QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2019 SKQB 143**

Date: **2019 06 06**
Docket: QB 312 of 2017
Judicial Centre: Prince Albert

BETWEEN:

PRINCE ALBERT RIGHT TO LIFE ASSOCIATION AND VALERIE HETTRICK

APPLICANTS

- and -

CITY OF PRINCE ALBERT

RESPONDENT

Counsel:

Philip Fourie and Marty Moore — for the applicants
Mitchell J. Holash, Q.C. — for the respondent

ORDER
June 6, 2019

GOEBEL J.

INTRODUCTION:

[1] The Prince Albert Right to Life Association [PARLA] is a non-profit charitable organization which operates in the City of Prince Albert. Valerie Hettrick is their past president and event organizer. For many years the City of Prince Albert [City] allowed non-profit interest groups and charitable organizations like PARLA to use a

flagpole located in Memorial Square just outside of City Hall to increase public awareness about their cause. At one point, the City enacted Policy No. 45.1 [Policy] "to establish a respectful and consistent process" for the raising of flags on municipally controlled flagpoles as well as to manage requests for other special designations in the city. This Policy was to be administered by the Director of Community Services.

[2] Each year for approximately 20 years PARLA applied for, and was granted, permission to use the "Courtesy Flagpole" during a week in May that was simultaneously proclaimed as "Celebrate Life Week". For the last seven of those years the applicant raised a flag which portrayed a symbol of a smiling, fully-formed cartoon fetus and the words "Celebrate Life Week" and "Please Let Me Live". The applicants described the message on the flag as "entirely positive and friendly". That, of course, is a matter of perspective.

[3] In the spring of 2017 two written complaints about PARLA's flag and the City's historical proclamation of "Celebrate Life Week" were received by the City. After some debate the Executive Council referred the complaints to the Mayor's office.

[4] Between April 3 and 6, 2017, Ms. Hettrick sent a number of documents to the City on behalf of PARLA. For example, she requested in writing that May 8 to 14, 2017 be proclaimed "Celebrate Life Week". She submitted an application form asking to use Memorial Square for a flag raising ceremony on May 8 in conjunction with other planned events. She also sent an "Event Invitation Request" asking that the Mayor or his designate attend the flag-raising event. Finally, she submitted the application form prescribed by the Policy seeking to use the Courtesy Flagpole from May 8 to 14, 2017.

[5] On April 6, 2017 an official proclamation was executed naming May 8 to 14, 2017 "Celebrate Life Week" in the City of Prince Albert. However, no formal response was provided to Ms. Hettrick or PARLA respecting the other requests and applications.

[6] According to the affidavit filed by the applicants, on or about May 4, 2017 the Mayor, Greg Dionne, initiated contact with Ms. Hettrick by phone to discuss the possibility of obtaining a "nationally recognized flag". Following that call, Ms. Hettrick sought clarification respecting the request for a "national flag" in a text message exchange with the Mayor. Confused by the text message exchange, she wrote a letter seeking clarification on the position being taken by the City. No response was forthcoming.

[7] On May 5, 2017 the applicants became aware of a media report indicating that the Mayor had stated that the requested flag would not be flown. The certified record filed by the City included a media release dated May 5, 2017 which indicated that PARLA's application was "deferred" but that the requested flag would not be flown. The release indicates that the Mayor's office, along with the Director of Community Services, reviewed the objections and concluded that the requested flag is "not consistent with any nationally or provincially approved flag, which is unique to this group". There is no suggestion that the media release was provided to Ms. Hettrick or PARLA in advance of this proceeding being initiated.

[8] In fact, it is not disputed that the applicants never received any communications from the Director of Community Services in response to its application to use the Courtesy Flagpole.

[9] Unhappy about the situation, in November 2017 the applicants commenced this proceeding seeking judicial review of the City's denial of their application to fly their requested flag on the requested dates. They seek a declaration that the decision was arbitrary, unreasonable and contrary to principles of natural justice and procedural fairness. They further seek a declaration that the decision violates their right to freedom of expression guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*. The application also seeks an order directing the City to permit them to fly their flag on the Courtesy Flagpole or an order remitting the matter back to the City. They also seek costs.

