Court of Appeal for Saskatchewan

Docket: CACV3444

Citation: *Prince Albert Right to Life Association v Prince Albert (City)*, 2020 SKCA 96

Date: 2020-08-10

Between:

Prince Albert Right to Life Association and Valerie Hettrick

Appellants/Respondents by Cross-Appeal (Applicants)

And

City of Prince Albert

Respondent/Appellant by Cross-Appeal (Respondent)

Before:	Ottenbreit, Schwann and Kalmakoff JJ.A.
Disposition:	Appeal dismissed Cross-appeal dismissed
Written reasons by:	The Honourable Mr. Justice Ottenbreit
In concurrence:	The Honourable Madam Justice Schwann The Honourable Mr. Justice Kalmakoff
On appeal from:	2019 SKQB 143, Prince Albert
Appeal heard:	January 22, 2020
Counsel:	Rod Wiltshire and Marty Moore for the Appellants/Respondents by Cross-Appeal Zachary Carter for the Respondent/Appellant by Cross-Appeal

Ottenbreit J.A.

I. INTRODUCTION

[1] Prince Albert Right to Life Association and Valerie Hettrick [collectively PARLA] appeal the decision of a Court of Queen's Bench Chambers judge dated June 6, 2019, dismissing an application for judicial review of a decision of the City of Prince Albert [City] on the basis it was moot: *Prince Albert Right to Life Association v Prince Albert (City)*, 2019 SKQB 143 [*Chambers Decision*]. The appellants filed a joint factum.

[2] The City cross-appeals in respect of various issues, including the order of costs made against it, citing various errors by the Chambers judge in fact and law found in the *Chambers Decision* at paragraphs 22–23, 30–32, 39–40 and 60.

[3] For the reasons hereinafter set forth, the appeal of PARLA is dismissed. The cross-appeal of the City is also dismissed.

II. FACTS AND BACKGROUND

[4] For seven years prior to 2017, the City had allowed PARLA to use a city flagpole, which is located in Memorial Square just outside the Prince Albert City Hall [Flagpole], to fly its right-to-life-themed flag to increase public awareness about its cause.

[5] On January 25, 2016, the City adopted a new policy entitled the Flag Protocol Policy [Policy]. It sets out a new comprehensive policy and procedure with regard to the use of the Flagpole. The City received correspondence from the community opposing the flying of the PARLA flag in 2016, citing the guidelines in the Policy. In March 2017, more people complained to the City, demanding that it refuse to allow PARLA's flag to fly on the Flagpole in 2017 or to proclaim Celebrate Life Week as the City had done in the past. The City's Executive Council considered those demands at a meeting held on April 3, 2017, and then referred the matter to the Mayor's office.

[6] On April 3, 2017, Ms. Hettrick applied on behalf of PARLA pursuant to the Policy to fly its flag for the week of May 8–14, 2017. The proposed flag portrayed a symbol of a smiling,

fully-formed cartoon fetus, and the words “Celebrate Life Week” and “Please Let Me Live”. This flag had been flown on the Flagpole the previous seven years.

[7] On April 4 and 5, 2017, the Mayor spoke with Ms. Hettrick by telephone and sought to have her propose flying a different flag. On or about May 4, 2017, the Mayor called Ms. Hettrick and informed her that the City would not allow the PARLA flag to be flown on the Flagpole because the flag was not “national” or “nationally recognized” (*Chambers Decision* at para 6).

[8] Ms. Hettrick, on PARLA’s behalf, sent a formal letter dated May 4, 2017, to the Mayor requesting that he clarify why the flag was being prohibited and what bylaw or provision was being used to prohibit the flying of the flag. The City did not respond to PARLA’s letter.

[9] On May 5, 2017, the City issued a press release indicating that the application to fly the “Right to Life” flag was heard at the Executive Council meeting on Monday, April 3, 2017, and the matter was referred to the Mayor’s office. The press release indicated the Mayor’s office, along with the Director of Community Services, had reviewed the objections and concluded the flag was “not consistent with any nationally or provincially approved flag, which is unique to [PARLA]” (*Chambers Decision* at para 7). The press release indicated that, when speaking with people, it was the picture on the flag that was objectionable and, therefore, the City had requested that a new flag be submitted without the imagery on the proposed flag. The request for a flag with new imagery did not give the City enough time to consider PARLA’s request for that year.

