT OF AN APPEAL

the proceedings is settled, the principal jurisdictional issue in a criminal appeal is whether the court in which the appeal lies has jurisdiction to decide the particular point sought to be appealed. Can the court review findings of fact, or questions of mixed law and fact? Or is its appellate jurisdiction limited to questions of law alone?

¶3.5 In ascertaining the terms of the court of appeal's jurisdiction, it is important to understand the distinction between the court's jurisdiction on the one hand, and the powers available to the court in the exercise of that jurisdiction on the other. For example, in an appeal against conviction by an accused, the court's jurisdiction is set out in section 675 of the Code, and the powers conferred upon the court are found in subsections 686(1)–(3). In *R. v. Ewert*,¹⁵ the British Columbia Court of Appeal appears to have taken the view that its *jurisdiction* in a conviction appeal was circumscribed by the scope of the appellate *powers* invoked by the accused.¹⁶ Of course, the court need consider its powers only once the appellant has established that the court has jurisdiction.

¶3.6 A preliminary question sometimes arises whether the particular order sought to be appealed is appealable. By virtue of section 674 of the Code,¹⁷ appeals in respect of indictable offences are limited to those authorized by Parts XXI and XXVI of the Code. In certain circumstances, however, section 674 will not limit the jurisdiction of the Supreme Court of Canada to hear an appeal pursuant to section 40 of the *Supreme Court Act*,¹⁸ as the Court discussed in *R. v. Laba*¹⁹ and *Dagenais v. Canadian Broadcasting Corp.*²⁰ As we will see shortly, an accused is entitled to appeal against conviction and the Crown against acquittal (or other order terminating a prosecution).

¶3.7 It is settled law that there are no appeals in interlocutory criminal proceedings, as there is no statutory basis for such appeals (with limited exceptions).²¹ As

¹⁵ [1991] B.C.J. No. 3394, 68 C.C.C. (3d) 207 (B.C.C.A.), rev'd, [1992] S.C.J. No. 81, 142 N.R. 154, [1992] 3 S.C.R. 161, 76 C.C.C. (3d) 287 (S.C.C.).

¹⁶ *R. v. Ewert*, [1991] B.C.J. No. 3394, 68 C.C.C. (3d) 207 at 218-19 (B.C.C.A.), rev'd, [1992] S.C.J. No. 81, 142 N.R. 154, [1992] 3 S.C.R. 161, 76 C.C.C. (3d) 287 (S.C.C.).

¹⁷ Section 674 is made applicable to summary conviction appeals to the court of appeal by subs. 839(2).

¹⁸ R.S.C. 1985, c. S-26.

¹⁹ [1994] S.C.J. No. 106, [1994] 3 S.C.R. 965, 94 C.C.C. (3d) 385, 120 D.L.R. (4th) 175 at 187 (S.C.C.).

²⁰ [1994] S.C.J. No. 104, 94 C.C.C. (3d) 289, 120 D.L.R. (4th) 12 at 24 (S.C.C.); see the discussion of *Dagenais* in Chapter 1, "Appellate Jurisdiction in Civil Matters". See also *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442 (S.C.C.).

²¹ See, e.g., *R. v. Duhamel*, [1984] S.C.J. No. 58, [1984] 2 S.C.R. 555 at 563 (S.C.C.); *R. v. Kumar*, [1987] S.J. No. 144, 54 Sask. R. 159 (Sask. C.A., Chambers), leave to appeal to S.C.C. ref'd (1987), 58 Sask. R. 80n (S.C.C.); *R. v. Dougan*, [2016] B.C.J. No. 2069, 2016 BCSC 1815 (B.C.S.C.); *R. v. Scott*, [2015] M.J. No. 124, 2015 MBCA 43 (Man. C.A.); *Re*

offences lies with Parliament, not the courts.¹⁵⁰

[e] Charter Issues

¶3.60 As discussed at the outset of this chapter, there is no appeal from orders made in the course of proceedings, such as evidentiary rulings at trial, which do not conclude the case. These may be appealed, if at all, at the conclusion of trial. This position was not altered by the proclamation of the *Canadian Charter of Rights and Freedoms*.¹⁵¹ The Supreme Court of Canada has held in both *Mills v. R.*¹⁵² and *R. v. Meltzer*¹⁵³ that the *Charter* does not create new rights of appeal.¹⁵⁴ Any *Charter* ground sought to be appealed must, accordingly, be taken pursuant to existing rights of appeal as established in the Code. In the wake of *Meltzer*, attempts have been made to ground appellate jurisdiction for interlocutory *Charter* points on the basis that the particular alleged *Charter* violation deprived the trial court of jurisdiction, for example, the refusal to permit a re-election for trial by judge and jury,¹⁵⁵ or an order removing an accused's counsel of record.¹⁵⁶ However, the better view would appear to be that the absence of statutory authority for interlocutory *Charter* appeals is a determinative jurisdictional obstacle to such appeals.¹⁵⁷