[10] On May 28, 2018 the Mayor brought forward a motion to amend the Policy by ending the practice of allowing access to a Courtesy Flagpole. The motion passed and the provisions of the Flag Protocol Policy central to this proceeding were repealed thereby eliminating future access by special interest groups, non-profits and/or charities to any flagpole in Memorial Square.

IS THE APPLICATION MOOT?

[11] As there is no longer a Courtesy Flagpole available to public interest groups, the City argues that the court should decline to adjudicate an issue that has become moot. In response, the applicants acknowledge that some of the remedies initially sought are no longer available, but argue that to the extent they seek declaratory relief the application is not moot and should proceed.

[12] The leading case on the doctrine of mootness is the Supreme Court of Canada's decision in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. In that decision, Justice Sopinka, writing for the Court, described the doctrine as follows at page 344:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly, 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 general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

[13] Justice Sopinka prescribed a two-part analysis for determining whether an application is moot and, even if it is found to be moot, whether the court should exercise its discretion to hear the matter:

> The approach in recent cases involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.
>
> [at page 353]

[14] The mootness doctrine and *Borowski* analysis were recently considered and applied by the Saskatchewan Court of Appeal in *Dearborn v Saskatchewan (Financial and Consumer Affairs Authority)*, 2017 SKCA 63 [*Dearborn*], and *Radiology Associates of Regina Medical PC Inc. v Sun Country Regional Health Authority*, 2016 SKCA 57, [2016] 10 WWR 662 [*Radiology*]. In both cases the proceeding was determined to be moot.

[15] In this instance, I am called upon to determine whether a live controversy remains despite the repeal of the Policy and, secondly, even if no live controversy remains, whether I should exercise my discretion to determine the application.

Step One: Is there a live controversy remaining between the parties?

[16] This step asks whether there is a tangible and concrete dispute remaining between the parties or whether the issues raised by the proceeding have become academic. The focus of the analysis lies upon the practical remedies remaining available to the parties.

[17] The City argues that there can no longer be a "live controversy" as the matter at hand is solely based upon the use of a flagpole that is no longer available for the applicants' use. PARLA takes issue with this simplistic characterization. While they concede that some of the relief originally sought is unavailable, they argue that the primary remedy sought – a declaration that the decision was an unreasonable violation of PARLA's rights – remains a discrete and separate remedy available to the court to order. They argue that, unlike in *Borowski*, the dispute here is not about the validity or constitutionality of the Policy, but rather the manner in which it was applied by the City.

[18] In support of their position, the applicants cite and rely upon the Alberta Court of Appeal in *Trang v Alberta (Edmonton Remand Centre)*, 2005 ABCA 66 at para 5, 363 AR 167. In that case, the court distinguished the outcome in *Borowski* and held:

> 5 In our view, the proceedings are not moot. There is clearly a live controversy between the parties as to whether or not the respondents' charter rights were breached while they were incarcerated. An action for a declaration may proceed in the absence of a claim for any other remedy. Given our findings on that issue it is unnecessary for us to consider the second stage of the *Borowski v. Canada (Attorney*

> *General)*, [1989] 1 S.C.R. 342 (S.C.C.) analysis, that is whether the chambers judge properly exercised his discretion in allowing the proceedings to continue.

[19] There is no question that a declaration, on its own, constitutes tangible relief. Section 11 of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, states that:

> 11 A judge may make binding declarations of right whether or not any consequential relief is or can be claimed, and no action or matter is open to objection on the ground that a mere declaratory judgment or order is sought.

[20] In fact, in many cases a declaration may be the only practical relief available to remedy past or historical violations: Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (Rel 28, September 2016) 2d ed, (Toronto: Thomson Reuters, 2016) at chapter 12. That being said, the mere fact that a declaration is sought does not end the analysis: see *Webber v Anmore (Village)*, 2012 BCCA 390. A more nuanced analysis is warranted taking into account a number of considerations including whether the situation is likely to arise again in the future, whether the declaration will settle the law or prevent further disputes in promotion of judicial economy or whether the relief will provide legal and practical guidance that solves underlying issues and prevents new ones from arising between the parties: *Constitutional Remedies in Canada* at para. 12.680.

