LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Citation: B.E. v The Personal Insurance Company and Ministry of the Ontario General (Ontario), 2020 ONLAT , 18-012331/AABS

Released Date: 06/05/2020

File Number: 18-012331/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

B.E.

Applicant

and

The Personal Insurance Company

and

Ministry of the Ontario General (Ontario)

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: **Jesse A. Boyce**

APPEARANCES:

For the Applicant: Ashu Ismail, Counsel

For the Respondent: Nadia Costantino, Counsel, The Personal Ins. Co.
Aud Ranalli, Counsel, Ministry of the Attorney General

HEARD: **Via written submissions**

OVERVIEW

[1] B.E. was seriously injured in an accident on July 27, 2018 and sought a number of benefits from the respondent, The Personal, pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010, O. Reg. 34/10 (the "*Schedule*"). The Personal initially adjusted her benefits on the basis that her injuries were predominantly minor injuries as defined by s. 3(1) of the *Schedule*.

[2] Due to the severity of her injuries, it was recommended that B.E. required 24-hour attendant care service, assessed at 168 hours per week at a cost of $10,423.46 per month. However, The Personal denied payment on the basis of paragraph 2 of s. 14 of the *Schedule*, which states that an insurer is liable to pay attendant care benefits to an insured under s. 19, but only if the insured's impairment is not a minor injury.

[3] Without access to funding for attendant care, B.E. filed an appeal with the Tribunal. Her application, dated December 10, 2018, set out a number of benefits in dispute, including attendant care benefits, along with a request for an award under s. 10 of O. Reg. 664.

[4] In addition to her claim for accident benefits, B.E. also delivered a Notice of Constitutional Question and served it upon the Attorney General. In short, B.E. challenged the constitutional validity of the Minor Injury Guideline ("MIG") and s. 14 of the *Schedule* as an impermissible infringement of her right under s. 15 of the *Charter of Rights and Freedoms* to be free from discrimination. To that end, she took aim at s. 268.3(1) and 268.3(2.1) of the *Insurance Act*, and s. 3(1), paragraph 2 of section 14, and s. 18(1), which, collectively, create the MIG and preclude those within it from entitlement to attendant care benefits.

[5] There is no dispute that B.E.'s *Charter* question and her s. 10 award claim have the same foundation. Both are based on her allegation of disentitlement and delay on the part of The Personal in the provision of accident benefits—specifically, attendant care benefits—because B.E. was initially found by The Personal to have sustained predominantly minor injuries as defined by the *Schedule*, a designation that limits coverage for accident-related impairments to $3,500 under the MIG and bars access to attendant care.

[6] On December 21, 2018, after receiving updated medical documentation, The Personal agreed that B.E. sustained injuries that were not predominantly minor injuries under the *Schedule.* As a result of that designation being lifted, B.E. had greater access to the benefits she needed. In the months that followed, the parties were able to resolve all of the remaining issues in dispute as listed in B.E.'s Tribunal application, with the exception of her claim for a s. 10 award.

[7] So B.E.'s application at the Tribunal proceeded. On May 22, 2019, a case conference was held between the parties which resulted in the parties resolving the remaining s. 10 award issue. As a result, there were no further substantive

issues in dispute as such issues are defined under s. 280(1) and (2) of the *Insurance Act*.

[8] Despite resolving all of the issues in her Tribunal application, B.E. still sought to have her *Charter* question answered. To that end, she alleges that paragraph 2 of s. 14 "limits or protects insurance companies from adjusting and paying attendant care benefits, for as long as they maintain that an insured's impairment is minor." Specifically, B.E. seeks a determination from the Tribunal as to whether paragraph 2 of s. 14 of the *Schedule* violates her right to be treated equally under the law.

[9] The Personal then raised the preliminary issues giving rise to this hearing. It submits that B.E.'s *Charter* challenge is moot because there are no remaining substantive issues in dispute. As a result, The Personal submits that the Tribunal has no jurisdiction to determine the *Charter* question. As B.E. raised a constitutional question, submissions from the Ministry of the Attorney General were also before the Tribunal.

ISSUES

[10] The preliminary issues identified in the case conference order are as follows:

i. Given that there are no substantive issues before the Tribunal, is the constitutional issue moot?

ii. Does the Tribunal have jurisdiction to hear and decide a constitutional question after a disputed benefit has been paid?

RESULT

[11] I find that B.E.'s *Charter* challenge is moot because there are no substantive issues remaining before the Tribunal. As a result, it is not necessary to decide the constitutional issue in order to resolve the accident benefits claim.

[12] I find that the Tribunal does not have jurisdiction to decide B.E.'s *Charter* question because the Tribunal only has jurisdiction to consider constitutional questions that arise in the course of carrying out its statutory mandate. As a result of the parties' resolution, the Tribunal has no mandate and therefore no inherent jurisdiction to decide the constitutional issue.

ANALYSIS

i. The constitutional issue raised by B.E. is moot

[13] Having considered the parties' submissions, I agree with the respondents and find that B.E.'s *Charter* question is moot. In making this finding, I rely on the Supreme Court of Canada's determination in *Borowski v. Canada (Attorney*

General), [1989] 1 SCR 342 at 353 that a matter will be considered moot where deciding it will have no practical effect on the rights of the parties because there is no longer any "live controversy" between them. In addition, I find support from another Supreme Court of Canada case, *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act),* [1995] 2 SCR 97 at 6, where the Court reiterated that questions about the constitutionality of statutory or regulatory provisions should be entertained only when necessary to resolve the underlying issues on appeal. The Court held that to consider such questions in the absence of the underlying issues on which the case was based would result in opining on a hypothetical situation and not on a real controversy.

[14] In this matter, I agree with the respondents that there is no longer any "live controversy" between the parties that could be affected by deciding B.E.'s constitutional question. B.E.'s *Charter* challenge focused on the constitutionality of the provisions of the *Schedule* that place limits on benefits owed to insureds when an insurer determines they have suffered a minor injury as a result of an accident. However, as noted, B.E. is no longer being subject to the confines of the MIG, as The Personal removed her from the designation in December 2018 and has been remitting payment for attendant care services and other benefits ever since. In addition, there is no dispute that the parties were able to resolve the s. 10 award claim, so there is no live or real controversy remaining with that issue either.

[15] Accordingly, I find that a determination by the Tribunal regarding the constitutionality of the MIG vis-à-vis s. 14.2 of the *Schedule* would have no impact on B.E.'s specific claim or entitlement to benefits, as the underlying issues of her appeal have been resolved.

[16] In her written submissions, B.E. offers a passionate rebuttal that was not lost on me. She submits that, as a result of The Personal's prolonged reliance on paragraph 2 of s. 14 of the *Schedule*, it saved thousands of dollars in what could have been incurred and owing in attendant care benefits. She asserts that *Borowski* is distinguishable and, in any event, it is of "no answer or solace to her" that the provision The Personal relied on will not apply to her *any longer*. B.E. submits that The Personal only resiled from its "otherwise unwavering reliance on s. 14.2" when it was met with her *Charter* challenge. To that end, she asks: how can the issue be moot when the legislation continues in existence and the effects on her were profound and ongoing?

[17] I agree with B.E. that the facts that underpin *Borowski*—a challenge to the validity of s. 251 of the *Criminal Code* permitting abortions which was struck before even reaching the Supreme Court—are certainly different than the facts here. However, I agree with the respondents that the Court's rationale on the mootness of a constitutional claim is analogous to the issues in this preliminary matter. While I agree that the *Schedule*'s sections at issue here have not been struck as in *Borowski* and that these provisions no doubt had a profound effect on B.E. and her families' post-accident life, it cannot be said that these provisions

continue to affect her or constitute a live controversy. As the respondents submit, and I agree, the necessary factual foundation required to entertain B.E.'s constitutional challenge is absent.

