Federal Court  Cour fédérale

Date: 20221027

Dockets: T-145-22
T-247-22
T-168-22
T-1991-21

Citation: 2022 FC 1463

Ottawa, Ontario, October 27, 2022

PRESENT: The Associate Chief Justice Gagné

Docket: T-145-22

BETWEEN:

NABIL BEN NAOUM

Applicant

et

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-247-22

AND BETWEEN:

THE HONOURABLE MAXIME BERNIER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-168-22

AND BETWEEN:

THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, AND AEDAN MACDONALD

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1991-21

AND BETWEEN:

SHAUN RICKARD AND KARL HARRISON

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT
(judgment issued to the parties on October 20, 2022)

I. Overview

[1] The Applicants challenge the constitutionality of air and rail sector vaccine mandates, which were implemented through a series of orders put in place by Transport Canada. They

required full vaccination against COVID-19 in order to board a plane or a train to travel within or departing Canada.

[2] All four groups of Applicants challenge the Interim Orders [IOs] that implemented the air passenger vaccine mandate; one group of Applicants also challenges the requirement for rail passengers, implemented through a Ministerial Order [MO].

[3] On June 20, 2022, the in-force iterations of the challenged IOs and MO were repealed, replaced by orders not requiring vaccination or, in the case of the air sector vaccine mandate, allowed to expire. On June 28, 2022, the Respondent filed his Notice of Motion seeking an Order to strike the Applications for mootness.

[4] Given that a five-day judicial review in these matters was scheduled for October 31, 2022, the Judgment was issued with reasons to follow. This was done to avoid additional preparation time by the parties, and because the proceedings leading to the issuance of this decision were conducted in both official languages and thus pursuant to section 20(1)(b) of the *Official Languages Act*, RSC 1985, c 31 (4th sup.), the Court's reasons are to be issued simultaneously in both languages. The time required for translation did not allow for issuing the Judgement and reasons in both official languages sufficiently ahead of the scheduled hearing so as to give the parties sufficient notice that it would not be proceeding.

II. Facts

A. *Air Passenger Vaccine Mandate*

[5] From June 2020 onwards, but prior to the period at issue in these Applications, the Minister of Transport made a series of 14-day IOs pursuant to subsection 6.41(1) of the *Aeronautics Act*, RSC 1985, c A-2, in order to respond to the risk to aviation or public safety caused by the COVID-19 pandemic (IOs 1 to 42). Subsection 6.41(2) of the *Aeronautics Act* provides that any such IO ceases to have effect fourteen days after it is made unless it is approved by the Governor in Council within that fourteen day period. When that is the case, the *Aeronautics Act* sets out a process to follow to transform the IO into a regulation having the same effect as the IO.

[6] In fact, none of the impugned IOs were submitted for approval by the Governor in Council, instead, each IO was replaced by a new IO every fourteen days.

[7] On October 29, 2021, IO 43 introduced the first elements of a federal vaccine mandate in the air transportation sector. It allowed for testing as an alternative to vaccination for air passengers.

[8] From November 30, 2021 (when IO 47 came in to effect) onwards, testing was no longer allowed as an alternative to vaccination. Vaccination was a requirement for air travel within or departing Canada with limited exceptions including medical inability to be vaccinated, essential medical care, sincerely held religious beliefs, foreign nationals (non-residents) departing Canada,

travel in support of national interests, travel to or from remote communities, or cases of emergency travel.

[9] This air passenger vaccine mandate was maintained through IOs until June 20, 2022.

[10] The Applicants each independently filed Notices of Application for judicial review challenging the orders. The earliest was filed on December 24, 2021 and the last on March 11, 2022. Because of the differences in time when they initiated their Applications, there are differences as to which specific iteration of the IO they challenge (one Applicant challenges IO 49, two challenge IO 52, and one challenges IO 53).

B. *Rail Passenger Vaccine Mandate*

[11] The rail passenger vaccine mandate was implemented by way of MOs made pursuant to section 32.01 of the *Railway Safety Act*, RSC 1985 c 32 (4th Supp.). From MO 21-08 (which entered into effect on October 29, 2021) onwards, rail passengers were required to be fully vaccinated against COVID-19 to board a train.

[12] From that time, the MOs were repeated, with slight modifications, until the implementation of MO 22-02, which repealed a previous MO, and did not itself implement any further vaccination requirements.

[13] Only the Applicants in file T-1991-21, Shaun Rickard and Karl Harrison, challenge the rail provisions, as set out in MO-21-09.

III. Issues

[14] The Applicants and the Respondent both agree that the applicable test on a motion for mootness is the one articulated by Justice Sopinka in *Borowski v Canada (Attorney General)*, 1989 1 SCR 342. Unsurprisingly, they take very opposite positions on both of the two key stages as set forth in *Borowski*. Namely, they disagree on i) whether the issue is moot, and on ii) whether the Court should exercise its discretion to nonetheless hear the case, if it is found moot.

[15] The Respondent's motion therefore raises the following issues:

A. *Are the issues raised by these Applications for judicial review moot; is there a live controversy?*

B. *If the issues are moot, should the Court nevertheless exercise its discretion to hear the merits?*

[16] Since this motion was taken under reserve, the Court received several letters. By way of two separate letters the Respondent submitted without further comment two decisions rendered after the hearing on the issue of mootness in cases of vaccination mandates (*Gianoulias et al c Procureur Général du Québec*, 2022 QCCS 3509 (CanLII) and *Lavergne-Poitras v The Attorney General of Canada et al*, 2022 FC 1391). In response, the Applicants in file T-1991-21 filed an additional six-page reply submission. The Court has considered both decisions and the Applicants' reply submission.

[17] In addition, the Court received a letter from an individual who attended the hearing on the Zoom platform (attendance peaked at 2300 people during the day), who wanted to remind the

Court of the "gravity" of its decision. This letter is totally inappropriate and will be disregarded. There is a clear line to be drawn between observing a hearing on one hand, and attempting to become a participant by voicing ones views in a letter to the assigned judge, on the other. That line must not be crossed. The principle of judicial independence requires judges to be able to prepare their decisions without pressure or interference.

IV. Analysis

A. *Are the issues raised by these Applications for judicial review moot; is there a live controversy?*

[18] As indicated above, because these Applications were filed at different times, they target different IOs/MO. With that in mind, the following is a summary of the remedies sought by the Applicants:

- That the IOs/MO be quashed and/or declared invalid and inoperative;
- Declarations that the IOs are *ultra vires* of the *Aeronautic Act* and/ or made for an improper purpose;
- Declarations that the IOs/MO are unconstitutional and made in breach of the Applicants sections 2 a), b), c) and d), 3, 6, 7, 8 and 15 *Charter* rights, in a way that can not be saved by section 1;
- Declarations that the IOs violated their rights under section 1 of the *Canadian Bill of Rights* and violated Articles 7, 12, 18 and 26 of the *International Covenant on Civil and Political Rights.*
- An order that the IOs/MO be amended to include recognition or natural immunity or allow travelers to show proof of a negative PCR test before travel;
- A prohibition against future provisions that may be similar to the impugned IOs/MO or a declaration of invalidity for breaches of *Charter* rights for future mandates;

- A declaration that the IOs breached the *Canada Elections Act*.

[19] The Respondent submits that the repeal of the air and rail passenger vaccine mandates on June 20, 2022 means that there is no live controversy between the parties. The Respondent raises four main reasons why the Court should find in favour of his motion:

1. That the IOs/MO that the Applicants challenge no longer exist in law;

2. That each Application is limited by the legislation challenged in the Notice of Application;

3. That the Applicants have generally obtained the ultimate remedy sought: the elimination of the vaccine mandate provisions;

4. That the request for declaratory relief cannot sustain a moot case in and of itself; the declaratory remedies sought by the Applicants fail to provide live issues for judicial review.

[20] The Applicants argue that there remains a live controversy because of statements by the Government of Canada that travel restrictions have only been "suspended", suggesting that they may be re-implemented at any time if the COVID-19 public health situation worsens. In that sense, the Respondent's motions would be premature. The Applicants rely on a press release issued by the Treasury Board of Canada Secretariat, statements made by Ministers at a June 14, 2022 press conference, and in an interview that the Minister of Intergovernmental Affairs gave to the CBC shortly afterwards.

[21] Firstly, the hearing of these Applications for judicial review is set for five days commencing on October 31, 2022. Since the hearing of this Motion, Transport Canada has removed the requirement to wear a mask on planes and trains and repealed the last remaining IO.

In my view, the situation is as likely to improve as it is to worsen by the time the hearing of these Applications on their merits is over. The Applicants' argument is highly speculative and does not support their position that the controversy is still ongoing.

[22] Secondly, a comment made by a Minister to a journalist, taken outside its context, does not amount to a decision by that Minister and it is no more an indication of a live controversy. Even if the Minister called what occurred in June 2022 a suspension, the reality is that all IOs/MO that had contained a vaccination mandate have legally expired and none that contain such a mandate have been reissued since June.

[23] The question is whether the IOs/MO have any effect on the Applicants' rights and the answer to that question is no; they all ceased to have any adverse effect on the lives and livelihoods of the Applicants the minute they were repealed.

[24] It follows that this argument by the Applicants should be dismissed.

[25] The Applicants argue that the IO in force at the time of their response continued to require disclosure of private medical information by passengers, which the Applicants argued in their Notice of Application violated their section 8 right to privacy. They target section 3 of the IO, which they refer to as the "notification requirement." This requirement applied to air carriers or private operators departing from any other country than Canada. The Court also notes that the contents of section 3 have varied between IOs (notably including between the IO 52 which this group of Applicants challenged and IO 68 which they refer to in their submissions), but that in any case no such section, let alone IO, is in force in any form as of October 1, 2022. Finally, in

all iterations of the challenged IOs, it was not strictly an obligation imposed on the Applicants, but rather an obligation on air carriers/private operators to notify air passengers of their own obligations under the *Quarantine Act*, SC 2005, c 20.

[26] Finally, the Applicants argue that even where the main relief sought is moot, this does not preclude the court from granting declaratory relief which would be binding on any *Charter* damages claim that may be brought as separate actions.

[27] Of note, after the IOs/MO were repealed and the Respondent had given notice of its motion for mootness, the Applicants in file T-1991-21 filed a Notice of Motion seeking orders to amend their Notice of Application to assert damages and indicating that their Application would proceed as an Action. On August 3, 2022, Associate Judge Tabib denied the motion, noting "it appears that one of the goals of the proposed amendments is to attempt to insulate the Applicants from the potential consequences of the Respondent's motion to declare this application moot." She considered the implications of a dismissal of the motion for mootness and concluded that "I am, accordingly, not satisfied that the dismissal of this application for mootness, if it is ordered, would substantially prejudice the Applicant's ability to pursue a claim for damages by way of action. More importantly, I am not satisfied that the possibility of a future dismissal, with the resulting costs and inefficiency, justifies, at this time, the extraordinary remedy sought by the Applicants."

[28] Generally speaking, the Applicants seek declarations of invalidity, on various grounds, in respect of the repealed air and rail passenger vaccine mandates. Yet, it is well known that Courts should refrain from expressing opinions on questions of law in a vacuum or where it is

unnecessary to dispose of a case. Any legal or constitutional pronouncement could prejudice future cases and should be avoided (*Phillips v Nova Scotia Commissioner of Inquiry into the Westray Mine Tragedy*, [1995] 2 SCR 97, at para 12).

[29] Two groups of Applicants also seek a prohibition against speculative future provisions that may be similar to the impugned IOs/MO. First, this Court cannot issue a prohibition against future undefined legal provisions. Second, and as we have seen since the outbreak of this pandemic, the measures taken by all governments have fluctuated with time and have been driven by the evolution of the situation and scientific knowledge.

[30] As stated by the Ontario Superior Court of Justice in *Work Safe Twerk Safe v Her Majesty the Queen in Right of Ontario*, 2021 ONSC 6736 (CanLII), at para 7:

> I do not agree with counsel for the applicant that the possibility of new discriminatory regulations in the future keeps the issues alive. The validity of any new regulation would have to be determined on the facts and circumstances at that time. There is no basis in the record to suppose that the regulations were repealed and replaced to evade judicial review in this court. Quite the contrary, the COVID-19 crisis has led the government to revisit its response to the public health crisis on an ongoing basis, as circumstances have changed, and the changes to regulations affecting establishments affected by the impugned regulations reflect this pattern.

[31] One group of Applicants seeks an order that the IOs/MO be amended to include recognition of natural immunity, or to permit travelers to show proof of a negative PCR test. Even if the IOs/MO in question were not repealed, it is not for the Court to rewrite legislative provisions it declares invalid.

[32] Finally, I agree with the Respondent that requests for declaratory relief cannot sustain a moot case in and of itself and that the declaratory remedies the Applicants seek fail to provide live issues for judicial resolution. Mootness "cannot be avoided" on the basis that declaratory relief is sought (*Rebel News Network Ltd v Canada (Leaders' Debates Commission),* 2020 FC 1181, at para 42). Courts will grant declaratory reliefs only when they have the potential of providing practical utility, that is, if when they settle a "live controversy" between the parties. The Court sees no practical utility in the declaratory reliefs sought by the Applicants.

[33] It follows that these Applications for judicial review are moot for lack of live controversy.

B. *Should the Court nevertheless exercise its discretion to hear the merits?*

[34] The Supreme Court in *Borowski* also provided guidance with respect to this second branch of the test. More specifically, Courts must look into:

- The presence of an adversarial context (this is not contested in the present case, the parties having spent a day in Court debating this motion being a strong indication it is the case);
- The concern for judicial economy; and
- The need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

(1) Judicial economy

[35] On this front, the Applicants argue that the Court has already dedicated significant resources to these Applications — by hearing motions and making procedural orders, that a

strong evidentiary record has been established, and that the majority of the steps have been completed.

[36] Second, they state that a decision by the Court may have practical effects on the rights of the parties if the government brings similar mandates back; allowing the Government's lifting of the measures to render the Applications moot would undermine public confidence in the administration of justice.

[37] Third, the Applicants argue that this is a case dealing with issues of public importance and that the societal cost and uncertainty regarding the constitutionality of vaccine mandates outweighs the concern for judicial economy.

[38] Finally, the Applicants argue that without this Court's decision on their Applications, the impugned IOs/MO would be evasive of review. They state that the Quebec Superior Court decision in *Syndicat des métallos, section locale 2008 c Procureur Général du Canada*, 2022 QCCS 2455 (heard by the Quebec Superior Court before the parties in the present case filed their written submissions but issued before their oral submissions) did not settle the issues at hand and that in any case there is no horizontal *stare decisis*.

[39] In the Court's view, none of these arguments are sufficient to justify additional resources being allocated to these files.

[40] It is true that the parties, and to some extent the Court, have already invested financial and human resources in these files. However, most of the Court resources are yet to come with a

five-day judicial review hearing and extensive writing time (these files comprise 23 affidavits and 15 expert reports totaling approximately 6,650 pages). That is without considering potential appeals to the Federal Court of Appeal and to the Supreme Court of Canada.

[41] As stated above, these proceedings will have no practical effect on the rights of the Applicants. They have obtained the full relief available to them and a decision of the remaining declaratory relief would provide them no practical utility. If they suffered damages as a result of these IOs/MO being in force, they would have to bring an action against the Crown and have their respective rights assessed in light of all the relevant facts.

[42] In addition, there is no uncertain jurisprudence. These Applications arose in a very specific and exceptional factual context: that of the COVID-19 global pandemic. Deciding these Applications would simply result in applying settled *Charter* jurisprudence to those exceptional — hopefully not to be repeated — circumstances; that is to a particular epidemiological point in the pandemic that is unlikely to be exactly replicated in the future. Federal and provincial health safety measures, adopted in the context of the pandemic, have been constitutionally challenged across the country as they were in full force and effect (see for example, challenging federal measures: *Monsanto v Canada (Health),* 2020 FC 1053, *Spencer v Canada (Health)*, 2021 FC 621, *Canadian Constitution Foundation v Attorney General of Canada*, 2021 ONSC 4744, *Turmel v Canada* 2021 FC 1095, *Wojdan v Canada (Attorney General)*, 2021 FC 1341, *Neri v Canada*, 2021 FC 1443, *Zbarsky v Canada*, 2022 FC 195; and challenging provincial measures: *Taylor v Newfoundland and Labrador,* 2020 NLSC 125, *Ingram v Alberta (Chief Medical Officer of Health),* 2020 ABQB 806, *Beaudoin v British Columbia,* 2021 BCSC 512, *Lachance c*

Procureur général du Québec, 2021 QCCS 4721, *Murray et al v Attorney General of New Brunswick,* 2022 NBQB 27).