¶3.61 The question of whether or not a *Charter* argument may be raised for the first time on an appeal was examined in *R. v. Brown*.¹⁵⁸ In that case, the accused raised a section 7 *Charter* argument for the first time to the Alberta Court of Appeal. The Supreme Court of Canada, in substantially adopting the reasons for judgment of Harradence J.A.,¹⁵⁹ allowed the appellant to raise the issue and ordered a new trial. In her dissenting opinion as to the outcome of the case, L'Heureux-Dubé J, set

¹⁵⁰ *R. v. Lacasse*, [2015] S.C.J. No. 64 at paras. 60-61, 333 C.C.C. (3d) 450 (S.C.C.). See the further discussion of *R. v. Lacasse*, [2015] S.C.J. No. 64, 333 C.C.C. (3d) 450 (S.C.C.) in Chapter 4, "Appellate Powers in Criminal Matters".

¹⁵¹ *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982* (U.K.), c. 11.

¹⁵² [1986] S.C.J. No. 39, [1986] 1 S.C.R. 863 at 899-900 (S.C.C.), *per* Lamer J. (dissenting on other grounds); at 958-64, *per* McIntyre J.; at 978, *per* La Forest J.

¹⁵³ [1989] S.C.J. No. 75, [1989] 1 S.C.R. 1764 at 1773-1774 (S.C.C.). See also *Kourtessis v. Canada (Minister of National Revenue)*, [1989] B.C.J. No. 1657, 39 B.C.L.R. (2d) 1 (B.C.C.A.), *rev'd*, [1993] S.C.J. No. 45, [1993] 2 S.C.R. 53 (S.C.C.).

¹⁵⁴ *R. v. Hudson*, [2007] S.J. No. 403, [2007] 9 W.W.R. 637 at para. 12 (Sask. C.A.): "a breach of a *Charter* right does not in itself create a right of appeal because the *Charter* is not an independent source of appellate jurisdiction".

¹⁵⁵ *R. v. Ruston*, [1991] M.J. No. 112, 63 C.C.C. (3d) 419 (Man. C.A.).

¹⁵⁶ *R. v. Druken*, [1998] S.C.J. No. 43, 126 C.C.C. (3d) 1 at 129 (S.C.C.); *R. v. Adamson*, [1991] O.J. No. 3384, 65 C.C.C. (3d) 159 (Ont. C.A.).

¹⁵⁷ See *R. v. Morgentaler*, [1984] O.J. No. 3386, 16 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Adamson*, [1991] O.J. No. 3384, 65 C.C.C. (3d) 159 (Ont. C.A.).

¹⁵⁸ [1993] S.C.J. No. 82, [1993] 2 S.C.R. 918 (S.C.C.).

¹⁵⁹ [1992] A.J. No. 602, 73 C.C.C. (3d) 481 (Alta. C.A.).

intelligibility, or a breach of the principles of natural justice,²⁶¹ would be the strongest grounds for an application for trial *de novo*.²⁶² Conversely, a transparent effort by one of the parties to adduce new evidence that ought to have been adduced at the first trial will weigh against a trial *de novo*,²⁶³ although the presence of fresh evidence ought not to disentitle an applicant to a trial *de novo*.²⁶⁴

¶3.114 The constitutional validity of a Crown appeal by way of trial *de novo* is open to doubt on the basis of *Corporation Professionnelle des Médecins du Québec v. Thibault*,²⁶⁵ in which the Supreme Court of Canada held that a provincial provision for a complainant's or prosecutor's appeal by trial *de novo* violated the accused's right not to be placed in double jeopardy, contrary to subsection 11(h) of the *Charter*. However, it should be noted that the legislation struck down in *Thibault* provided for trial *de novo* as of right at the instance of the prosecutor, whereas the Code permits trial *de novo* only upon application. It may be argued that this discretionary control over trial *de novo*, linked as it is to the "interests of justice", would constitute a reasonable limit on the subsection 11(h) violation within the meaning of section 1 of the *Charter*.²⁶⁶

[a] By the Accused

¶3.115 The accused's general right of appeal in summary conviction matters is found in paragraph 813(a), which reads as follows:

813. Except where otherwise provided by law,

- (a) the defendant in proceedings under this Part may appeal to the appeal court
 - (i) from a conviction or order made against him,
 - (ii) against a sentence passed on him, or
 - (iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder; . . .

