Federal Court of Appeal  Cour d'appel fédérale

Date: 20231109

Dockets: A-251-22 (Lead file)
A-252-22
A-253-22
A-254-22

Citation: 2023 FCA 219

CORAM: **LOCKE J.A.**
LEBLANC J.A.
GOYETTE J.A.

Docket: A-251-22 (Lead file)

BETWEEN:

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

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-252-22

AND BETWEEN:

SHAUN RICKARD and KARL HARRISON

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-253-22

AND BETWEEN:

THE HONOURABLE MAXIME BERNIER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-254-22

AND BETWEEN:

NABIL BEN NAOUM

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on October 11, 2023.

Judgment delivered at Ottawa, Ontario, on November 9, 2023.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: LEBLANC J.A.
GOYETTE J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20231109

Dockets: A-251-22 (Lead file)
A-252-22
A-253-22
A-254-22

Citation: 2023 FCA 219

CORAM: **LOCKE J.A.**
LEBLANC J.A.
GOYETTE J.A.

Docket:A-251-22 (Lead file)

BETWEEN:

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

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-252-22

AND BETWEEN:

SHAUN RICKARD and KARL HARRISON

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket:A-253-22

AND BETWEEN:

THE HONOURABLE MAXIME BERNIER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-254-22

AND BETWEEN:

NABIL BEN NAOUM

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

LOCKE J.A.

I. Background

[1] Four groups of appellants ask this Court to set aside the dismissal (by the Federal Court) of their respective judicial review applications before that Court. Those applications took issue with the air and rail vaccine mandates that, with certain exceptions, required air and rail

travellers to be vaccinated against COVID-19. The mandates were imposed by a series of Interim Orders (IOs) and Ministerial Orders (MOs), and were in force from October 29, 2021 until June 20, 2022. The parties disagree on whether the mandates were repealed or merely suspended, but there is no dispute that they have not been in force since June 20, 2022.

[2] Pursuant to a motion by the respondent, after the vaccine mandates ended, the Federal Court (2022 FC 1463, *per* Associate Chief Justice Jocelyne Gagné) struck the appellants' applications on the basis that they had become moot and that hearing the applications despite their mootness was not warranted.

[3] One of the appellant groups (Shaun Rickard and Karl Harrison, hereinafter the Rickard Appellants) argues that the Federal Court erred in finding that the applications were moot. Further, all of the appellants argue that the Federal Court erred in refusing to exercise its discretion to hear the applications.

[4] Despite the parties' passionate submissions, both in writing and orally, I would dismiss the present appeals for the reasons that follow.

II. Standard of Review

[5] Key to these appeals is the fact that the dismissal of the underlying applications was the Federal Court's decision. While this Court's role is to scrutinize the Federal Court's decision, we do not simply re-decide.

[6] On appeals like these, this Court applies standards of review as directed in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: questions of law are reviewed on a standard of correctness, whereas questions of fact and of mixed fact and law from which no question of law is extricable are reviewed on a standard of palpable and overriding error.

[7] In order to set aside a decision on the palpable and overriding error standard, the appellants must establish that the alleged error is obvious and goes to the very core of the outcome of the case. It is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38 (*Benhaim*), quoting from *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46. A palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye, and it is impossible to confuse these last two notions: *Benhaim* at paragraph 39, quoting from *J.G. v. Nadeau*, 2016 QCCA 167 at para. 77. As discussed in *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at para. 62, examples of palpable errors include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.

[8] Two of the four groups of appellants do not address the standard of review at all in their memoranda of fact and law. The other two argue that the standard of review in these appeals is correctness. However, in oral submissions, the appellants now acknowledge that this Court must follow the appellate standards of review described in the previous paragraph.

III. The Federal Court's Decision

[9] In its decision under appeal, the Federal Court correctly identified the approach on a motion to strike for mootness. As indicated by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (*Borowski*), the approach involves a two-step analysis in which the court decides first whether the case is moot. Where no present live controversy exists which affects the rights of the parties, a case is said to be moot.