[10] The Mayor also spoke to the media about the flag, saying that PARLA’s present flag would never fly again at City Hall but that he would, in the future, be open to flying a different pro-life flag, provided it did not display a cartoon image of a fully-developed fetus.

[11] The City never formally dealt with the application and PARLA was not able to fly its flag on the Flagpole. PARLA then filed an originating application dated October 31, 2017, seeking judicial review of the City’s decision to deny its application to fly its flag on the Flagpole.

[12] On May 28, 2018, City Council passed a motion to amend the Policy and end the practice of allowing public use of the Flagpole.

III. THE *CHAMBERS DECISION*

[13] The Chambers judge reviewed the facts and background of the application for judicial review. Because the Flagpole was no longer available for public use, she turned first to whether the application was moot. The Chambers judge, after reviewing *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*], and *Dearborn v Saskatchewan (Financial and Consumer Affairs Authority)*, 2017 SKCA 63 [*Dearborn*], observed that the governing principles required her to first determine whether there was a live controversy despite the repeal of the Policy and, second, if no live controversy remained, whether she should exercise her discretion to determine the application in any event.

[14] The Chambers judge noted that whether or not a live controversy existed between the parties focused on the practical remedies remaining available. She noted that the availability of a remedy did not end the matter. Referring to Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (Rel 28, September 2016) 2d ed, (Toronto: Thomson Reuters, 2016) at 12.680, the Chambers judge identified that it was necessary to determine whether the situation was likely to arise again in the future, whether the declaration would settle law or prevent further disputes in promotion of judicial economy, or whether the relief would provide legal and practical guidance that solved underlying issues and prevented new ones from arising between the parties.

[15] She recognized that, even if the repeal of the Policy did not foreclose, on an academic level, declaratory relief, the matter would have become moot if the best possible result practically available to PARLA was an order directing the matter back to the City for rehearing or further reasons.

[16] She determined that an analysis of mootness in this case required examination of three issues:

> [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:
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> a. Was there a denial of procedural fairness?
>
> b. Was the decision reasonable?
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> c. Did the decision violate section 2(b) of the *Charter of Rights and Freedoms*?

[17] With respect to whether there was a denial of procedural fairness, the Chambers judge determined the standard of review to be applied was correctness. She determined that the City owed a duty of procedural fairness to PARLA and that the standard required of them was based on the criteria set out in *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 55, [2011] 2 SCR 504, and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at para 21.

[18] After reviewing the *Baker* criteria, the Chambers judge determined that it was reasonable and appropriate for PARLA to expect the City to adhere to the process outlined in the Policy, which set out a minimum level of procedural fairness to be accorded and created a legitimate expectation that it would be followed. She concluded:

> [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.
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> [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 Youth Ranch Inc. v Corman Park (Rural Municipality #344)*, 2016 SKCA 20, 395 DLR (4th) 24] at para. 19. Given the repeal of the Policy, this relief is no longer practically available.

[19] The Chambers judge then turned to whether the decision was reasonable and, if not, what the appropriate remedy would be. PARLA had argued that the decision of the City was unreasonable because it lacked any intelligible reasons.

[20] She noted that in *Skyline Agriculture Financial Corp. v Farm Land Security Board*, 2017 SKCA 26 at para 91, quoting from *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, 16 Imm LT (4th) 267, this Court 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'".

[21] The Chambers judge found that the decision of the City was neither the product of a transparent process, nor was it supported by intelligible reasons and, in fact, no reasons were articulated to PARLA at all. She concluded:

> [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: [*Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, 2018 BCCA 344, 426 DLR (4th) 333 [*CCBR*]]. Again, given the repeal of the Policy, this relief is no longer available.

[22] The Chambers judge then turned to whether the decision violated s. 2(b) of the *Canadian Charter of Rights and Freedoms* [*Charter*] and, if so, what the appropriate remedy for that violation would be.

[23] PARLA had argued that the City's refusal to fly the requested flag constituted a denial of its right to freedom of expression under s. 2(b) of the *Charter* and that it was not justified under s. 1. It did not challenge the constitutionality of the Policy, but only its application. The Chambers judge noted that the City argued this was not a situation where the *Charter* was even engaged.

[24] After reviewing the applicable law, she stated:

> [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 Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295]), 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 v Barreau to Québec*, 2012 SCC 12, [2012] 1 SCR 395], [*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613].
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> [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.

[25] She found that it was essential that constitutional claims and, in particular, *Charter* claims, be decided on an adequate factual record and implied there was no such record in this case.