[21] Furthermore, the analysis does not end with a consideration of the relief *sought* by the applicants. It is necessary to drill down and assess what practical remedies remain *available* to the parties on the evidence presented. Even if the amendment to the Policy does not foreclose, on an academic level, declaratory relief, the matter will have become moot if the best result practically available to PARLA is an order directing the matter back to the municipal body for a rehearing or further reasons, relief rendered moot by the repeal of the Policy. In that instance, the proceeding will have become an academic exercise.

[22] This method of analysis requires some fairly detailed consideration of the merits of the issues raised by the application and the available remedy in the event that the issues are resolved in favour of the applicants. Below, I have addressed, on a simplified basis, the three main issues raised by the application being:

a. Was there a denial of procedural fairness?

b. Was the decision reasonable?

c. Did the decision violate section 2(b) of the *Charter of Rights and Freedoms*?

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

a. Was there a denial of procedural fairness and if so, what is the appropriate remedy?

[24] Public decision-makers hold a duty to act fairly in coming to decisions that affect the rights, privileges and interests of others: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 79, [2008] 1 SCR 190 [*Dunsmuir*]. See also *101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 31 at para 76 [*101115379 Saskatchewan Ltd.*]. Individuals affected by a public body's decision should have the opportunity to present their case and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 28 [*Baker*].

[25] When a reviewing court is asked to consider whether there has been a denial of procedural fairness, the standard of review to be applied by the court is one of correctness, with no deference to be shown to the body that made the decision under scrutiny: *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502; *101115379 Saskatchewan Ltd.*; *SEIU-West v Heartland Regional Health Authority*, 2017 SKCA 84; *Phillips Legal Professional Corporation v Vo*, 2017 SKCA 58, [2017] 12 WWR 779; *Risseeuw v Saskatchewan College of Psychologists*, 2019 SKCA 9 at para 64, [2019] 2 WWR 452; *Eagle's Nest Youth Ranch Inc. v Corman Park (Rural Municipality #344)*, 2016 SKCA 20, 395 DLR (4th) 24 [*Eagle's Nest*]. The reviewing court must determine whether, in fact, the decision was "borne of a 'just' exercise of power": *Eagle's Nest*.

[26] The existence of a duty of fairness, however, does not identify the standard that applies – it is not "one size fits all": *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 55, [2011] 2 SCR 504 and *Baker* at para 21. In the very recent decision of the Saskatchewan Court of Appeal in *101115379 Saskatchewan Ltd.*, Ryan-Froslie J.A. succinctly summarized the analysis as follows:

> 77 Given the vast number of administrative decision-makers that exist and the many different ways their decisions are made, what constitutes procedural fairness will vary depending on the nature of the administrative decision-maker and the context in which the decision is made. This was discussed by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. Justice L'Heureux-Dubé, writing for the majority in *Baker*, set out a non-exhaustive list of factors to be considered in determining the degree of procedural fairness required of an administrative decision-maker:
>
> (a) the nature of the decision being made and the process followed in making it (the closer an administrative process resembles a judicial process the higher the duty of procedural fairness) (at para 23);
>
> (b) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates (at para 24);

(c) the importance of the decision to the persons affected (at para 25);

(d) the legitimate expectations of the person challenging the decision (at para 26), and

(e) the choices of procedure made by the administrative decision-maker, particularly where the enabling statute gives the decision-maker the ability to choose the process or when the agency has an expertise in determining what procedures are appropriate in the circumstance (at para 27).

[27] In this instance, there appears to be little debate that the City held a duty of procedural fairness to the applicants. It is also agreed that the standard required would have been relatively low. No elaborate adjudicative process was required nor expected. That being said, it was conceded that the issue was highly important to the applicants.