[10] Where a case is found to be moot, the second step is for the court to decide whether to exercise its discretion to hear the case despite its mootness. *Borowski* addressed the exercise of discretion over several pages, noting three underlying rationales. The appellants rightly do not take issue with the Federal Court's summary of the relevant considerations (see paragraph 34 of its reasons):

- The presence of an adversarial context;
- 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.

[11] On the first step of the two-step analysis, the Federal Court found that the appellants' applications were moot for lack of live controversy as a result of the repeal of the vaccine mandates. The Federal Court acknowledged the possibility that the vaccine mandates might be reinstated, but found this to be highly speculative.

[12] The Federal Court also found that the fact that declaratory relief was sought in the appellants' applications was insufficient to avoid mootness, even where the declarations sought might be relevant to separate actions claiming damages. The Federal Court noted the principles that:

A. Courts should refrain from expressing opinions on questions of law in a vacuum or where it is unnecessary to dispose of a case (see paragraph 28 of the Federal Court's reasons, citing *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at paragraph 12); and

[13] A request for declaratory relief cannot sustain a moot case in and of itself (see paragraph 32 of the Federal Court's reasons, citing *Rebel News Network Ltd v. Canada (Leaders' Debates Commission)*, 2020 FC 1181 at paragraph 42 (*Rebel News*)).

[14] On the second step of the *Borowski* analysis (the exercise of discretion), the Federal Court noted first that it was not contested that there remained an adversarial context.

[15] The Federal Court's decision to exercise its discretion not to hear the applications was largely influenced by the concern for judicial economy. In this regard, *Borowski* indicated that the following should be taken into account: (i) whether the court's decision will have some practical effect on the rights of the parties, (ii) whether the case is of a recurring nature but brief duration that might be evasive of review, and (iii) whether the case raises an issue of such public importance that a resolution is in the public interest.

[16] The Federal Court made the following observations in considering judicial economy:

A. Though resources had already been invested by the parties and the Court in the appellants' applications, most of the required expenditure of Court resources was yet to come (see paragraph 40 of the Federal Court's reasons);

B. The applications would have no practical effects on the appellants' rights because they had already obtained the full relief that was available to them, and the declaratory relief they sought would be of no practical utility – any claim for damages resulting from the IOs and MOs would have to be the subject of a separate action (see paragraph 41 of the Federal Court's reasons);

C. There was no uncertainty in the jurisprudence to be resolved (see paragraph 42 of the Federal Court's reasons); and

D. The impugned IOs and MOs were not evasive of review (see paragraphs 42 and 43 of the Federal Court's reasons).

[17] The Federal Court did not include a distinct section in its analysis for the third consideration in deciding whether to exercise its discretion to hear a case despite its mootness (the need for the Court to be sensitive to its role as the adjudicative branch in its analysis). However, the Federal Court did observe at paragraph 50 of its reasons (in its Conclusion section) that "it is not the role of the Court to dictate or prevent future government actions."

IV. Analysis

[18] The appellants raise many issues in their memoranda of fact and law and in their oral submissions. Several of these issues relate to the merits of their applications. However, the merits of the applications are beyond the scope of the present appeals.

[19] Even on the issues that are properly before this Court for consideration, the appellants' written arguments generally fail to recognize that we must apply the appellate standards of review. Except on pure questions of law, we will not interfere with the Federal Court's decision in the absence of a palpable and overriding error. This is a highly deferential standard. As stated in *Plato v. Canada (National Revenue)*, 2015 FCA 217 at para. 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*). This fine exercise of balancing is a mixed question of facts and law. Deference is owed to that decision.

[20] As stated above, the conclusions that the appellants' applications were moot and that discretion should not be exercised to hear them were for the Federal Court to make, not this Court. Many of the cases cited by the appellants (though not all) can be distinguished on the basis that they involved the appellate court's own exercise of discretion, not an appeal of a lower court's discretionary decision.