[43] In that sense, the IOs/MO are not evasive of judicial review.

[44] In *Syndicat des métallos*, Justice Mark Phillips of the Quebec Superior Court recently found that the IOs/MO did not breach the plaintiffs section 7 *Charter* rights and that if they did, the violation would be saved by section 1 of the *Charter* for being one that is justified in a democratic society. As is the case here, Justice Phillips was seized with an application for judicial review. As the IOs/MO were repealed during his deliberation, he exercised his discretion to nevertheless issue his decision. In doing so he considered i) the resources already invested in the case, ii) the existence of related labour disputes between the same parties, and iii) the fact that all parties desired to have a decision on the issues raised by the case. Quite different from the situation at hand.

[45] Justice Phillips studied the choice imposed on the Applicants — accepting to be fully vaccinated against COVID-19 or loosing one's employment — and found that even if the vaccination was subject to the consent of the individual, there is nevertheless a breach of section 7 if the refusal has important consequences; as a result, the IOs/MO violates the liberty and security of the person in their psychological dimension (*Syndicat des métallos*, at para 179). However, he found that the measure was neither arbitrary, nor excessive or disproportionate and that, according to the evidence before him, the deprivation was made in accordance with the principles of fundamental justice and therefore did not violate section 7 (paras 212-213).

[46] Additionally, the rail passenger vaccine mandate is also challenged for breaching sections 2(a), 7, 8 and 15 of the *Charter* in several actions in damages before this Court (files no. T-554-22 and T-533-22), and the air passenger vaccine mandate in the Alberta Court of King's Bench (file no. 2203 09246). It is true that none of these proceedings will test the IOs/MO against section 6 of the *Charter* but, as indicated above, considering that they are no longer in force, the proper vehicle would be an action in damages if the Applicants suffered any damages as a result of these temporary measures. The Court would then have the proper factual background to assess the Applicants' *Charter* rights.

[47] As a result, the Court is of the view that the judicial economy considerations outweigh the alleged important public interest and uncertainty in the law.

V. Conclusion

[48] For the above reasons, these Applications will be struck as moot. The air and rail passenger vaccine mandates were repealed, as have other related public health measures. The Applicants have substantially received the remedies sought and as such, there is no live controversy to adjudicate.

[49] There is no important public interest or inconsistency in the law that would justify allocating significant judicial resources to hear these moot Applications.

[50] Finally, it is not the role of the Court to dictate or prevent future government actions. If the air and rail vaccine mandates are re-introduced in the future, they can be properly challenged and should be weighed against the reality in which they are implemented.

[51] As agreed during the hearing of this Motion, the parties have 10 days from the date of these Reasons to provide the Court with their written submissions on costs (not exceeding 5 pages).

JUDGMENT in T-145-22, T-247-22, T-168-22, and T-1991-21

THIS COURT'S JUDGMENT is that:

1. The Respondent's Motion is granted;
2. The Applicants' Applications for judicial review are struck out as moot;
3. The parties shall provide written submissions on costs, not exceeding 5 pages, within 10 days of these Reasons.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-145-22, T-247-22, T-168-22 AND T-1991-21
DOCKET:	T-145-22
STYLE OF CAUSE:	NABIL BEN NAOUM v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-247-22
STYLE OF CAUSE:	THE HONOURABLE MAXIME BERNIER v ATTORNEY GENERAL OF CANADA
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AND DOCKET:	T-1991-21
STYLE OF CAUSE:	SHAUN RICKARD AND KARL HARRISON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO & HELD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 21, 2022
REASONS FOR JUDGMENT:	GAGNÉ A.C.J.
DATED:	OCTOBER 27, 2022

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