²⁶¹ See *R. v. Faulkner*, [1977] N.S.J. No. 750, 39 C.R.N.S. 331 (N.S. Co. Ct.); *R. v. Ford*, [1987] P.E.I.J. No. 29, 68 Nfld. & P.E.I.R. 139 (P.E.I.T.D.).

²⁶² *R. v. M. (R.N.-Z.)*, [2005] O.J. No. 5497 at para. 14, 68 W.C.B. (2d) 224 (Ont. S.C.J.), citing with approval this passage from an earlier edition of this work.

²⁶³ *R. v. Winters*, [1981] B.C.J. No. 344, 59 C.C.C. (2d) 454 at 457 (B.C.C.A.).

²⁶⁴ *R. v. Winters*, [1981] B.C.J. No. 344, 59 C.C.C. (2d) 454 at 457 (B.C.C.A.). See also *R. v. Steinmiller*, [1979] O.J. No. 856, 47 C.C.C. (2d) 151 (Ont. C.A.).

²⁶⁵ [1988] S.C.J. No. 46, [1988] 1 S.C.R. 1033 (S.C.C.).

²⁶⁶ In *Corporation Professionnelle des Médecins du Québec v. Thibault*, [1988] S.C.J. No. 46, [1988] 1 S.C.R. 1033 (S.C.C.), no evidence was adduced to support s. 1 arguments in favour of the validity of the impugned provisions: *Corporation Professionnelle des Médecins du Québec v. Thibault*, [1988] S.C.J. No. 46, [1988] 1 S.C.R. 1033 at 1045 (S.C.C.).

¶3.116 This appeal is as of right and is not limited to particular grounds. An appeal will lie, therefore, anywhere along the spectrum of questions of fact and law. The availability of an appeal against a “conviction or order” is not an invitation to interlocutory appeals, and the general rule against interlocutory criminal appeals applies. In *R. v. Frontier Photos Ltd.*,²⁶⁷ the Saskatchewan Court of Queen’s Bench declined to permit an appeal, in the course of a trial, from a decision of the summary conviction trial judge dismissing a motion attacking the constitutional validity of the charging section.

¶3.117 An accused’s appeals from conviction and sentence, pursuant to paragraph 813(a), are procedurally separate matters. Thus, an appeal from conviction may be launched prior to the imposition of sentence.²⁶⁸ Furthermore, an appeal court seized with a conviction appeal has no jurisdiction over sentence unless a sentence appeal is commenced in conjunction with the conviction appeal.²⁶⁹

[b] By the Crown

¶3.118 The Crown’s general right of appeal in summary conviction matters is contained in paragraph 813(b) of the Code, which reads as follows:

813. Except where otherwise provided by law,

- ...
- (b) the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court
 - (i) from an order that stays proceedings on an information or dismisses an information,
 - (ii) against a sentence passed on a defendant, or
 - (iii) against a verdict of not criminally responsible on account of mental disorder or unfit to stand trial, . . .

In common with the accused, the Crown may appeal as of right. In contradistinction to the Crown’s right of appeal in indictable matters, the Crown is not limited under section 813 to grounds involving questions of law.²⁷⁰

²⁶⁷ [1986] S.J. No. 855, 52 Sask. R. 310 (Sask. Q.B.).

²⁶⁸ *R. v. MacNeil*, [1979] O.J. No. 1794, 46 C.C.C. (2d) 383 (Ont. C.A.); but see *R. v. Auld*, [1987] O.J. No. 2712, 38 C.C.C. (3d) 43 at 48-49 (Ont. Dist. Ct.), leave to appeal to Ont. C.A. ref’d (1989), 49 C.C.C. (3d) 128 (Ont. C.A.).

²⁶⁹ *R. v. Praisley*, [1964] B.C.J. No. 98, [1965] 1 C.C.C. 316 (B.C.C.A.); *R. v. Ferencsik*, [1970] O.J. No. 1485, [1970] 4 C.C.C. 166 (Ont. C.A.); *R. v. Dignard*, [2019] M.J. No. 15, 2019 MBCA 6 (Man. C.A.).

²⁷⁰ *R. v. Wilke*, [1980] O.J. No. 1417, 56 C.C.C. (2d) 61 (Ont. C.A.); *R. v. Nelson*, [1979] S.J. No. 550, [1979] 3 W.W.R. 97 (Sask. C.A.); *R. v. Labadie*, [2011] O.J. No. 1257, 2011 ONCA 227 at para. 50 (Ont. C.A.); *R. v. Pierone*, [2018] S.J. No. 165, 2018 SKCA 30 (Sask. C.A.); *R. v. Pederson*, [2019] N.B.J. No. 148, 2019 NBCA 42 (N.B.C.A.).