[28] It was also reasonable and appropriate for the applicants to expect that the City would adhere to the process outlined in its Policy. It has been held that a prescribed process sets a minimum level of procedural fairness to be accorded and creates a legitimate expectation that it will be followed: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559; *Eagle's Nest* at paras 21 to 24; *Amin v Saskatchewan (Ministry of the Economy)*, 2017 SKQB 142 at paras 83 and 84.

[29] In this instance, the City created the Policy "to establish a respectful and consistent process" for the raising of flags on municipally controlled flagpoles in the city. The Director of Community Services was specifically identified as the person "responsible for ensuring compliance" with the Policy. Paragraph 6.05 of the Policy specifies that the City will maintain a Courtesy Flagpole for the use of charitable and non-profit organizations and para. 6.07 outlines the procedure to be followed when an

organization seeks to use the flagpole and the guidelines that "shall be" reviewed for the flying of guest flags. Those guidelines are as follows:

> (c) The following guidelines shall be reviewed for the flying of guest flags:
>
> i. Flag raisings shall be in conjunction with a particular circumstance by an organization;
>
> ii. Flags of commercial, political, or religious organizations require City Council approval;
>
> iii. Flags of organizations which may be considered controversial, contentious or divisive within the community shall not be flown;
>
> iv. Flags that involve organizations which promote hatred of any person or class of persons, support or promote violence, racism, or intolerance, or otherwise involves illegal activity shall not be flown;
>
> v. Flags that involve any undertakings or philosophy which are contrary to the City of Prince Albert's bylaws or policies shall not be flown; or
>
> vi. Flags that contain any inflammatory, obscene, or libellous statement shall not be flown.

[30] The City had a duty to follow its own prescribed procedure and to ensure general fairness in so doing. When the applicants submitted their application, as they had done in prior years, they held a legitimate expectation that the process prescribed by the Policy would be followed, that the designated decision-maker would assess the application within the context of the Policy and its criteria, that the designated decision-maker would advise them if the application was adequate and if not, what needed to be done and that he/she would advise them of the decision that was ultimately made.

[31] Here there is no doubt that the Policy was not followed. The applicants were not advised of the case to be met, given an opportunity to be heard, provided with adequate reasons or had the assurance that the decision was made by an impartial

decision-maker with the prescribed authority to make it. No intelligible response nor decision was communicated to the applicants. Instead, the requested days came and went without the City raising the requested flag. In the circumstances, I would have no hesitation in finding that there was a denial of procedural fairness.

[32] That being said, the appropriate relief where there has been a denial of procedural fairness is generally to quash the decision and return the matter to the designated authority to determine the application in accordance with the principles of natural justice, without considering the reasonableness or correctness of the decision itself: *Eagle's Nest* at para. 19. Given the repeal of the Policy, this relief is no longer practically available.

b. Was the decision reasonable and if not, what is the appropriate remedy?

[33] The parties agree that the standard of review of the decision is reasonableness: *Dunsmuir*. The applicants argue that the lack of any intelligible reasons for refusing the application renders the decision unreasonable.

[34] In response, the City points to the discretion afforded within the language of the Policy to refuse an application where the flag may be considered "controversial, contentious or divisive". Counsel for the City points to the letters of complaint received by the City about the flag and argues that where no reasons are provided, a reviewing court can "connect the dots" in determining that the decision was reasonable.

[35] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], the Supreme Court of Canada provided guidance to reviewing courts where they were called upon to determine if a decision was unreasonable due primarily to a lack of reasons. The court held:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

[36] This oft-cited case does not, however, stand for the proposition that a reviewing court should engage in pure speculation as to the basis for the decision made where no reasons have been provided. On this point, the applicants cite a recent decision of the British Columbia Court of Appeal in *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority,* 2018 BCCA 344, 426 DLR (4th) 333 [*CCBR*]. In that case, the Court of Appeal did not accept the argument that it is open to the court to look to those factors that "could have" provided justification for the decision, or "connect the dots" (para. 52). It held:

