Court of King's Bench of Alberta

Citation: Nassichuk-Dean v University of Lethbridge, 2022 ABKB 629

Date: 20220920
Docket: 2106 00780
Registry: Lethbridge

Between:

Hailey Nassichuk-Dean

Applicant

- and -

University of Lethbridge

Respondent

Memorandum of Decision
of the
Honourable Justice D.V. Hartigan

Background

[1] The Applicant, Hailey Nassichuk-Dean ("Ms. Nassichuk-Dean"), was a student at the University of Lethbridge (the "University") from the fall of 2019 to the Fall of 2021.

[2] Due to the COVID-19 pandemic, the Government of Alberta cancelled in-person classes in post-secondary institutions on March 15, 2020. Between March of 2020 and September of 2021, the University primarily delivered classes to students online.

[3] In order to facilitate a return to in-person classes, and recognizing the high rates of COVID-19 infections due to the 4th wave of the pandemic, the University imposed a mandatory

COVID-19 vaccination policy for students and staff. Effective November 1, 2021, all persons on campus would need to provide proof of vaccination, unless they were subject to an exemption.

[4] Ms. Nassichuk-Dean sought an exemption from the general policy based upon her religious beliefs. That request for an exemption was denied by the University. As consequence of that denial, the Applicant was unable to take all the courses she intended to take in that academic year, although she was able to complete two of her three chosen courses online.

[5] The Applicant seeks the following Declarations from this court:

i) A Declaration that the Respondent's vaccination policy and its application to the Applicant violated s. 7 of the *Charter of Rights and Freedoms* [*Charter*]; and

ii) A Declaration that the Respondent's rejection of the Applicant's religious exemption request breached the *Alberta Human Rights Act*, RSA 2000, c A-25.5 [*Alberta Human Rights Act*].

Preliminary Issues

[6] Prior to dealing with the substantive issues for which the above remedies are sought, two initial issues need to be addressed. The University argues that this application should not proceed for two interrelated reasons:

1. The University argues that as the impugned vaccination policy was rescinded in March of 2022, the application is moot; and
2. Even if the application is not moot, this application is not an appropriate case for declarative relief.

Is The Application Moot?

[7] The Respondent argues that there is no longer a tangible or concrete dispute between the parties. The vaccination program which is the subject matter of this application was repealed after being in place approximately four months. Therefore, it is the Respondent's position that any decision made by this Court as to the impact of the program on the Applicant's *Charter* or other rights will have no practical effect on her ability to attend the University.

[8] The leading case regarding the principles of mootness remains ***Borowski v Canada (Attorney General)***, [1989] 1 SCR 342 [***Borowski***]. The doctrine of mootness is an aspect of the general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. If, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The matter will therefore not be heard unless the court exercises its discretion to depart from that general policy: ***Borowski***, at para 15.

[9] To determine whether an application is moot, a two-step analysis must be undertaken: first, to determine whether the required tangible and concrete dispute has disappeared and the

issues have become academic; and second, if the answer to the first question is yes, to determine whether the court should exercise its discretion to hear the case: ***Borowski***, at para 16.

[10] With respect to the first stage of the analysis, there must be a consideration of whether there remains a live controversy between the parties. A live controversy, in this context, involves whether there exists, on an objective assessment, a dispute between the parties the resolution of which will actually affect the parties' rights or interests: ***The Alberta Teachers' Association v Buffalo Trail Public Schools Regional Division No 28***, 2022 ABCA 13, at para 34.

[11] It may well be, from a practical perspective, that there is no remedy that can be granted by the Court to rectify or ameliorate the impact of the alleged breaches of the Applicant's rights. The Applicant is not seeking damages or other compensatory relief. Nor can the court provide any relief from future potential harm the vaccination policy may cause Ms. Nassichuk-Dean, as that policy is no longer in place and hasn't been since March. Again, Ms. Nassichuk-Dean is not seeking injunctive or other relief for any anticipated rights breaches against her.

[12] Rather, the Applicant is seeking declarations that the application of the University's COVID-19 policy violated her s. 7 *Charter* rights, and that the rejection of her application for a religious exemption from the policy breached her rights under the *Alberta Human Rights Act*.

[13] Our Court of Appeal has held that an action for declaration may proceed in the absence of a claim for any other remedy: ***Trang v Alberta (Edmonton Remand Centre)***, 2005 ABCA 66 [***Trang #1***], at para 5**.**

[14] In ***Trang #1***, the parties seeking a declaration alleged that their *Charter* rights were breached by the detention facility while they were remanded awaiting trial. The government argued that the action was moot, as all the charges against the applying parties had either been stayed or otherwise disposed. The Court of Appeal held that, notwithstanding that the underlying criminal proceedings were at an end, whether or not the applying parties' *Charter* rights were breached while they were detained remained a live controversy: ***Trang*** #1, at para 5. The proceedings were therefore not moot.

[15] In ***Pridgen v University of Calgary***, 2010 ABQB 644 [***Pridgen***], Strekaf J considered the issue of mootness in an action for declarative relief. In that case, a group of students had been disciplined by the University of Calgary. The students sought a declaration that the discipline violated their *Charter* rights. The University of Calgary argued that the issues on that application were moot, as the applicant's periods of probation had passed and all reference to the discipline had been removed from the respective academic records. Applying ***Trang #1***, the Court found that the action for declarative relief was not moot: ***Pridgen***, at paras 27 and 28.

[16] I therefore find that the issue as to whether Ms. Nassichuk-Dean's rights were violated remains a live controversy between the parties. The application is not, therefore, moot.

[17] Given that finding, I do not need to proceed to the second stage of the analysis set out in ***Borowski***.

Is This an Appropriate Case for Declarative Release?

[18] While I have found that the application is not moot, there remains the question as to whether the Court should exercise its discretion to hear the matter. The Applicant argues this is an appropriate case for the Court to exercise that discretion.

The Legal Framework

[19] Declaratory relief is a discretionary remedy, which should only be given in appropriate circumstances. Generally, declarations will not be granted "where the dispute has become academic or will have no practical effect in resolving any remaining issues between the parties: ***Trang v Alberta (Edmonton Remand Centre)***, 2007 ABCA 263 [***Trang #2***], at para 15.

[20] Clearly, there can be no practical effect on Ms. Nassichuk-Dean's rights or interests were this Court to grant her the declarations she seeks. The University has rescinded the vaccination policy. Ms. Nassichuk-Dean's vaccination status, whatever it may be, will have no effect on her ability to attend the University in the future. In that respect, the issue has become an academic enterprise.

[21] However, even where the issues have become largely academic, exemptions to the general principal can occur. The Court of Appeal in ***Trang #2*** set out the reasons courts should be hesitant to make such exceptions:

> Declarations can potentially be granted even if they will have no practical effect on the rights of the parties. However, this is rarely done for several reasons:
>
> a) Generally speaking, parties who actually suffer damage or consequences have a right to set the legal principles surrounding their injury. Others who are not directly affected are not generally granted remedies that may affect the rights of those directly affected.
>
> b) Judicial and societal resources are limited. People cannot afford to be in court constantly just because someone else wants to resolve theoretical questions.
>
> c) Declarations can lack context, leading to generalized and unhelpful declarations that are meaningless without further litigation.
>
> d) Abstract declarations encourage intervention in the affairs of governments and citizens beyond the proper role of the superior courts:
>
> ...
>
> For all these reasons, declarations that have no practical utility are rarely granted.
>
> [***Trang #2***, at para 16]

[22] It is helpful to review cases where the principles in ***Trang #2*** have been applied to applications for declarations where the underlying dispute between the parties has effectively become academic.

[23] In ***Anderson v Canada (Employment, Workforce and Labour)***, 2019 ABQB 579 [***Anderson***], the applicants sought a declaration that their s. 2(a) and 2(b) *Charter* rights were infringed by an attestation clause requirement in the 2018 Canada Summer Jobs application form. The impugned clause was removed in subsequent years' applications. As a consequence, the only live issue between the parties was the application for declarative relief.

[24] In that action, Tilleman J declined to hear the claim. While some of his concerns involved timing and resource issues not present in this case, as well as the fact there were a number of similar actions currently before other courts, he stated: "I also remain concerned about deciding a constitutional issue where the foundation upon which the proceedings were launched no longer exists, as the attestation clause is no longer mandatory[.]" (***Anderson***, at para 16). Clearly, this parallels the action before me, as the vaccination policy, like the attestation clause, is no longer in effect.

[25] In ***R v Alcantara***, 2012 ABQB 73 [***Alcantara***], the two accused persons sought declarations that two sections of the *Criminal Code* were of no force or effect as being contrary to the *Charter*. The issue was rendered effectively academic, as the evidence obtained through those wiretap provisions had been found admissible via other means.

[26] The Court declined to exercise its discretion to issue a declaration. Greckol J, as she then was, canvassed each of the four considerations in ***Trang #2***. I find her analysis helpful to me in the present case and will summarize her reasons below.