[21] In the following paragraphs, I discuss the appellants' arguments.

A. *Whether the Federal Court erred in finding that the appellants' applications are moot*

[22] As indicated at paragraph 3 above, the Rickard Appellants argue that the Federal Court erred in finding that the underlying applications are moot. They argue that a live controversy remains based on their requests for declaratory relief. The Rickard Appellants cite certain jurisprudence in support of this argument, but nothing that contradicts the statement in *Rebel News* that a request for declaratory relief cannot sustain a moot case in and of itself.

[23] The Rickard Appellants attempt to distinguish *Rebel News* on the basis that injunctive relief had been granted in that case, but I see nothing therein that limits the application of the principle that a request for declaratory relief cannot by itself avoid mootness. In *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 832, the Supreme Court of Canada stated that "a declaration will not normally be granted when the dispute is over and has become academic." If it were otherwise, then virtually any case could be saved from being moot by simply including a claim for declaratory relief. The applications in *Rebel News* were found moot on essentially the same basis as in the present case: the applicants had obtained the core of the relief they were seeking (see *Rebel News* at para. 38).

[24] I note that the Court of Appeal for British Columbia (BCCA) recently confirmed the correctness of the Federal Court's statement that a request for declaratory relief cannot by itself avoid mootness: *Kassian v. British Columbia*, 2023 BCCA 383 at para. 31 (*Kassian*).

[25] The Rickard Appellants argue that the Federal Court erred in stating at paragraph 32 of its reasons that "Courts will grant declaratory reliefs only when they have the potential of providing practical utility, that is, if when (sic) they settle a 'live controversy' between the parties." The Rickard Appellants argue that the jurisprudence does not support such an absolute bar to declaratory relief without practical utility. I see no error by the Federal Court in this regard. The quoted statement is well supported by the Supreme Court of Canada's decision in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99 at para. 11, and this Court's decisions in *Right to Life Association of Toronto v. Canada (Attorney General)*, 2022 FCA 220 at para. 13, and *Spencer v. Canada (Attorney General)*, 2023 FCA 8 at para. 5. Moreover, this statement was made in determining the first step of the *Borowski* analysis (whether the matter was moot). The Federal Court went on to consider the second step separately, thus leaving open the possibility that a case could be heard despite seeking only declaratory relief without practical utility.

[26] Some of the appellants argue that the Federal Court erred in finding that a factual vacuum exists in this case. On the contrary, the appellants argue that considerable evidence was before the Federal Court, including 15 expert reports, 23 affidavits and transcripts of weeks of cross-examinations. However, the Federal Court did not state that there was a factual vacuum. Rather, it cited the principle that courts should refrain from expressing opinions on questions of law in a vacuum or where it is unnecessary to dispose of a case (see paragraph 12A above). It is the second part of this principle (where it is unnecessary to dispose of a case) that is applicable in this case.

[27] I am not convinced that, on its conclusion of mootness, the Federal Court made either an error of law or a palpable and overriding error of fact or of mixed fact and law from which no question of law is extricable.

B. *Whether the Federal Court erred in refusing to exercise its discretion to hear the applications despite their mootness*

[28] At the outset of this section, I repeat that the exercise of discretion is a question of mixed fact and law. Therefore, this Court can intervene only in the case of a palpable and overriding error by the Federal Court, or an extricable error of law. Many of the appellants' arguments, in writing at least, are directed to urging this Court to decide for itself whether to exercise discretion. Again, that is not our role.

[29] Turning to the relevant considerations, the Federal Court acknowledged that there was an adversarial context, and so I need not discuss any of the appellants' arguments based on this consideration. Some appellants criticize the Federal Court for not saying more about the adversarial context, but I see no reviewable error here.