> 54 In the case at bar, there are no dots for a court to connect. In denying the CCRB's advertisement request, Mr. Beaudoin did not acknowledge the CCRB's right to freedom of expression, let alone explain how the denial represents a proportionate balance with TransLink's objectives. Accordingly, I would not endorse the view, expressed in *Grande Prairie (City)* (Alta. C A.) [2016 ABQB 734] at para. 40, that in a case such as this one it is open to the decision-maker to ask the court to consider "all possible objections to an advertisement, and all justifications for its rejections." Doing so would subvert the deferential role of a reviewing court and, in the words of Rennie J., amount to "speculat[ion] as to what the tribunal might have been thinking".
>
> 55 I am not suggesting a decision-maker such as Mr. Beaudoin is obligated to provide reasons comparable to those a judge might provide. However, the decision must allow an advertiser to understand why its advertisement has been rejected. "[A] handful of well-chosen words can suffice": *Vancouver International Airport Authority v.*

> *Public Service Alliance of Canada*, 2010 FCA 158 at para. 17(b), [2011] 4 F.C.R. 425 (per Stratas J.A.).

[37] Similar considerations were at play in *Skyline Agriculture Financial Corp. v Farm Land Security Board*, 2017 SKCA 26, [2017] 6 WWR 235, where the Saskatchewan Court of Appeal recently acknowledged that reviewing courts can "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn" but may not "supply the reasons that might have been given and make findings of fact that were not made". The court held:

> 91 In particular, reviewing judges must be sensitive to the context in which an administrative decision is made and must remain cognizant of the fact that "[r]easons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708 [*Newfoundland Nurses]*). Reviewing courts can "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn" but may not "supply the reasons that might have been given and make findings of fact that were not made" (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, 16 Imm LR (4th) 267). Otherwise, respectful attention to reasons that could have been offered may become a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54, [2011] 3 SCR 654).

[38] Likewise in *Haghir v University Appeal Board*, 2019 SKCA 13, the Court of Appeal cited *Newfoundland Nurses* and held that even though the adequacy of the reasons is not a discrete basis for judicial review on its own, the reasons should "adequately explain the bases of [the] decision" (at para. 94). See also *Abouhamra v Prairie North Regional Health Authority*, 2016 SKQB 293; *Renner v Regina (City)*, 2018 SKQB 326; and *Total Oilfield Rentals Limited Partnership v Saskatchewan (Minister of Finance)*, 2017 SKQB 317.

[39] In this instance, despite granting the applicants' request to fly this particular flag for many years, the City did not grant the applicants' request in 2017. This "decision" was neither the product of a transparent process nor was it supported by intelligible reasons. In fact, no reasons were articulated to the applicants at all.

[40] Despite the documents provided by the City and the submissions of its counsel, a reviewing court should not be called upon to speculate as to the reasons that might have been given or the findings of fact that may have been made had the prescribed decision-maker put his or her mind to the application and the underlying Policy. Once again, however, the appropriate relief where the decision has been found unreasonable based upon a lack of reasons would be to direct the matter back to the municipal body to provide reasons for the decision made: *CCBR*. Again, given the repeal of the Policy, this relief is no longer available.

c. Did the decision violate section 2(b) of the *Charter of Rights and Freedoms* and if so, what is the appropriate remedy?

[41] Overlying the above issue is the applicants' concern that the City's refusal to fly their requested flag on the requested dates constituted a denial of its right to freedom of expression under s. 2(b) of the *Charter* that was not justified under s. 1. The applicants did not challenge the constitutionality of the Policy but only the City's application of the Policy in this instance.

[42] Section 2(b) of the *Charter* guarantees freedom of "thought, belief, opinion and expression, including freedom of the press and other media of communication". The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for expression that does not conflict with the purposes which s. 2(b) is intended to serve, namely democratic discourse, truth finding and self-fulfillment:

Montréal (City) v 2952-1366 Québec Inc., 2005 SCC 62 at paras 56, 74 and 75, [2005] 3 SCR 141. Once it is established that the activity is protected, the second step asks if the decision made infringes upon that protection, either in purpose or effect: *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673.

