VANCOUVER
15-Apr-25
COURT OF APPEAL
REGISTRY

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BETWEEN:

Phyllis Janet Tatlock, Laura Koop, Monika Bielecki, Scott Macdonald, Ana Lucia Mateus, Darold Sturgeon, Lori Jane Nelson, Ingeborg Keyser, Lynda June Hamley, Melinda Joy Parenteau and Dr. Joshua Nordine

APPELLANTS
Petitioners

AND:

Attorney General for the Province of British Columbia and Dr. Bonnie Henry in her capacity as Provincial Health Officer for the Province of British Columbia

RESPONDENTS
Respondents

MEMORANDUM OF ARGUMENT
APPLICATION TO DISMISS APPEAL AS MOOT

Attorney General of British Columbia and Dr. Bonnie Henry in her capacity as Provincial Health Officer for the Province of British Columbia

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Part 1: Facts

Overview

1. This moot appeal, for declaratory relief only, is brought from a judicial review of orders of the Provincial Health Officer ("PHO") that were rescinded on July 26, 2024.

2. The appeal will have no practical effect on the parties' rights, does not raise an issue of a recurring nature, and does not engage an issue of public importance where resolution is in the public interest. The court should decline to exercise its discretion to hear the appeal and dismiss it for mootness.

PHO Orders

3. On March 17, 2020, the PHO gave notice that the spread of SARS-CoV-2, the infectious agent that causes the disease COVID-19, was a "regional event" under s. 51 of the *Public Health Act*.[1] The notice triggered the PHO's authority to exercise emergency powers under Part 5 of the *PHA*.[2]

4. In the fall of 2021, the PHO issued orders pursuant to her emergency powers requiring workers in hospital and community care settings and long-term care and assisted living facilities to be vaccinated against SARS-CoV-2 to work (the "Orders").[3] The Orders were repealed and replaced in November 2021, September 2022, April 2023, and October 2023.

Appellants Seek Judicial Review

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[1] *Public Health Act*, S.B.C. 2008, c. 28 ("*PHA*"). Affidavit #1 of Dr. Brian Emerson ("Emerson #1) at paras. 19-20.
[2] *PHA*, s. 52(2).
[3] Emerson #1 at paras. 105-121; Affidavit #2 of Dr. Brian Emerson ("Emerson #2") at para. 3; Affidavit #1 of Haley Miller ("Miller #1) at para. 2.

5. On March 16, 2022, the appellants filed a petition for judicial review challenging the Orders.[4] The appellants amended their petition on October 24, 2022, April 24, 2023, and November 1, 2023.[5]

6. The chambers judge heard the petition, together with two other petitions challenging the Orders, in November and December 2023. At the hearing, the appellants significantly narrowed the scope of their challenge, as noted by the chambers judge:

> … during the hearing they expressly confined their relief to seeking, under *JRPA* s. 5(1), directions to the PHO to provide a meaningful s. 43 reconsideration process for remote and administrative workers and for those whose ss. 2(a) and 7 rights had been infringed.[6]

7. On May 10, 2024, the chambers judge dismissed the three petitions with one exception. The chambers judge remitted to the PHO whether to consider requests under s. 43 of the *PHA* "for reconsideration of the vaccination requirement from healthcare workers able to perform their roles remotely, or in-person but without contact with patients, residents, clients or the frontline workers who care for them".[7]

8. On June 10, 2024, the appellants filed a notice of appeal.

PHO Ends Public Health Emergency

9. On July 26, 2024, the PHO rescinded the Orders and provided notice that the "regional event" had passed.[8] The notice ended the PHO's authority to exercise her emergency powers under the *PHA* in response to the transmission of SARS-CoV-2 at that time.

10. As of July 26, 2024, the PHO requirement to be vaccinated against SARS-CoV-2 to work in healthcare or residential care settings ended.

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[4] Appeal Record ("AR") at pp. 4-31.
[5] AR at pp. 32-154.
[6] *Hoogerbrug v. British Columbia*, 2024 BCSC 794 at para. 91.
[7] AR at pp. 181-182.
[8] Affidavit #1 of Nicole Mar, Exhibit A, p. 001.

The PHO has not issued any subsequent orders requiring healthcare or residential care workers to be vaccinated against SARS-CoV-2 to work in these settings.

PHO Confirms Her Decision

11. On August 28, 2024, the PHO issued her reconsideration decision.[9] While the Orders were no longer in place at that time, the PHO confirmed her decision to have suspended requests for reconsideration under s. 43 of the *PHA* in the Orders.

Part 2: Issues

12. The appeal is moot. This Court should not exercise its discretion to hear the appeal.

Part 3: Analysis

Law of Mootness

13. There is a two-stage approach to issues of mootness.[10] First, the Court must determine whether there is a live controversy affecting the rights of the parties. If so, the Court must decide whether to exercise its discretion to hear the case in any event.

