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(Winnipeg Centre)
Indexed as: Lukács v. Doering et al.
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

	)	Counsel:
	)	
	)	
DR. GÁBOR LUKÁCS,	)	R. L. Tapper, Q.C.
	)	for the applicant
applicant,	)	
	)	
- and -	)	J. A. Kagan
	)	for the respondents,
	)	Dr. John (Jay) Doering and
DR. JOHN (JAY) DOERING and THE	)	The University of Manitoba,
UNIVERSITY OF MANITOBA, through its	)	through its Academic Body,
Academic Body, THE SENATE OF THE	)	The Senate of the University
UNIVERSITY OF MANITOBA and A.Z.,	)	of Manitoba
	)	
respondents.	)	
	)	D. I. Marr
	)	for the respondent, A.Z.
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	August 25, 2011

McCAWLEY, J.

[1] The respondents, Dr. John (Jay) Doering and the University of Manitoba, through its Academic Body, the Senate of the University of Manitoba, bring a motion for an order that a notice of application filed by Dr. Gábor Lukács be struck on the grounds that Dr. Lukács does not have standing to seek the relief

claimed and therefore the application fails to disclose a reasonable cause of action.

BACKGROUND

[2] Dr. Lukács is an Assistant Professor of Mathematics at the University of Manitoba (the "University") and has held that position since 2006. Dr. Doering is Dean of the Faculty of Graduate Studies at the University and A.Z. was a graduate student in the PhD Program in Mathematics at the relevant time. The University made certain accommodations pursuant to its disability policies to allow A.Z. to complete his doctorate as a result of which he was awarded a PhD Degree in Mathematics. Dr. Lukács takes exception to the awarding of the degree and the process followed. He seeks various declarations and orders including an order that A.Z. has not fulfilled the requirements of a PhD Degree in Mathematics. It is his position that the extent to which the respondents went to accommodate A.Z pursuant to its disability policies undermines the academic integrity and standards of the PhD Program in Mathematics and the University as a whole.

[3] The motion of Dr. Doering and the University to strike the application is supported by A.Z. At the outset of the hearing, counsel for all parties indicated they were agreeable to having the narrow issue of standing determined first and, depending on the outcome, the remaining matters would be argued later.

[4] It should be noted that although A.Z. was a student in the PhD Program in Mathematics at the University, at no time was Dr. Lukács his teacher, supervisor

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or adviser. There was some disagreement as to whether Dr. Lukács was a member of the Mathematics Graduate Studies Committee (the "Committee") at the relevant time. The evidence is that Dr. Doering met with the Committee on September 29, 2009, at which time Dr. Lukács was not a member. It was then that the decision was taken – the applicant says the decision was "announced" by Dr. Doering whereas the respondents say Dr. Doering's view was "accepted" by the Committee, although not without controversy – to waive certain academic requirements for A.Z. Dr. Lukács was elected to the Committee the following day as a result of the resignation of one of the Committee members. The decision of the Committee was communicated by Dr. Doering to A.Z. one month later, by letter dated October 30, 2009.

[5] I raise this disagreement over how the decision came to be by way of example of the kinds of disagreements as to facts Dr. Lukács raised in his brief. Whereas they were characterized as prejudicial misstatements or omissions of crucial facts on the part of the respondents, in my view, they are more properly described as a question of interpretation rather than difference and lack the somewhat ominous nature implied.

[6] In or around March 2009, A.Z. failed his second Candidacy Examination in the PhD Program of Mathematics and was subsequently required to withdraw from the program pursuant to the applicable University policies and regulations.

[7] On June 26, 2009, A.Z. appealed the decision to the Dean of Graduate Studies on the ground that he suffered from a disability. The regulations

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governing academic appeals by graduate students permit the Dean of the Faculty to mediate between a student and the student's department to resolve the appeal, failing which the matter is remitted to an Appeal Panel for hearing. The Appeal Panel has the authority to hear and determine the appeal on behalf of the Faculty Council of Graduate Studies.

[8] The Dean decided to reinstate A.Z., without the necessity of A.Z. sitting for another examination, pursuant to the University's Accessibility for Students with Disabilities By-law.

[9] Section 2.1.2 states:

> **2.0 Policy Statement**
>
> **2.1 General**
>
> . . . . .
>
> 2.1.2. The University will use reasonable efforts to offer reasonable in the delivery of academic programs and services to students with disabilities.

[10] Section 2.2 designates the Disability Services ("DS") office as the centralized service for the University to provide focus and expertise regarding disability related accommodations. Among other things, it evaluates medical documentation from students requesting DS assistance and is responsible for ensuring the University's criteria for academic excellence is not compromised in providing accommodations.

[11] On August 11, 2009, in response to a request from Dr. Doering, the Committee and DS made a joint recommendation to Dr. Doering as to what

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accommodation might be afforded to A.Z. Dr. Doering did not accept this recommendation, preferring to propose an alternative accommodation which was first rejected and then accepted by the Committee. As noted earlier, it was not without dissension.

[12] On October 30, 2009, A.Z was advised by letter of the accommodation made. It was not until some ten months later that it came to light A.Z. was short a doctoral course. The Committee proposed a solution to the problem to which Dr. Doering responded again with an alternative which was unacceptable to the Committee. Nevertheless, Dr. Doering implemented his alternative exercising his authority as Dean which decision was later confirmed by counsel to the University as being within his jurisdiction to make.

[13] Dr. Lukács took exception to the Dean's decision and made numerous efforts to challenge it. These included requests for meetings some of which were refused, others of which did take place, and ultimately an appeal was filed by Dr. Lukács to the University Senate. After some procedural difficulties, the Senate Committee on Appeals declined to hear the appeal on September 17, 2010, taking the position it lacked the jurisdiction. For the purpose of deciding the threshold question of standing, it is not necessary to go into further detail as to what steps were taken and various other issues that were raised throughout other than to say Dr. Lukács' attempts were unsuccessful and, ultimately, he turned to the courts.

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ANALYSIS

[14] The respondents' motion is brought pursuant to Manitoba ***Court of Queen's Bench Rule 25.11(d)*** which gives the court discretion to strike out a pleading on the ground that it does not disclose a reasonable cause of action.

[15] It is well settled that the threshold is low and a claim is only to be struck where it is "plain and obvious" or "beyond doubt" that no reasonable cause of action has been set out. ***Basaraba v. Manitoba Court of Queen's Bench***, 2006 MBCA 27, 201 Man.R. (2d) 302.

[16] Standing, which is the ability of a party to invoke the jurisdiction of the court, can be established by showing either private interest standing or public interest standing. The difference is the difference between standing as a matter of right arising from a direct relationship between the person and the state, and standing granted by a court in the exercise of its discretion where a direct relationship does not exist. ***Downtown Eastside Sex Workers United Against Violence Society et al. v. Canada (Attorney General)***, 2010 BCCA 439, 324 D.L.R. (4th) 1.

Private Interest Standing

[17] In ***Re Greenpeace Foundation of British Columbia et al. and Minister of the Environment*** (1981), 122 D.L.R. (3d) 179 at 184 (B.C.S.C.) [***Re Greenpeace*** cited to D.L.R.], Callaghan J., citing Buckley J. in ***Boyce v. Paddington Borough Council***, [1903] 1 Ch. 109, explained the test for private interest standing as either a situation where interference with a public right also

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interferes with the private right of a private citizen, or where no private right of a citizen is interfered with, but in respect of his public right a private citizen suffers special damage peculiar to himself from the interference with a public right.

[18] Of particular applicability to the present case is the decision of the Supreme Court of Canada in ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607, which cited with approval ***Australian Conservation Foundation Inc. v. Commonwealth of Australia*** (1980), 28 A.L.R. 257 at 270, to the effect that the applicant must have a personal stake in the outcome of the litigation ([***Finlay*** cited to S.C.R.] at p. 623):

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

[19] The court in ***Finlay*** also cautioned against the expansion of public interest standing out of a concern for the allocation of scarce judicial resources and emphasized the need to "screen out the mere busybody" (at p. 631).

[20] Further concerns were expressed in ***Cassells v. University of Victoria***, 2010 BCSC 1213, 323 D.L.R. (4th) 180, where the court stated that private interest or special damage giving rise to standing must flow from the impact of an asserted public wrong independently of the political or social activism which the petitioner in that case undertook (at para. 64). The court went on to say that a fear of flood of unnecessary litigation that could result from affording broad rights of standing and a concern over the politicization of the judicial

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process were two factors that should constrain the courts from affording standing to an individual seeking a remedy with respect to a matter of general public interest.

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[21] Counsel for the respondents argued that Dr. Lukács has no individual rights in law or in equity that are at stake in the matter before the court. Furthermore, it was submitted that he does not have a direct or personal interest in the alleged improper acts of the Dean or the University, nor has he suffered or is likely to suffer special damages peculiar to himself, as a result of the accommodation afforded to A.Z. by the University or any of the decisions made by the University as a result of the accommodation made. It is the position of the respondents that the only advantage Dr. Lukács would gain is the satisfaction of righting an alleged wrong and, further, if he were not granted the relief, he would not suffer any disadvantage other than a sense of grievance or debt for costs which ***Finlay*** would not allow.