[26] The Chambers judge concluded on the issue of whether there was a live controversy by stating:

> [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.
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> [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.

[27] The Chambers judge then turned to whether she should exercise her discretion to hear the case, notwithstanding that the application may be moot. She noted that this part of the *Borowski* test was not to become "a mechanical process" as noted in *Borowski*.

[28] She noted PARLA's submissions that the court should exercise its discretion to decide the matter for a number of reasons. These included the following arguments: the case would assist in resolving other situations that raise similar questions; the application had already been fully argued before the court and therefore judicial economy should play no role; and deciding the matter was the necessary consequence of the court's jurisdiction to determine an important controversy concerning government actions and the *Charter* rights of its citizens.

[29] On the question of the exercise of her discretion, the Chambers judge concluded:

> [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.
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> [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.

[30] She dismissed the application as being moot.

[31] With respect to the question of costs, the Chambers judge said as follows:

> [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.

IV. ISSUES

[32] PARLA devoted most of its efforts in its argument, both written and oral, to trying to establish that the Chambers judge erred by not making a definitive declaration that its *Charter* right to freedom of expression was violated. I need not address this argument because I am of the view that this case falls to be decided on the question of mootness. Accordingly, I assume for the purposes of my analysis, as did the Chambers judge, that PARLA's s. 2(b) *Charter* rights have been breached.

[33] With respect to the City's cross-appeal, for the reasons I will set out later, the only viable issue arising out of it is the matter of costs.

V. STANDARD OF REVIEW

[34] The standard of review applicable to decisions involving mootness was set out in *Plato v Canada (Revenue Agency)*, 2015 FCA 217, 477 NR 197. The court said :

> [4] The identification of the legal factors to determine if a case is moot is a question of law reviewable under the standard of correctness (*Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40, [2013] 4 F.C.R. 155, at paragraph 57). Once it is established that a case is moot, the Judge has a broad discretion to hear the matter or not, but must properly weigh the criteria established in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, (*Borowski*). …

[35] The standard of review for discretionary decisions has long been that set out in *Rimmer v Adshead*, 2002 SKCA 12, [2002] 4 WWR 119, as follows:

> [58] In turning to this issue, it is necessary to bear in mind that the powers in issue are discretionary and therefore fall to be exercised as the judge vested with them thinks fit, having regard for such criteria as bear upon their proper exercise. The discretion is that of the judge of first instance, not ours. Hence, our function, at least at the outset, is one of review only: review to determine if, in light of such criteria, the judge abused his or her discretion. Did the judge err in principle, disregard a material matter of fact, or fail to act judicially? Only if some such failing is present are we free to override the decision of the judge and do as we think fit. Either that, or the result must be so plainly wrong as to amount to an injustice and invite intervention on that basis. (See, for example, *McKinnon Industries Ltd. v. Walker*, [1951] 3 D.L.R. 577, at 579 (P.C.) and *Saskatchewan Power Corporation v. John Doe*, [1988] 6 W.W.R. 634 (Sask. C.A.)).

VI. ANALYSIS

A. The City's cross-appeal on the reasons

[36] I begin with the matter of the City's cross-appeal. In addition to its appeal of the costs award, in its cross-appeal, the City seeks to vary the reasons of the Chambers judge, arguing she made errors of fact and law at paragraphs 22–23, 30–32, 39–40 and 60 of her decision.

[37] The City also challenges the analytical approach used by the Chambers judge. This challenge is expressed in the following excerpt from its factum:

> 76. Specifically, the Chambers Judge's presumption that a reviewable decision was made by the City formed the basis of findings, within the mootness analysis, that procedural

> fairness was denied. Further, the presumption of a reviewable decision was used to determine that *if* a "decision" were unreasonable, and *if* it breached the Appellants' *Charter* right to freedom of expression, then the appropriate relief would be to remit the matter back to the City for a proper and fair determination, which would serve no practical effect. The Respondent submits that these findings, which are hypothetically based on presumptions, are not legal conclusions applicable outside of the mootness analysis.
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> (Footnotes omitted; emphasis in original)

[38] The City goes on in its factum on to argue that the Chambers judge misapplied the doctrine of legitimate expectations and failed to find that the City did not violate the *Charter*.

[39] It is trite law that an appeal is from the result and not the reasons: *R v Sheppard*, 2002 SCC 26, at para 4, [2002] 1 SCR 869; *Zelinski v Pidkowich*, 2020 SKCA 42 at para 28; *Boardwalk General Partnership v Olson*, 2016 SKCA 135 at para 14, 410 DLR (4th) 357. The City made a cogent argument before the Chambers judge that the matter was moot and was wholly successful on that issue.

[40] The City, as the respondent in this appeal that seeks to sustain the result below, makes a robust argument that the Chambers judge undertook a thorough examination of PARLA's best-case scenario based on so-called assumptions and provisional findings as described in the excerpt from the City's factum set forth above. Yet, as the cross-appellant, the City submits the Chambers judge erred in making those assumptions and findings as part of her mootness analysis. It blows both hot and cold.

[41] Those findings may sit uncomfortably with the City, but in seeking to uphold a favourable decision, it cannot ask this Court to rewrite the favourable decision with reasons that are more to its liking. A respondent may seek to uphold the lower court's decision on an alternative basis. However, this is not what the City is doing. It merely seeks to appeal what it perceives are reasons that put it in a bad light.

[42] The only live issue which is appropriately appealable by the City is the matter of costs. Apart from that issue, its cross-appeal must be dismissed.

B. Did the Chambers judge err in declining to determine the application of PARLA because it was moot?

[43] PARLA argues the Chambers judge erred in declining to determine its application on the merits. It submits its application was not moot because there is a sufficient live controversy between the parties, even with the elimination of the Flagpole by the City. It further argues that the Chambers judge should have exercised her discretion in favour of determining the matter even if it was moot.

[44] The City argues that since there is no dispute or relationship between the parties and no practical relief in the dispute can occur, there is no live controversy. It submits that remitting the matter to the City for a decision would have no consequence because the City no longer maintains the Flagpole and, consequently, neither PARLA nor anyone else is now able to apply to fly their flag. It also argues the matter is moot because the relevant portions of the Policy have been eliminated. As such, the City argues the appeal has become a purely academic exercise that lends itself only to hypothetical analysis. The City also argues the Chambers judge appropriately exercised her discretion not to decide the matter on the merits.

[45] The governing analytical approach to considering whether to hear a case when mootness is alleged is the two-step test set out in *Borowski* (at 353):

> 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. ...
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> 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. ...

[46] In *Dearborn*, Richards C.J.S. summarized the doctrine of mootness and the *Borowski* test. After referring to the portion of *Borowski* cited above, he wrote:

> [16] The consideration of an arguably moot appeal involves two steps. The first is to determine if the appeal is moot, *i.e.*, to determine if it involves a live and concrete controversy between the parties. 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.

[47] *Borowski* does not require that each of these three factors informing the exercise of discretion favour a hearing on the merits. As Sopinka J. noted (at 363):

> In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

1. Is the matter moot?

[48] Respecting the first step of the *Borowski* test, PARLA argues there is a sufficient live controversy and the matter is not moot. I turn first to the jurisprudence to evaluate this submission.

[49] The case of *Stewart v Ontario (Independent Police Review, Director*), 2013 ONSC 7907 (Div Ct), is instructive on the issue of "live controversy":

> [18] A case will therefore be moot if there is no live controversy between the parties. There is no live controversy where the question before the Court has ceased to exist or the substratum of the litigation has disappeared. Further, there is no live controversy where a decision on the merits would have no practical effect on the parties' rights or where the question the Court is now being asked to resolve has been overtaken by post-decision events or a subsequent decision of a board (as in this case). It is not enough that a party has a continuing interest in the outcome of the litigation.
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> (Footnotes omitted)

[50] In *Webber v Anmore (Village)*, 2012 BCCA 390, 4 MPLR (5th) 64, the court said on this point:

> [14] I observe at the outset there is no other outstanding litigation between these parties. Even accepting the expressed desire of Mr. and Mrs. Webber to commence an action for damages for misfeasance of public office, we are left in this appeal with a pure claim for a declaration impugning the conduct of the Approving Officer, without any practical effect in the context of judicial review proceedings, and in a proceeding where we could not allow the petition because the relief in respect to the subdivision is not available.

[51] *Greenspace Alliance of Canada's Capital v Ottawa (City)*, [2008] 52 MPLR (4th) 155 (Ont Sup Ct (Div Ct)), is particularly instructive. Greenspace applied for judicial review of a municipal board's decision dismissing its appeal of two zoning bylaws. The bylaws had been superseded by a comprehensive zoning bylaw which specifically repealed the bylaws that Greenspace had appealed. The matter was dismissed as moot. There was no live controversy with respect to the zoning bylaws because they had been superseded by the comprehensive zoning bylaw and the tangible and concrete dispute between the parties had disappeared.