[18] Again, all of the issues in dispute, including attendant care and the s. 10 award alleging unreasonable delay in removing B.E. from the MIG, have been resolved. For the Tribunal to determine the constitutional issue in the absence of a factual foundation would amount to an "unwarranted exercise of judicial power" to a hypothetical situation.[1]

ii. The Tribunal has no inherent jurisdiction to determine B.E.'s Charter question where there is no remaining dispute between the parties

[19] Moreover, and at any rate, I find that the Tribunal does not have jurisdiction to decide B.E.'s *Charter* question since the Tribunal only has jurisdiction to consider constitutional questions that arise in the course of carrying out its statutory mandate.

[20] As the Attorney General acknowledges, *Borowski* suggests that where a constitutional question is moot, courts may still exercise their discretion to consider the issue despite it being "hypothetical" or "academic." However, this discretion to consider hypothetical or academic questions stems from a superior court's inherent jurisdiction under s. 96 of the *Constitution Act*, *1867*, which this Tribunal obviously does not possess. Thus, even if I wanted to consider B.E.'s *Charter* challenge in the absence of an underlying factual foundation or live controversy, how can I? As an administrative tribunal and creature of statute, the Tribunal does not have the discretion to consider hypothetical or academic questions once a claim for accident benefits has been resolved by the parties. By all accounts, that is the case here.

[21] A tribunal's explicit or implied authority to decide *Charter* questions is necessarily limited to deciding *Charter* questions that arise in the course of carrying out its statutory mandate.[2] At this Tribunal, that statutory mandate is to resolve accident benefit matters as set out in ss. 280(1) and (2) of the *Insurance Act* in respect of an insured person's entitlement to, or amount of, statutory accident benefits. Where the Tribunal cannot exercise its mandate due to a resolution between the parties, the Tribunal has no remaining jurisdiction—inherent or implied or residual—to address allegations of unconstitutional legislation like B.E.'s. On this basis, I agree with the respondents that the Tribunal's jurisdiction over this matter ended when the underlying substantive issues in dispute were resolved, because the Tribunal was no longer required to apply the allegedly unconstitutional law to the matter before it.

---

[1] *R. v. Banks*, 2007 ONCA 19, at para. 25, citing *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 SCR 1572, at pg. 12.

[2] *R. v. Conway*, 2010 SCC 22, at 22.

[22] In any event, I agree with the respondents that, even if the Tribunal did have the authority to determine B.E.'s *Charter* challenge, the only remedy available to the Tribunal would be to decline to apply the MIG to B.E. if it determined that s. 3(1) and 14.2 of the *Schedule* were unconstitutional, something that would have no practical effect here or in any other matter before the Tribunal. Further, since B.E. has already been removed from the MIG and received a settlement in relation to her s. 10 award claim, I would agree with the respondents that there is no remedy being denied to B.E. at this stage. However, and again, the Tribunal has no jurisdiction to make binding declarations of constitutional invalidity.

[23] This is not to say that B.E.'s challenge is not valid or important. In her submissions, B.E. sought clarity on the Tribunal's jurisdiction to decide this constitutional matter, arguing that insurers will continue to resist a hearing on this issue to save costs and because the matter is important to all insureds who are deprived of early access to attendant care services. For clarity, I find that the Tribunal does not have the statutory authority to determine a *Charter* challenge once its mandate has been exhausted or a resolution has been reached, as it has here.

CONCLUSION

[24] The *Charter* challenge is moot because there are no substantive issues remaining and it is therefore not necessary to decide the constitutional question in order to resolve the accident benefits claim. Further, the Tribunal does not have jurisdiction to decide the *Charter* question because the matter was resolved, and it only has authority to consider constitutional questions that arise in the course of carrying out its statutory mandate.

[25] For these reasons, the application is dismissed.

Released: June 8, 2020

Jesse A. Boyce
Adjudicator