14. Courts generally will not decide cases that raise hypothetical or abstract questions.[11] Criteria to consider in determining whether to hear a moot appeal include the existence of an adversarial context, judicial economy, and sensitivity to the adjudicative function of the court.[12]

15. The criteria of judicial economy will be addressed if "the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it" including where:

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[9] Affidavit #1 of Nicole Mar, Exhibit B, p. 004.
[10] *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at p. 353.
[11] *Sandhu v. British Columbia (Provincial Court)*, 2013 BCCA 88 at para. 23.
[12] *Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2021 BCCA 171 at para. 19 citing *Borowski* at pp. 358-363.

a. the Court's decision will have some practical effect on parties' rights even without the effect of determining the controversy that gave rise to the matter;

b. the appeal raises an issue of a recurring nature but of a necessarily brief duration that might otherwise evade review; or

c. the appeal raises an issue of public importance where a resolution is in the public interest.[13]

16. A party may file evidence in support of its application to dismiss an appeal as moot without meeting the test for the admission of fresh evidence on appeal.[14]

The Appeal is Moot

17. The appeal is moot. The PHO rescinded the final iterations of the Orders and ended the COVID-19 regional event in July 2024. There is no live controversy affecting the rights of the parties.

Court Should Not Exercise Its Discretion to Hear the Appeal

18. This Court should not exercise its discretion to hear the moot appeal.

19. The appeal will have no practical effect on the rights of the parties. The Orders are no longer in place and the appellants are not otherwise required by the PHO to be vaccinated against SARS-CoV-2 to work in health and residential care settings.

20. Moreover, the only relief sought on appeal is declaratory. A request for declaratory relief cannot sustain a moot case in and of itself, and a declaration will not normally be granted when the dispute is over and it has become academic.[15] This Court recently declined to grant a declaration concerning exemptions from a rescinded COVID-19 public health order because the issue was of "no practical importance", and

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[13] *Henderson v. Bank of Montreal*, 2022 BCCA 412 at para. 35 citing *Mapara v. Ferndale Institution*, 2014 BCCA 49 at para. 34.
[14] *Forjay Management Ltd.* at para. 15.
[15] *Peckford v. Canada (Attorney General)*, 2023 FCA 219 at paras. 21-23.

it was "… unlikely that the precise scenario under consideration will ever be repeated".[16]

21. The appeal does not raise "an issue of a recurring nature". The Orders were in place for approximately 2.5 years during an unprecedented public health emergency. Given the end of the "regional event", the PHO lacks authority to make further emergency orders in response to COVID-19 at this time. Any future pandemic will not necessarily take the same form or require the same response. Even the Orders subject to this judicial review evolved throughout the pandemic before being rescinded, and so it is unlikely any future order would be the same.

22. The appeal does not raise an issue of public importance where a resolution is in the public interest. The s. 7 *Charter* jurisprudence, as it pertains to this appeal, is settled.[17] There is no *Charter*-protected right to practise a profession or work a particular job. This can be contrasted with *Kassian v. British Columbia*, in which this Court allowed an appeal to proceed because it offered an opportunity to provide guidance on whether section 7 includes a "right to roam".[18]

23. The appellants' challenge to the chambers judge's conclusion that the Orders reflect a proportionate balancing of s. 2(a) *Charter* rights and public health objectives is similarly unlikely to provide precedential value. Whether an administrative decision is reasonable under the second step of the *Doré* framework necessarily depends on the particular decision at issue and the statutory and factual contexts. What may be proportionate in one public health crisis, may not be in another.

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[16] *Kassian v. British Columbia (Public Health Officer),* 2025 BCCA 20, paras. 81-84, 88.
[17] *Mussani v. College of Physicians and Surgeons of Ontario, [2004] O.J. No. 5176, 2004 CanLII 48653 (C.A.); Tanase v. College of Dental Hygienists of Ontario, 2021 ONCA 482, leave to appeal ref'd [2021] S.C.C.A. No. 350; Ouellette v. Law Society of Alberta, 2019 ABQB 492, leave to appeal ref'd 2021 ABCA 99; Siemens v. Manitoba (Attorney General), 2003 SCC 3; Banas v. HMTQ, 2022 ONSC 999.*

[18] *Kassian v. British Columbia*, 2023 BCCA 383 [*Kassian*] at para. 42.

24. As the Ontario Court of Appeal held in *Harjee v. Ontario*,[19] to the extent that governments (or public health officers) may enact public health measures in the future that are challenged on constitutional grounds, the assessment of the constitutionality of those measures is better considered in the context of a live controversy, based on the factual context at issue, and the record in support of the asserted constitutional claims.

25. None of those exist here. Dismissing the appeal is consistent with the weight of appellate jurisprudence.[20]

Part 4: Order Sought

26. This Court ought to dismiss the appeal as moot.

All of which is respectfully submitted.

Dated at the City of Victoria, Province of British Columbia, this April 15th of 2025.



Counsel for the respondents
Julie K. Gibson, Alexander C. Bjornson, and Christine Bant

[19] *Harjee v. Ontario*, 2023 ONCA 716.
[20] *C.M. v. Alberta*, 2024 ABCA 136; *Spencer v. Canada (Attorney General)*, 2023 FCA 8; *Beaudoin v. British Columbia*, 2022 BCCA 427 (in part); *Kassian* (in part); *Peckford.*