[52] Of similar effect to the above cases is jurisprudence from the Supreme Court of Canada. In *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [1999] 3 SCR 46, the Court said:

> [42] There can be little doubt that the present appeal is moot, and that the response to the first question is affirmative. At issue is whether the Government of New Brunswick was under an obligation to provide state-funded counsel to the appellant in the circumstances of this case. The appellant, though, was in fact represented by counsel at the custody hearing, the custody order has expired, and she has since regained custody of her children. Consequently, there is no "live controversy" in this appeal. The tangible and concrete dispute has disappeared, and the issue has become academic.

[53] In *R v Penunsi*, 2019 SCC 39, 435 DLR (4th) 65 [*Penunsi*], the Court said:

> [10] "The doctrine of mootness reflects the principle that courts will only hear cases that will have the effect of resolving a live controversy which will or may actually affect the rights of the parties to the litigation except when the courts decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 17). …

[54] Without attempting to define the term exhaustively, based on the foregoing, I conclude that a live controversy may cease to exist in the following circumstances: when the tangible and concrete dispute has disappeared; when the decision will or may no longer actually affect the rights of the parties; where the practical relief sought is no longer available because of alterations in the factual or legal matrix of the case; where the question before the court has ceased to exist or the substratum of the litigation has disappeared; where a decision on the merits would have no practical effect on the parties' rights; and where the question the court is now being asked to resolve has been overtaken by post-decision events or a subsequent decision of a decision-maker.

[55] PARLA cites *Trang v Alberta (Edmonton Remand Centre)*, 2005 ABCA 66, 363 AR 167 [*Trang 2005*], in support of its argument that there continues to be a live controversy and that, in

any event, a declaration can be granted. PARLA accepts that some of the relief it originally sought is no longer available given the change in the Policy but submits that a live controversy exists because it was nevertheless open to the Chambers judge to grant a discrete and separate remedy: a declaration that the decision of the City was an unreasonable violation of its *Charter* rights.

[56] *Trang 2005* dealt with an application for declaratory relief for past *Charter* breaches relating to conditions in the Edmonton Remand Centre. The applicant's underlying criminal charges were stayed over time and the applicants were released. The case became a standalone application for declaration of a *Charter* breach. The Alberta Court of Appeal held that the proceedings were not moot and there was a live controversy between the parties as to whether or not the applicants' *Charter* rights were breached while they were incarcerated at the Edmonton Remand Centre. That court noted that an action for declaration may proceed in the absence of a claim for any other remedy.

[57] The City seeks to distinguish *Trang 2005* on the basis that the declaratory relief sought in that case presented a wider-reaching utility because it could clarify whether conditions at that jail had violated *Charter* rights. The City argues there is no similar utility in this case because PARLA merely seeks to challenge a singular deferred application under a repealed portion of a bylaw respecting an application process that can no longer occur. In *Trang 2005*, the conditions at the Edmonton Remand Centre remained a reality, whereas the issues surrounding the use of the Flagpole in this case do not.

[58] In *Trang v Alberta (Edmonton Remand Centre)*, 2007 ABCA 263, 412 AR 215 [*Trang 2007*], leave to appeal refused (2008), 164 CRR (2d) 376 (note), which can be considered the sequel to *Trang 2005*, the court clearly stated the following regarding the availability of a declaration where the dispute is academic:

> [15] Declarations may not be granted where the dispute has become academic, or will have no practical effect in resolving any remaining issues between the parties: *Canada v. Solosky*, [1980] 1 S.C.R. 821; *Tr'ondek Hwech'in v. Yukon*, 2007 YKCA 1; *Terrasses Zarolega Inc. v. Québec (Régie des installations olympiques)*, [1981] 1 S.C.R. 94 at pg. 106; *Lee v. Canada (Minister of Citizenship and Immigration)*, 126 F.T.R. 229, 37 Imm. L.R. (2d) 278.

[59] Similarly, in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99 [*Daniels*], the Court was clear that a live controversy is a prerequisite to the possibility of a declaration:

> [11] This Court most recently restated the applicable test for when a declaration should be granted in *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44. The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[60] In view of *Trang 2007* and *Daniels*, in its submissions, I find PARLA puts the cart before the horse. The possibility of granting a declaration is not determinative of whether a live controversy continues to exist.

[61] The Chambers judge understood this because she approached the issue of whether there was a live controversy on the basis that the mere availability of a declaration did not end the analysis of whether the matter was moot. She indicated it was necessary to assess what practical remedies, as opposed to academic remedies, were available to the parties on the evidence presented. The Chambers judge noted that even if the amendment of the Policy did not foreclose declaratory relief, the matter would become moot if the best practical result available to PARLA was an order directing a rehearing by the City or an order for the City to provide further reasons.

[62] The practical remedies PARLA sought were an order directing the City to allow it to fly its flag and, alternatively, remitting the decision to the City to be reconsidered in accordance with the law.

[63] The Chambers judge, in considering if there was a live issue, took the best view of some of PARLA's substantive arguments, addressed the merits of its application and examined the available remedies that would flow from such findings. I can find no error in this approach.

[64] With respect to procedural fairness, the Chambers judge correctly set out the governing law. She concluded that there was little debate that the City owed a duty of procedural fairness to PARLA, that PARLA reasonably could expect the City to adhere to the process outlined in the Policy, and that the City had a duty to follow its own procedures and to ensure general fairness in

doing so. She concluded that, in the circumstances, she would have no hesitation in finding that there was a denial of procedural fairness.

[65] The Chambers judge noted that the remedy for breach of procedural fairness was to quash the decision and to return the matter to the tribunal to make the decision in accordance with the principles of natural justice. She noted that in this case the relief was no longer practically available given the repeal of the Policy. I see no error in this reasoning.

[66] The Chambers judge then proceeded to analyze whether the decision was reasonable in light of the absence of reasons by the City. She correctly set out the governing law on this issue. She determined the decision made by the City was neither the product of a transparent process nor was it supported by intelligible reasons and, in fact, no reasons were given to PARLA. The Chambers judge concluded that she could not be called on to speculate as to the reasons that might have been given or the findings of fact that might have been made if the decision-maker at the City had put his or her mind to PARLA's application in light of the Policy.

[67] She noted that the appropriate relief in such a case, i.e., to direct the matter back to the City to provide reasons, was no longer available given that the Policy was repealed. I see no error in this reasoning.

[68] Last, the Chambers judge addressed the matter of the alleged violation of PARLA's right to freedom of expression under s 2(b) of the *Charter*. She again set out the correct governing law and canvassed the law regarding whether the *Charter* applied. She made no determination of that issue but, for the purposes of her analysis, assumed that it did apply and that PARLA's s. 2(b) *Charter* rights were in play.

[69] Given those assumptions, she concluded that she would still be unable to definitively determine if the City's decision was constitutionally sound because it was a reasonable limitation of s. 2(b) rights. She determined that she could not engage in the necessary proportionality analysis to determine if it was reasonably justified because there was an inadequate record and no reasons. I see no error in this line of analysis.

[70] The Chambers judge concluded that this was 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

City could not be trusted to conduct a proper analysis under the prescribed Policy. She determined that if there was a *Charter* breach, the appropriate relief would be to refer the matter back to the City for a proper and fair determination.

[71] The Chambers judge ended her analysis of whether there was a live controversy by concluding that, even accepting that the applicants had advanced a compelling argument on each of its substantive grounds, i.e., denial of procedural fairness, a lack of reasons and a denial of its freedom of expression, the appropriate remedy would result in the matter being directed back to the City. Given that the Policy no longer allowed for public access to the Flagpole, there was no practical reason to do so. She concluded, rightly in my view, that there remained no live controversy between the parties and that the application was therefore moot.

[72] The Chambers judge's conclusion that there remained no live controversy accords with the various descriptions set out above of when such a controversy has ceased to exist. In this case, the specific question before the Court had ceased to exist. The substratum of the litigation had disappeared. A decision on the merits of the issues on which PARLA sought a declaration would have had no practical effect on the outcome of the matter. The matter the Court was being asked to resolve, and any practical remedies consequent thereon, had been overtaken by post-decision events. The Flagpole was no more and the best result of any determination on the merits was a bare declaration that PARLA's *Charter* rights had been breached. In short, it would have been an academic exercise since such declaration would have been barren of any effective remedy. The Chambers judge made no error in determining the matter was moot.

2. Did the Chambers judge err in not exercising her discretion to determine the matter in any event?

[73] With respect to the exercise of her discretion under the second step of the *Borowski* test, the Chambers judge correctly instructed herself on the governing factors, referring at paragraph 52 to the following excerpt from *Dearborn* that bears repeating:

> [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.

[74] The Chambers judge explained why she exercised her discretion as she did, as follows:

> [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.

[75] With respect to the first factor, i.e., the presence of an ongoing adversarial context, I have concluded, as did the Chambers judge, that there is no such context. Although the collateral consequences of an order can provide the necessary adversarial context, I cannot say that granting a declaration in the circumstances of this case will have any meaningful consequences apart from perhaps generally demonstrating that when a party with *Charter* rights deals with a city, those rights must be respected. Unlike the circumstances in *Trang 2005*, there is no possibility that a declaration will ensure that the City's behaviour in the future, in a similar case related to the same or similar subject matter, will be altered. The situation is not capable of arising again in the future because there is no longer a Flagpole or Policy.

[76] With respect to the second factor, i.e., the importance of conserving judicial resources, I cannot say that the type of situation is of a recurring nature but of a brief duration and, as such, is evasive of review. An example of such a case is the rights of prisoners where the factual background of the matter has changed quickly but the larger underlying issue not specific to the party remained (see: *R v Myers*, 2019 SCC 18, [2019] 2 SCR 105; and *R v Oland*, 2017 SCC 17, [2017] 1 SCR 250).

[77] This was not a case that would settle a recurring point of law, thereby preventing further disputes, such as in *Penunsi*, where the significance of the issue and the inconsistency in the appellate jurisprudence merited the expenditure of resources to decide the moot issue. This was also not a case that presented issues of broad public importance beyond the present litigants. There

was no suggestion that the law would remain unsettled if the appeal were not decided. Likewise, deciding the matter would have no practical side effect on the rights of the parties because the Flagpole and Policy no longer exists. In this case, the principle of conservation of judicial resources militates against deciding the matter.

[78] The third factor to consider regarding the exercise of discretion is 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. The Chambers judge correctly noted that pronouncing a declaration in the absence of a concrete dispute about the repealed Policy risked intruding into the legislative function of the City.

[79] Given the foregoing, I cannot say that the Chambers judge erred in her analysis of the factors informing the exercise of her discretion and, in doing so, declining to determine the matter because it was moot.

[80] On the basis of the discretionary standard of review set forth above, I cannot say the Chambers judge erred in principle, disregarded a material fact, or failed to act judicially. Nor do I conclude the result is so plainly wrong as to amount to an injustice and invite intervention on that basis.

C. Costs

[81] The City argues that the discretionary award of costs in favour of PARLA was arbitrary and unreasonable, and based on presumptive legal conclusions rather than findings.

[82] The City argues that the costs award inappropriately relies on the Chambers judge's provisional findings during her mootness analysis that the City did not proceed fairly in its dealings with PARLA. The City argues the Chambers judge erred in principle and misdirected herself on the facts and the law.

[83] The City notes that the traditional principle of awarding costs to a party that has been wholly successful applies unless there are strong reasons to the contrary. It acknowledges that, although there are public law cases that involve special circumstances that may warrant costs awarded to an unsuccessful litigant (e.g., *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 [*Okanagan*]), no such circumstances were canvassed by the Chambers judge other than her findings made in the course of her analysis of whether there was a live controversy. The City submits this analysis was based on presumptions and assumptions.

[84] As a first point, the Chambers judge made only certain presumptions and these did not impact the exercise of her discretion to award costs. Those presumptions, mentioned in paragraph 23 of her decision, relate to preliminary and jurisdictional matters, the court's competence to review the matter and if there was a decision to be reviewed. In addition, the Chambers judge assumed for the purposes of the *Charter* analysis that PARLA had met its burden of proving its s. 2(b) *Charter* rights were infringed. In my view, these assumptions did not significantly impact the Chambers judge's exercise of her discretion with respect to costs.

[85] The Chambers judge's findings that PARLA was denied procedural fairness, that the City failed to follow the Policy, that it failed to engage in a transparent process and give intelligible reasons, were not based on presumptions but were grounded in facts that evidenced a mishandling of PARLA's application. The Chambers judge's conclusion that, as a result of the lack of transparent and intelligible reasons from the City, she was unable to complete any reasonable analysis, was also not based on presumptions.

[86] Rule 11-1 of *The Queen's Bench Rules* provides a wide discretion to the Chambers judge to award costs.

> **Discretion of Court**
>
> **11-1**(1) Subject to the express provisions of any enactment and notwithstanding any other rule, the Court has discretion respecting the costs of and incidental to a proceeding or a step in a proceeding, and may make any direction or order respecting costs that it considers appropriate.
>
> (2) In exercising its discretion as to costs, the Court may determine:
>
> (a) by whom costs are to be paid, which may include a successful party;
>
> (b) to whom costs are to be paid;

> (c) the amount of costs;
>
> (d) the date by which costs are to be paid; and
>
> (e) the fund or estate or portion of the fund or estate out of which costs are to be paid.
>
> …

[87] Rule 11-1(2)(a) clearly contemplates that a successful party may have an award of costs made against them.

[88] The law governing the exercise of discretion to award costs is set out in *Okanagan*, as follows:

> [42] The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to any applicable rules of court and to the need to act judicially on the facts of the case (*Earl v. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68, at para. 7, citing *Benson v. Benson* (1994), 120 Sask. R. 17 (C.A.)). Sigurdson J.'s decision in the present case was based on his judicial experience, his view of what justice required, and his assessment of the evidence; it is not to be interfered with lightly.
>
> [43] As I observed in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 814-15, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

[89] Our Court in *Abrametz v Law Society of Saskatchewan*, 2018 SKCA 37, explained the principles governing a judge's discretion to award costs to an unsuccessful party:

> [58] The governing principle in relation to how costs are dealt with in the courts is found in Rule 11-7(1) of the *Queen's Bench Rules of Court*, that is, costs of a proceeding must follow an event. This Rule has been interpreted to mean that the successful party is generally entitled to costs. This is a long standing principle firmly rooted in common law (Mark M. Orkin, *The Law of Costs*, loose-leaf (Rel 73, December 2017) 2d ed, vol 1 (Toronto: Thomson Reuters, 2017).
>
> [59] Notwithstanding this general principle, courts retain discretion to not award costs, or for that matter, to award costs to the unsuccessful party (*Bourque v Clark*, 2016 SKQB 44). An order depriving a successful party of costs is exceptional (*Georgian Bluffs (Township) v Moyer*, 2012 ONCA 700 at para 21, 298 OAC 121; *Law of Costs* at para 202.1). The exercise of discretion departing from the general rule must be based on good reasons, such as "misconduct of the parties, miscarriage in the procedure or oppressive and vexatious conduct of the proceedings" (*Law of Costs* at para 205.2(2); see also *Hill v Arcola (School Division)*, 2002 SKQB 156, 218 Sask R 82).

[90] The Chambers judge made the following determination as to 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 l fix at $6,000 payable within 30 days.

[91] The Chambers judge, in her analysis of the merits of the arguments advanced by PARLA, found fault with the behaviour of the City both in its handling of PARLA's application to fly its flag and its failure to provide intelligible or transparent reasons for its decision.

[92] The Chambers judge, as part of her mootness analysis, made clear findings of fact. Those findings were ultimately neither here nor there in terms of a determination of the rights of the parties, because the matter was moot. However, those findings were relevant and operative with regard to the question of costs, a matter that was not moot.

[93] I see no error in the Chambers judge considering those facts and findings in the course of determining the issue of costs. In my view, this was an exceptional case. The Chambers judge cited the misconduct of the City in handling the application. I agree with her observation. PARLA, after making the application, was stonewalled by the City until it became impossible to fly the flag as had been done in past years. Members of the community are entitled to better treatment than this from public officials.

[94] The lack of a clear decision from the City had the effect of hampering the court from properly exercising judicial oversight over the City's behaviour. Public actions and decisions should not be this inscrutable. Last, while the City had a right as a legislative body to repeal the Policy, doing so during the litigation played a significant role in the finding of mootness and in the dismissal of an application that was brought in good faith. These are all good, principled reasons to depart from the normal costs rule and to make the relatively modest cost award against the City.

[95] For all the foregoing reasons, I cannot say that the Chambers judge erred in the exercise of her discretion to award costs.

VII. CONCLUSION

[96] The appeal of PARLA and Ms. Hettrick is dismissed. The cross-appeal of the City is also dismissed.

[97] In view of the fact there has been mixed success, there will be no costs to any party.

"Ottenbreit J.A."

Ottenbreit J.A.

I concur. "Schwann J.A."

Schwann J.A.

I concur. "Kalmakoff J.A."

Kalmakoff J.A.