[27] In dealing with the first consideration, that parties not directly affected are not granted remedies that may affect the rights of those who are, the Court found a declaration could affect the rights of those who have not had an opportunity to argue the matter. The Court found this consideration weighed against granting a declaration: ***Alcantara***, at para 29.

[28] With respect to the issue of the appropriate use of judicial resources, the Court found, notwithstanding the thoroughness of counsel's arguments, and the fact that they were "worthy of serious consideration", the "concern with the expenditure of public and judicial resources in relation to an issue that, while not moot, largely is academic at this stage, weighs heavily against granting a declaration" (***Alcantara***, at para 42).

[29] The Court found that the third consideration, that being the concern that a declaration in the case would lack context, was not an issue. Nor did the fourth consideration, that of the potential for abstract declarations encouraging improper intervention in governmental affairs, weigh against a declaration.

[30] The Court summarized its reasons for declining the application as follows: "[t]he issue sought to be determined is in large part theoretical at this juncture, and to make a decision could affect the course of future litigation. It is preferable to litigate in a context where the result has practical significance and the impact is real. Further, judicial and public resources are limited."

Application to The Present Case

[31] I will therefore apply the considerations in ***Trang #2*** to the Ms. Nassichuk-Dean's application.

[32] The first consideration, that parties not directly affected are generally not granted remedies that may affect the rights of those who are, weighs against granting a declaration. The policy that is the subject matter of this application is gone. It can no longer have any effect on Ms. Nassichuk-Dean's future education, nor can a declaration rectify any breach of her rights or compensate her for any losses she may have incurred from any potential breach.

[33] The second consideration, that of the use of scarce public and judicial resources, also weighs against declarative relief.

[34] The Applicant argues in her supplemental brief that "the facts and legal issues are fully before this court". I do not agree. A considerable portion of the Applicant's argument relies upon the evidence of an expert witness as to the potential harm from vaccines. The Respondent provided evidence from an expert as well, who effectively contradicts the Applicant's expert. Neither expert testified in these proceedings.

[35] Clearly, absent *viva voce* testimony and the inherent safeguard of cross-examination, I am in no position to chose between the evidence of the two experts, or to make any determinations with respect to their credibility. The Applicant bears the onus of proof in her application. Either a more fulsome hearing is required to present a more thorough evidentiary record, or I must determine the matter in the absence of any expert scientific evidence. Such a hearing, effectively a "battle of experts", would consume considerable court time and resources.

[36] I am also of the view that a declaration in this case may lack context. The circumstances here are very specific and unique. Essentially, this application involves the impact of a specific learning institution's short-term policy meant to address a serious and unprecedented public health crisis. The policy was created in the context of a constantly changing pandemic environment, and had to take into account the availability and efficacy of vaccines and testing equipment.

[37] It is difficult to imagine a similar set of circumstances arising again. As such, a declaration on so narrow and specific a factual context would have no future public utility. If anything, it would only have the potential to make mischief were it to be applied to or influence future health policies.

[38] Ms. Nassichuk-Dean argues in her submissions that: "[t]his application is not just about the Applicant, it speaks to the public interest of all students in Alberta, Canada, and beyond, to determine how far a state agent can go in mandating a medical treatment in order to meet the objective of health and safety." (Brief of Argument of the Applicant, at paragraph 7) In effect, the Applicant is asking the Court to make an abstract declaration which may have a significant impact on future governmental action. That impact is the very concern identified in the fourth aspect of the ***Trang #2*** test.

[39] Finally, with respect to the specific request for a declaration in relation to the Alberta human rights legislation, Ms. Nassichuk-Dean has not commenced any action or complaint under

that legislation. The Respondent argues that this Court does not have jurisdiction to hear that matter, as it should properly be before the Human Rights Commission.

[40] I find that I do not have to rule with respect to the jurisdictional issue. Even if this Court had jurisdiction to issue such a declaration, the fact that Ms. Nassichuk-Dean could have sought a remedy under the *Alberta Human Rights Act* and declined to do so further weighs against making that declaration. Declaratory relief is generally not appropriate where other, more concrete legal proceedings can address an issue: ***Trang #2***, at para 19.

Conclusion

[41] When I weigh the considerations in ***Trang #2*** in the context of the circumstances of this case, I find that this is not an appropriate case for declarative relief. The application is therefore dismissed.

Costs

[42] If the parties are unable to agree on the issue of costs, they may arrange to bring the matter back before me within 30 days of this decision being published. The matter of costs may be heard either in person or via WebEx.

Heard on the 5th day of May, 2022 to the 6th day of May, 2022.
Dated at the City of Lethbridge, Alberta this 20th day of September, 2022.

D.V. Hartigan
J.C.K.B.A.

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