[22] The position of the applicant with respect to private interest standing is summarized in paragraph 100 of his motion brief:

> The substance of the Applicant's pleading is that Dr. Doering interfered, without authority and unreasonably, with the academic requirements in the case of student A.Z.. Furthermore, the interference was to the benefit of A.Z., and to the detriment of the University's academic integrity and credibility, and the ability of the Applicant to perform his duties credibly insofar as PhD candidates are concerned.

[23] Furthermore, Dr. Lukács says that if the decisions of Dr. Doering are allowed to stand, the University will rightfully be labelled a "diploma mill," its

graduates and faculty will be suspect, their integrity will be questioned, and the future of post-secondary education in the province will be threatened.

[24] Without belabouring the point, I fail to see any direct, legitimate personal or private interest as defined by the authorities which would grant Dr. Lukács private interest standing. He did not teach the student in question, he was only laterally a member of the Committee, he himself does not hold a degree from the University of Manitoba nor does he represent in any official capacity anyone but himself. Neither has he demonstrated any damages other than unsubstantiated statements as to what he thinks will occur if he does not succeed in his mission. His interest, as he himself acknowledges, is one of "conscience" which, as counsel for the respondents observed, does not in itself necessarily ground a legal proceeding.

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Public Interest Standing

[25] In its 1992 decision in ***Canadian Council of Churches v. Canada (Minister of Employment and Immigration)***, [1992] 1 S.C.R. 236, the Supreme Court of Canada set out the test for public interest standing as follows:

(1) Is there a serious issue raised as to the invalidity of the legislation in question?

(2) Has it been established that the plaintiff is directly affected by the legislation or, if not, does the plaintiff have a genuine interest in its validity?

(3) Is there another reasonable and effective way to bring the issue before the court?

[26] While recognizing the purpose of granting public interest status is to prevent the immunization of legislation or public acts, the court indicated that the granting of status is not "required" when, on a balance of probabilities, it can be shown that the impugned measure will be the subject of attack by a private litigant. In very clear language, the court stated that the decision whether to grant status is a discretionary one and in that case there was no need to expand the principles enunciated by the Supreme Court to grant it.

[27] In ***Downtown Eastside Sex Workers United Against Violence Society***, the British Columbia Court of Appeal found that although the forgoing test is to be applied generously, each of the three conditions must be met before public standing is granted.

[28] The respondents submit that the three part test has not been met by Dr. Lukács as Dr. Lukács has not raised an issue regarding the invalidity of ***The University of Manitoba Act***, C.C.S.M., c. U60, or any other legislation. I agree and, on this basis alone, he has failed to establish a public interest standing on the first ground.

[29] Even had I not so found, Dr. Lukács has not shown that he is directly affected by any impugned legislation or that he has a genuine interest is its validity. The matter of the validity or invalidity of legislation is not the issue. Accordingly, Dr. Lukács would also have failed on the second ground.

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[30] With respect to the third question, it is also not necessary to decide it, but as the following indicates, if the matter is not one which should come before the courts it matters not whether there is a reasonable and effective way for it to do so.

[31] Although prior to the ***Canadian Council of Churches*** decision, but in keeping with it in the Saskatchewan Court of Queen's Bench in ***Shiell v. Amok Ltd. and Saskatchewan Mining Development Corp. et al.*** (1987), 58 Sask.R. 141, Barclay J. held that public interest standing will not be granted to individuals for the purpose of conducting an action against another private party. The court found in that case that the purpose of public interest standing is not to pursue a claim against a private individual or group, but rather to ensure that private individuals have the avenue by which to challenge the unlawful use of government authority.

[32] I accept the respondents' argument that the University is a private entity and decisions made on its behalf are private decisions affecting the governance of the University and its academic programs. I also agree that this is a dispute between Dr. Lukács, as a private individual, and the University, as a private entity, which is not analogous to a governmental authority. Accordingly, the court should not extend public interest standing to Dr. Lukács, an individual, for the purpose of conducting an action against the University, a private party with respect to this matter. It is well known that Dr. Lukács has availed himself of other avenues available to him to resolve some related matters.

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[33] Counsel for Dr. Lukács argues that the University is a public body, created by statute, dependent in large measure on the public purse and that given the value society places on higher education there is a public interest quality which should be subject to some measure of judicial control.

[34] Although there is no doubt that universities are not immune from the purview of the courts as seen in such decisions referred to by the applicant as ***Al-Bakkal v. University of Manitoba et al.***, 2003 MBQB 198, 176 Man.R. (2d) 127; ***Ghaniabadi v. University of Regina et al.*** (1997), 161 Sask.R. 129 (Q.B.); ***Paine v. University of Toronto*** (1981), 34 O.R. (2d) 770 (C.A.), the cases are clear the conferring of academic degrees is private in nature and generally the courts should exercise restraint.

[35] In ***King v. University of Saskatchewan***, [1969] S.C.R. 678 at 689, the Supreme Court of Canada rejected the argument that the respective duties of faculty council and the senate were in the nature of public duties rather than domestic. The court held that as they especially affected the rights of the appellant student, an order of *mandamus* should be granted. However, the court also found that the senate of the University of Saskatchewan, as elsewhere, is the sole body to determine to whom the degrees of the university may be conferred.

[36] In ***Re Polten and Governing Council of University of Toronto*** (1976), 8 O.R. (2d) 749 (H.C.J., Div. Ct.), although the court opined that

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prerogative writs may be available to a student who has been denied natural justice in respect of his examinations, the court clearly stated (at p. 758):

> ... the standards for a degree, and the assessment of a student's work, are so clearly vested in the university that the Courts have no power to intervene merely because it is thought that the standards are too high, or that the student's work was inaccurately assessed. There must be other grounds.

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[37] A similar hands off approach is seen in the decision of the Manitoba Court of Appeal in ***Warraich v. University of Manitoba***, 2003 MBCA 58, 173 Man.R. (2d) 202. There, the central issue was whether the applicant's dispute with the University was in its essential character an academic matter to be resolved by the University's own dispute resolution process or a breach of the applicant's contractual rights and therefore the proper subject of proceedings in the courts.

[38] The court found that the dispute was an internal disagreement relating to academic matters which, by their very nature, are better resolved by the University's own procedures "so long as they are fair, comprehensive and effective" (citing ***King v. University of Saskatchewan*** at para. 14).

[39] Here the decisions taken with respect to A.Z. were, in their "essential character," related to academic matters with which the University is uniquely positioned to deal. It should also be noted that here there also exists a multi-faceted appeal process to ensure procedural fairness to students which, not insignificantly, Dr. Lukács is not.

[40] Counsel for Dr. Lukács also submitted that he is entitled to a statutory appeal to the Senate under the "others" category found in s. 34(1) of ***The***

University of Manitoba Act, suggesting that the existing appeal process insofar as Dr. Lukács is concerned is not "fair, comprehensive, and effective." No authorities were provided in support of this position which in my view is an attempt to gain standing before the court without first meeting the rigours of the legal test laid down in ***Canadian Council of Churches***. While the inclusion of the word "others" is unclear it could conceivably be meant to cover some out of the ordinary situation where a student is unable to represent himself or herself and some other person – perhaps a guardian or personal representative – must. Certainly the interpretation urged by counsel for the applicant is difficult to accept in light of the authorities, and could lead to the unhappy conclusion that a third party can challenge the degree of someone with whom they have no viable, direct and substantial connection. To the extent the courts have warned against the floodgate of litigation that could result by expanding standing, for similar reasons this argument is unpersuasive.

[41] Interestingly, at the outset of his submissions, counsel for the applicant admitted that Dr. Lukács has no connection to A.Z. Rather, it is his connection to the process on which he relies. While that may be so, it is insufficient to ground his application in law. In the result, I find that Dr. Lukács lacks the necessary public standing to invoke the jurisdiction of the court.

JUDICIAL REVIEW

[42] In their brief, counsel for the applicant argued that the court should exercise its discretion to not strike the application without first hearing the

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matter on its merits. In support of this position, it was submitted that the process followed involves a complex factual matrix, significant disagreement as to the facts, and therefore warrants judicial review. Furthermore, whether to grant public interest standing is discretionary.

[43] Reference was made to ***Finlay*** and ***Sierra Club of Canada v. Canada (Minister of Finance) et al.*** (1998), 157 F.T.R. 123 (T.D.), which establishes that whether standing should be granted is a question of judicial discretion and depends on the nature of the issues and whether the court has sufficient materials before it for a proper understanding, at that stage, of the nature of the interest asserted.

[44] I have no hesitation in saying that in light of the quantity and quality of the material before me, I have a clear understanding of what is at stake. Additionally, and in accordance with the rationale laid down in ***Soldier v. Canada (Attorney General)***, 2009 MBCA 12, 236 Man.R. (2d) 107 at para. 46, I am satisfied that the clear application of the law leads me to the conclusion that the motion to strike should be granted. To exercise my discretion in favour of the applicant and accede to the applicant's request on this ground would effectively grant him standing when he has not demonstrated he is entitled to it.

CONCLUSION

[45] As is apparent, I have not referred to all the cases cited by counsel although all have been read and considered. Similarly, I have not responded to all of the matters raised, some of which went beyond the issue before me.

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[46] For the foregoing reasons, I find Dr. Lukács lacks both public and private interest standing in these proceedings and, accordingly, his application is struck.

[47] Counsel may speak to the issue of costs if they cannot be agreed.

McCawley, J.

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