[43] Determining *Charter* issues within the administrative law framework requires the reviewing court to determine if, in exercising its statutory discretion, the decision-maker properly balanced the relevant *Charter* values with its statutory objectives. If so, the decision will be found to be reasonable: *Doré v Barreau du Québec*, 2012 SCC 12 at paras 57 and 58, [2012] 1 SCR 395 [*Doré*]; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 37 - 42, [2015] 1 SCR 613 [*Loyola*]; *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295 [*Greater Vancouver*].

[44] In this instance, the City argues that this is not a situation in which the *Charter* is even engaged, citing *Vietnamese Association of Toronto v Toronto (City)* (2007), 282 DLR (4th) 134 (Ont Sup Ct), a case where the court was called upon to decide whether the city's refusal of the applicant's request to fly a heritage flag was a denial of its freedom of expression. In that case, the court found that s. 2(b) does not guarantee a right to any particular means of expression and that the city was under no obligation to provide a particular platform of expression to groups or individuals. Distinguishing a municipal flagpole from an airport or public street to which the public has unimpeded access, the court found that the purpose of the flagpole policy at play was not to suppress expression but to facilitate expression in a manner that did not create diplomatic incidents. In this regard, the court acknowledged that the use of a flagpole must be regulated because the flags flown on municipal grounds are perceived, rightly or wrongly, as the expression of the city's perspective and approval. Ultimately,

it held that while the applicant can use the city square for its commemorative ceremony, and participants may carry and display the heritage flag, the fact that they cannot display their flag in the way they wish did not constitute a denial of freedom of expression.

[45] To a certain extent, this case appears to stand in contrast to those decisions which have held that *Charter* values were at play where a government authority managed advertising on public transit: *Greater Vancouver*; *CCBR*; *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154, [2018] 6 WWR 463 [*Grande Prairie (City)*]; *Grande Prairie (City) cited American Freedom Defence Initiative v Edmonton (City)*, 2016 ABQB 555, [2017] 3 WWR 603.

[46] That aside, within the limited context of determining the issue of mootness, even if I leave aside the question as to whether this was the kind of expression to which constitutional protections apply (see also *Greater Vancouver*), and assuming the applicants can meet the burden of proving their s. 2(b) rights were infringed, I would nevertheless be unable to determine if the City's decision was reasonable so far as it reflects a proportionate balance between the *Charter* value of freedom of expression and the City's legitimate municipal objectives: *Doré, Loyola.*

[47] Such was the situation in *CCBR,* the case cited and relied upon by the applicants, where the court, having found that the decision-maker did not provide any meaningfully reviewable reasons for his decision, directed that the matter be remitted back to the authority for determination. Just as that court was not prepared to "connect the dots" in importing justification for the decision made where no reasons were provided, the court held that it was not prepared to engage in a proportionality analysis on behalf of the decision-maker. See also *Canadian Centre for Bio-Ethical Reform v Peterborough (City),* 2016 ONSC 1972 at para 25, where the court held:

> [25] We have considerable unease with the Applicant's request for a declaration that the limit on its freedom of expression caused by the Respondent's decision was unconstitutional. To do so would require us to have a full understanding of the statutory objectives being pursued by the Respondent and the ability to analyze whether the Applicant's freedom of expression was being limited as little as possible in all of the circumstances. Without an evidentiary record from the Respondent addressing these issues and in the absence of any adversarial party to contest the evidence and submissions of the Applicant, we decline to make a declaration that may be seen to be a general pronouncement with precedential value.

[48] A similar outcome was rendered in *Christian Heritage Party of Canada v Hamilton (City)*, 2018 ONSC 3690, 143 OR (3d) 207, another case cited by the applicants. There the court found there to be a breach of procedural fairness, a lack of coherent reasons provided and an inadequate record upon which to engage in any principled proportional balancing analysis required by the *Charter*, but refused to make the declaration sought. The court held:

> [63] The City's lack of due process ensured that no reasons balancing the competing Charter values were ever written. Given the importance of the rights at play to both sides, and given the nuanced analysis of the Decision that must be undertaken upon judicial review, it was imperative for the City to undertake an adequately robust process in determining whether or not to remove the Advertisements. The parties needed to be heard, the relevant evidence needed to be considered and adequate reasons needed to be given. In providing such a procedural foundation, the City would have ensured that any adjudication would have properly balanced the interests at play. This is not a case where, like *Law Society of British Colombia v. Trinity Western University* [2018] S.C.J. No. 32, the reviewing Court can examine a sufficient record to determine reasonableness. In this case, there is an inadequate record to review and we cannot therefore engage in the analysis described in *Doré, supra.*

[49] It is essential that constitutional claims and, in particular, *Charter* claims be decided based on an adequate factual record. The rationale for this position was articulated by Cory J. in *MacKay v Manitoba*, [1989] 2 SCR 357 at page 361 as follows:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts

> is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. ...

[50] The present case is not a situation in which it could be said that any decision refusing the application to fly this particular flag would be unreasonable, nor that the prescribed decision-maker could not be trusted to conduct a proper analysis under the prescribed Policy. A proper application of the Policy does not automatically confer entitlement to use the Courtesy Flagpole, but rather the right to apply to use the flagpole and the legitimate expectation that the Policy regulating its use will be applied reasonably and fairly. Once again, the appropriate relief would be to refer the matter back to the City for a proper and fair determination.

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

Step Two: Notwithstanding that the application is moot, should I exercise my discretion to hear the case?

[52] In *Dearborn*, Richards C.J.S., writing for the court of appeal, summarized the second step of the *Borowski* analysis as follows:

> [16] ... The second step is to determine whether, notwithstanding that the appeal is moot, the court should nonetheless exercise its discretion to hear the case. That exercise of discretion, according to Borowski, should be undertaken with reference to the underlying basis of the

> mootness doctrine itself: (a) the presence of an ongoing adversarial context, perhaps because of the collateral consequences of the outcome of the appeal, (b) the importance of conserving judicial resources, and (c) the need for a court to be sensitive to its proper law-making function, i.e., its role as an adjudicator of disputes affecting the rights of parties.

[53] In *Borowski*, the Supreme Court cautioned that the application of this test is not to become "a mechanical process. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa": at page 363.

[54] Here the applicants argue that even if the court should find the application to be moot, the court should exercise its discretion to decide the matter. In support of same they argue that the determination of the case will assist in resolving other situations that raise similar questions, the application has already been fully argued before the court (so judicial economy should play no role) and deciding the matter is a necessary consequence of the court's jurisdiction to determine important controversies concerning government actions and the *Charter* rights of its citizens.

[55] In *Radiology*, the Saskatchewan Court of Appeal considered each of the second stage factors finding that none of them, standing alone, precluded the court from intervening. An illustration of the court's analysis is evident in the following paragraphs:

> [23] Of the three *Borowski* factors, it is useful to consider and dispense with any concern about the adversarial nature of the case. In *Borowski*, the Court stated, "the requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome" but "this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail" (at 358–359). The collateral consequences of an order can provide "the necessary adversarial context" (at 360) to enable the Court to hear the matter either through the presence of an intervenor or otherwise. Applying this particular principle to the situation in *Borowski*, Sopinka J. said he had "little or no concern about the absence of an adversarial relationship" because "the appeal