[30] Some appellants argue that the Federal Court failed to take into account the third consideration relevant to the exercise of discretion: the need for the Court to be sensitive to its role as the adjudicative branch in our political framework. Though it would have been preferable if the Federal Court had explicitly discussed this consideration in its Analysis section, it is my view that the following references in the Federal Court's reasons are sufficient to indicate that it was considered:

A. Paragraph 34, in which this consideration is explicitly acknowledged;

B. Paragraphs 31 and 50, regarding the limited role of the Court; and

C. Paragraph 28, noting that Courts should refrain from expressing opinions on questions of law where it is unnecessary to dispose of a case.

[31] On the issue of the concern for judicial economy, the Federal Court identified the appellants' arguments at paragraphs 35 to 38 of its reasons, and addressed each of them.

[32] Some of the appellants argue that the Federal Court erred by failing to adequately consider the public interest in a decision on their applications. They argue that it made only passing references to this issue at paragraphs 47 and 49 of its reasons. I disagree. Those paragraphs provide conclusions reached after having considered the absence of any uncertainty in the jurisprudence and the fact that the appellants' applications "arose in a very specific and exceptional factual context" that is "unlikely to be exactly replicated in the future": see paragraph 42 of the Federal Court's reasons. It follows from this that the Federal Court was of the view that any decision that would be made on the appellants' applications would be of limited value. Though the appellants note several facts that were not acknowledged by the Federal Court in its reasons in this regard, I see neither palpable and overriding error nor extricable error of law here.

[33] It is true, as some of the appellants suggest, that the Federal Court's statement about the absence of uncertainty in the jurisprudence refers to Charter jurisprudence. However, the same

appears to apply to jurisprudence in other areas that might be relevant to the appellants' applications, such as whether the IOs and MOs were *ultra vires* or whether they violated the *Canada Elections Act*, S.C. 2000, c. 9. The appellants have not convinced me otherwise. Moreover, *Borowski* at p. 361 makes clear that the relevant public interest concerns the interest in resolving uncertainty in the law.

[34] The appellants cite several examples of decisions in which other courts exercised their discretion to hear a case despite its mootness. Some of these decisions have treated the public interest as a factor in favour of hearing cases related to the COVID-19 pandemic. However, those cases, based on different circumstances and different exercises of discretion, do not establish that the Federal Court made a reviewable error in this case. For example, I distinguish the decision of the BCCA in *Kassian* on the basis that the trial court in that case had exercised its discretion to hear the matter, and had rendered a decision thereon (unlike the present case). The BCCA exercised its discretion on the basis that one of the points addressed by the trial court was an important one (see *Kassian* at paragraphs 42-43). The BCCA also noted at paragraphs 34-36 that the decision to hear a moot case is discretionary, and that several courts have refused to exercise their discretion in respect of measures against COVID-19.

[35] I also note that there is a difference between a case that raises an issue in which many people are personally interested in having a decision, and a case that raises "an issue of public importance of which a resolution is in the public interest", *per Borowski* at p. 361. The Federal Court was clearly concerned that a decision in the appellants' applications would not be of sufficient value to the public in future circumstances to justify the significant resources that

would be required to hear and decide them. It is notable that, in *Borowski* itself, the issues in debate (the validity of certain provisions of the *Criminal Code* relating to abortion, and the Charter rights of a foetus) were, and remain, of intense public interest. Despite this, the Supreme Court of Canada refused to exercise its discretion to hear that matter despite its mootness.

[36] Some of the appellants argue that the Federal Court erred by failing to find that the IOs and MOs in issue are of a recurring nature but brief duration that are evasive of review. I see no reviewable error here. The Federal Court acknowledged the fact that these orders were periodically replaced with other orders of similar effect, such that a whole series of orders was effectively in issue. However, the finding of mootness is unrelated to the temporary nature of the orders. Whether or not they were of a recurring nature but brief duration, the appellants' applications became moot because of the repeal (or suspension) of the entire series. Any argument of evasiveness of review would have to be based on the possibility that the vaccine mandates would be reinstated.