> was fully argued with as much zeal and dedication on both sides as if the matter were not moot" (at 363). The same can be said in this appeal. The appeal was argued fully before us.
>
> [24] The second broad factor, on which the mootness doctrine is based, as discussed in *Borowski*, is the need to conserve judicial resources. Sopinka J. outlined three circumstances where hearing a moot appeal might be warranted, notwithstanding issues of judicial economy: (i) where the case is "of a recurring nature but brief duration" (at 360); (ii) where the case raises an issue of public importance of which a resolution is in the public interest with respect to which the court weighs "the economics of judicial involvement" against "the social cost of continued uncertainty in the law" (at 361); and (iii) whether deciding the appeal would "have practical side effects on the rights of the parties" (at 364): also see "Mootness" at 76.
>
> [25] Considering the second factor, the Court has no concerns about the waste of judicial resources. By the time Sun Country filed its application to quash the appeal for mootness, Radiology's appeal had been perfected and was ready for hearing. In light of this, and as a matter of judicial economy, the Court made the determination that it would be of use to hear the appeal at the same time as it heard the application to quash to avoid calling the parties back and preparing for the same appeal twice.
>
> [26] The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The concern is that "[p]ronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch" (*Borowski* at 362). As an aspect of this rationale, Sopinka J. stated, "the Court should be sensitive to the extent that it may be departing from its traditional role" (at 363). He also explained that one element of this third factor is "the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention" (at 365).
>
> [27] The third rationale does not raise concerns that would preclude this Court from intervening. The Court is not being asked to depart from its traditional function or to tread on the legislative sphere.

[56] Nevertheless, the Court of Appeal declined to exercise its discretion to decide the appeal on the basis that even if the court found in favour of the applicant, it could not give it the remedy it seeks. Jackson J.A. writing for the court held as follows:

[28] Thus, while none of the specific *Borowski* factors impede the Court from deciding the appeal, an aspect of what Sopinka J. said in relation to the third factor is pertinent to this appeal: the Court must demonstrate sensitivity to the effectiveness or efficacy of judicial intervention.

[29] In this appeal, it is clear that, if this Court found the Chambers judge had erred, the Court could not give Radiology the remedy it seeks: it cannot enjoin Sun Country's actions because they have already been performed. If the Court were disposed to decide the appeal, the only decision this Court could render is to say whether an injunction *should have been* granted. Radiology asks this Court, in essence, to grant a declaration in circumstances where no declaration would be granted in first instance. Further, granting such a declaration would have no readily apparent meaningful consequences for either side. It also could have the unintended effect of prejudicing the eventual outcome at trial.

[30] In *Sidhu Trucking* [2015 YKCA 5], the Yukon Court of Appeal was asked to consider the correctness of a declaration at first instance. After concluding the matter was moot, as the declaratory opinion had already been acted upon, the Court commented upon the advisability of having granted a declaration in the first place. The Court in *Sidhu Trucking* referred to Chief Justice McEachern's concurring opinion in *Horton Bay Holdings Ltd. v Wilks* (1991), 1991 CanLII 1156 (BC CA), 8 BCAC 68:

> [24] ... I think mischief could easily result from actions just for declarations. I would expect no declaration would be made unless the Court is satisfied that the declaration will have some practical value.

[31] Similarly in this appeal, a declaration that the injunction should have been granted – if the Court had found error – will have no practical value and has much potential for mischief. Radiology clearly has a stake in the appeal. It wants this Court to decide the appeal in the expectation that it will be allowed, with the Court saying that the Chambers judge erred by not granting the injunction. Even though the Court cannot enjoin Sun Country from doing what it has already done, Radiology submits such a disposition would be of use to it in the event that Sun Country decides to carve out other parts of "diagnostic radiological services." In our view, the Court cannot take on this appeal on such a basis.

[32] Having regard for these considerations, the Court declines to exercise its discretion to decide the appeal...

[57] In this instance, the applicants have not satisfied me that I should exercise my discretion to fully determine the issues raised by this matter on the merits. For the reasons expressed above, not only is there no live and concrete controversy remaining, but there can be no ongoing adversarial context. There are no outstanding or legal issues at play between these parties, nor any collateral consequence that will be advanced by a full determination on the merits. The "heart of the dispute" disappeared when the City repealed its Policy eliminating any future use of the flagpole by the applicants: *Meigs v Saskatchewan Penitentiary*, 2012 SKQB 282, 401 Sask R 139. This has become an academic exercise with no practical value.

[58] Further, I must remain mindful that the repeal of the Policy was part of a legitimate legislative function and pronouncing declarations in the absence of a concrete dispute may teeter upon intrusion into the role of the legislative branch.

[59] For all of the above reasons, the application is dismissed as being moot.

How should I exercise my discretion respecting costs?

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

J.
G.V. GOEBEL