[37] This brings me to the appellants' argument that the Federal Court erred by failing to consider adequately the threat that the vaccine mandates would be reinstated. Again, I find no merit in this argument. The appellants' argument based on that threat was considered by the Federal Court but dismissed as highly speculative (see paragraph 21 of the Federal Court's reasons). I see no reviewable error in this conclusion. The fact that the Federal Court's discussion in this regard is found in its analysis of the first step of mootness (rather than the second step of exercise of discretion) is of no moment. There is no reason to believe that it was not in the Federal Court's mind while considering the exercise of discretion. Moreover, though

the appellants take issue with the Federal Court's view that the vaccine mandates ended with the repeal of the IOs and MOs, rather than their suspension, it is clear that the Federal Court did not misunderstand what happened.

[38] In addition, even in the event that the vaccine mandates were reinstated at some point, it would be speculative to argue that they would be evasive of review at that time. Any party before either the Federal Court of Appeal or the Federal Court who is concerned that their proceeding may become moot before it can be decided should bear in mind that our Courts are able to expedite proceedings on request, and do so in appropriate circumstances. As an example, earlier this year, this Court, in an appeal from a decision of the Competition Tribunal involving a major proposed merger of Canadian telecommunications companies, was able to hear and render a decision within 26 days after the filing of the notice of appeal (see *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2023 FCA 16). The Court responded appropriately to circumstances in which it was convinced that a quick decision was required.

[39] Some of the appellants argue that the Federal Court erred when it concluded that the declaratory relief sought in the appellants' applications would provide them no practical utility. I disagree. Though the appellants might wish to have a decision on the merits of their applications, I see no reviewable error in the Federal Court's analysis of this consideration, including its conclusion that the appellants had obtained the full relief available to them.

[40] I see no reviewable error that would permit this Court to intervene.

V. Conclusion

[41] For the foregoing reasons, I would dismiss all of the present appeals.

[42] As to costs, having considered the parties' oral submissions, I would award them to the respondent in the all-inclusive amount of $5,000, to be divided equally between the four appeals.

"George R. Locke"
J.A.

"I agree
René LeBlanc J.A."

"I agree
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-251-22 (Lead file), A-252-22, A-253-22 and A-254-22
DOCKET:	A-251-22 (Lead file)
STYLE OF CAUSE:	THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, and AEDAN MACDONALD v. ATTORNEY GENERAL OF CANADA
AND DOCKET:	A-252-22
STYLE OF CAUSE:	SHAUN RICKARD and KARL HARRISON v. ATTORNEY GENERAL OF CANADA
AND DOCKET:	A-253-22
STYLE OF CAUSE:	THE HONOURABLE MAXIME BERNIER v. ATTORNEY GENERAL OF CANADA
AND DOCKET:	A-254-22
STYLE OF CAUSE:	NABIL BEN NAOUM v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 11, 2023
REASONS FOR JUDGMENT BY:	LOCKE J.A.
CONCURRED IN BY:	LEBLANC J.A. GOYETTE J.A.
DATED:	NOVEMBER 9, 2023

APPEARANCES:

Allison Kindle Pejovic Chris Fleury	FOR THE APPELLANTS THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, and AEDAN MACDONALD and FOR THE APPELLANT THE HONOURABLE MAXIME BERNIER
Sam A. Presvelos Evan Presvelos	FOR THE APPELLANTS SHAUN RICKARD and KARL HARRISON
Nabil Ben Naoum	FOR THE APPELLANT (ON HIS OWN BEHALF)
J. Sanderson Graham Robert Drummond Virginie Harvey	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Pejovic Law Calgary, Alberta	FOR THE APPELLANTS THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, AND AEDAN MACDONALD and FOR THE APPELLANT THE HONOURABLE MAXIME BERNIER
Presvelos Law LLP Toronto, Ontario	FOR THE APPELLANTS SHAUN RICKARD and KARL HARRISON
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA