Federal Court Cour fédérale

Date: 20230316

Dockets: T-1736-22
T-1738-22

Toronto, Ontario, March 16, 2023

PRESENT: Associate Judge Trent Horne

Docket: T-1736-22

BETWEEN:

AMANDA YATES, PATRIC LAROCHE, JENNIFER HARRISON, VICTOR ANDRONACHE, SCOTT BENNETT, BEVERLEY MASON-WOOD, DAWN BALL, MATTHEW LECCESE, DARLENE THOMPSON, ALEXANDER MACDONALD, AND MARCEL JANZEN

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1738-22

AND BETWEEN:

CORRINE JANZEN AND CODY TILBURY

Applicants

and

CANADA (MINISTER OF HEALTH)

Respondent

JUDGMENT

UPON motion in writing by the Attorney General of Canada, on behalf of the respondents in Court files T-1736-22 and T-1738-22, filed November 28, 2022 pursuant to Rules 369 and 221 of the *Federal Courts Rules*, SOR/98-106, for:

1. an order striking the applications for judicial review in Court files T-1736-22 and T-1738-22 because they are moot;

2. costs of this motion; and

3. such further and other relief as the Court deems appropriate;

AND UPON reading the respondents' motion record, the responding motion records of the applicants in Court files T-1736-22 and T-1738-22, each filed January 30, 2023, and the respondents' reply in each of the proceedings filed February 15, 2023;

AND UPON considering:

I. Overview

[1] These applications for judicial review challenge the constitutionality of now-repealed COVID-19 border measures.

[2] The respondent brings this motion to strike the notices of application on the grounds of mootness.

[3] With the repeal of the impugned Orders in Council, the challenged provisions no longer exist in law. They are moot. This is not an appropriate instance for the Court to exercise its discretion to hear a moot application. The notices of application will therefore be struck.

II. Background

[4] In response to the COVID-19 pandemic, a series of emergency Orders in Council ("OICs") were made by the Governor in Council pursuant to section 58 of the *Quarantine Act*, SC 2005, c 20 ("*Quarantine Act*").

[5] On February 17, 2020, OIC PC 2020-0070 came into effect. This OIC required certain persons who arrive in Canada to go to a quarantine facility. This OIC was repealed and replaced approximately every 30 days, with subsequent OICs of similar name that modified, or introduced public health measures.

[6] On October 30, 2020, OIC PC 2020-0840 came into effect. It required, with minimal exceptions, every person entering Canada to provide health and travel information through electronic means specified by the Minister of Health.

[7] On June 21, 2021, OIC PC 2021-0615 came into effect. It exempted fully vaccinated persons entering Canada from the 14-day quarantine requirement.

[8] On December 20, 2021, OIC 2021-1050 came into effect. It required Canadians who are not vaccinated, or who are vaccinated but do not use ArriveCAN, to undergo testing and mandatory quarantine upon returning to Canada.

[9] On September 30, 2022, the final iteration of the OIC (PC 2022-0836) was repealed. It was not replaced by any subsequent OIC.

A. *T-1736-22 ("Yates")*

[10] The Yates applicants consist of eleven Canadians citizens who entered Canada by air or land between April and July 2022 and refused to comply with some of the requirements of the OIC in place at the time. With the exception of Alexander Macdonald, each of the Yates applicants received a fine for non-compliance with border measures.

[11] The Yates applicants challenge the requirement that travellers submit information through ArriveCAN, and the requirement that, with limited exception, unvaccinated travellers quarantine for 14 days upon entry. They argue that 1) the repealed provisions were beyond the scope of section 58 of the *Quarantine Act*, and 2) the repealed provisions violated their rights under sections 2(a), 6, 7, 8, 9, 10(b), and 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

[12] The Yates applicants seek the following relief:

i) a declaration pursuant to s. 52 of the *Charter* that the OICs breached ss. 2(a), 6, 7, 8, 9, 10(b), and 15 of the *Charter* in a way not justified under s. 1;

ii) a declaration that the border measures are *ultra vires* s. 58 of the *Quarantine Act*;

iii) damages, pursuant to s. 24(1) of the *Charter*, amounting to $1,000.00 per applicant; and

iv) an order pursuant to s. 18(1) of the *Federal Courts Act* and s. 24(1) of the *Charter* in the nature of *certiorari*, quashing the OICs.

B. *T-1738-22 (“Janzen”)*

[13] This application requests a declaration that there is no legal requirement that persons entering Canada use ArriveCAN. The applicants assert that the Minister of Health failed to specify ArriveCAN as the “electronic means” by which persons crossing the border were required to provide mandatory health and travel information. The applicants assert that the Minister of Health has not properly and legally specified the electronic means by which any person entering Canada must provide mandatory travel and health information.

[14] The applicant Corrine Janzen alleges that she inputted her personal information into ArriveCAN in or around November 2021 when returning to Canada from Mexico under fear of being charged with an offence or being ticketed. Ms. Janzen does not consent to the retention of her personal information by the Minister of Health, or any government, organization or other entity. She does not consent to sharing this information with any person, government, organization or entity as contemplated by ArriveCAN’s privacy statement.

[15] The applicant Cody Tilbury alleges that, upon returning to Canada from Mexico, he did not provide mandatory travel and health information through ArriveCAN as this information would tend to reveal intimate details of his health, lifestyle and personal choices, including information which may lead to stigmatization and discrimination. Mr. Tilbury does not consent to the disclosure or sharing of his personal information with any person, government, organization or entity as contemplated by ArriveCAN’s privacy policy. As a result of Mr. Tilbury’s refusal to use ArriveCAN, he received a ticket in an amount of $6,255.00.

III. Test for Mootness

[16] The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353 ("*Borowski*")).

[17] There is a two-step test to determine if the Court should exercise its discretion to hear a moot case: first, has the required tangible dispute disappeared and have the issues become academic; second, if the answer to the first question is yes, should the court exercise its discretion to hear the case (*Borowski* at page 353).

[18] The first stage of the analysis requires a consideration of whether there remains a live controversy. In *Borowski*, the appeal was dismissed as moot, and the Supreme Court did not exercise its discretion to hear it. The provisions of the *Criminal Code* that were in issue in that proceeding had been struck down after the decision of the Court of Appeal, and before the hearing at the Supreme Court. The Supreme Court found that the substratum of Mr Borowski's appeal, and the *raison d'être* of the action, had disappeared (*Borowski* at page 357).

[19] In the absence of a live controversy, three considerations guide the exercise of discretion to hear a moot proceeding: the absence or presence of an adversarial context; whether there is any practical utility in deciding the matter or if it is a waste of judicial resources; and whether the court would be exceeding its proper role by making law in the abstract, a task reserved for

Parliament (*Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 9).

IV. Analysis

A. *The proceedings are moot*

[20] With the repeal of the OICs, the substratum of these proceedings, their *raison d'être*, has disappeared. Since October 1, 2022, there have been no COVID-19 border measures in place. The proceedings are therefore moot. There is no longer a live controversy between the parties.

[21] As for the claim for damages in Yates, damages cannot be awarded in an application for judicial review (*Philipps v Canada (Librarian and Archivist)*, 2006 FC 1378 at para 71). This pleading is not properly before the Court.

B. *The Court should not Exercise its Discretion to Hear the Applications*

[22] As for the second part of the test, there have been numerous legal challenges to COVID-19 measures. The respondent points to a number of decisions where the proceedings were dismissed as moot, and the Court did not exercise its discretion to hear the matter:

a) *Kakuev v Canada*, 2022 FC 1465 at paras 25-33 ("*Kakuev*");

b) *Ben Naoum v Canada (Attorney General)*, 2022 FC 1463 at paras 35-47;

c) *Lavergne-Poitras v Canada (Attorney General)*, 2022 FC 1391 at para 41;

d) *Bowen v City of Hamilton*, 2022 ONSC 5977 at paras 23-32;

e) *Gianoulias v Attorney General of Quebec*, 2022 QCCS 3509 at paras 24-35;

f) *Wojdan v Canada (Attorney General)*, 2022 FCA 120 at para 4; and

g) *Spencer v Canada (Attorney General)*, 2023 FCA 8 at paras 4-6 ("*Spencer*").

[23] The Yates applicants point to instances where the Court exercised its discretion to hear a COVID-19 proceeding, even though it was moot. These decisions can be distinguished on their facts. In *Canadian Society for the Advancement of Science in Public Policy v British Columbia*, 2022 BCSC 1606, the Court found that there was a possibility that the impugned orders could be reinstated (paras 69-70). On this record, I am unable to conclude that there is a reasonable possibility that the OICs proposed to be reviewed will be reinstated. In *Harjee v Ontario*, 2022 ONSC 7033 (paras 23-25) the Ontario Superior Court of Justice exercised its discretion to hear the application. But in that proceeding, the Court had a full evidentiary record, including expert evidence. Further, the respondent was prepared to argue the matter on the merits, and did not move to have the proceeding quashed for mootness (para 24). Here, the applications are at the very early stages and are far from being ready for a hearing.

[24] I am not persuaded that the facts and circumstances of these proceedings are sufficiently different from the decisions cited by the respondent, and would warrant a different outcome.

(1) Yates

[25] The notice of application alleges that, with the exception of Alexander Macdonald, each of the applicants received a fine for non-compliance with border measures. For the purposes of this motion, I will presume that to be true.

[26] The applicants argue that the findings in this application, if permitted to proceed, would impact the prosecution of those outstanding charges.

[27] In the decision giving rise to the appeal in *Spencer* (*Spencer v Canada (Health)*, 2021 FC 621), one of the applicants was fined $3,000 in lieu of an airport quarantine upon his return to Canada. His counsel maintained that the determinations made on his application would be germane to the defence of that fine (para 18).

[28] In the appeal of that decision, (Court file A-183-21), the respondent brought a motion to dismiss the appeal as moot. In a joint motion record on behalf of the appellants filed October 25, 2022 it was argued that certain of the appellants, and many other Canadians, face fines, prosecution, and penal consequences as a result of alleged non-compliance with OICs. It was submitted that this creates a further adversarial relationship between the appellants and the respondent. The appellants relied, as the applicants do on this motion, on *Vic Restaurant Inc v City of Montreal*, [1959] SCR 58 (joint written representations of the appellants dated October 25, 2022, para 25).

[29] The appeal in *Spencer* was dismissed as moot.

[30] Given the close similarity of the issues on this motion to what was considered in *Spencer*, the applicants bear a heavy burden to demonstrate that the outcome of this motion should be different. They have not done so.

[31] Particularly in respect of any ongoing prosecutions, I agree with the respondent that the applicants are free to seek a determination on the constitutionality of the impugned provisions in those prosecutions if they so choose. Having duplicative proceedings addressing the same issue

would be a waste of judicial resources and militates against the Court exercising its discretion to hear these moot applications.

[32] Amanda Yates, Patric Laroche, Jennifer Harrison, Victor Andronache, Scott Bennett, Matthew Leccese, Darlene Thompson, Alexander MacDonald, and Marcel Janzen are also the plaintiffs in a parallel action filed before this Court on January 24, 2023. The applicants submit that a decision from this Court will resolve one of the areas of live controversy in that action. I do not see a benefit in permitting this application to proceed if the same issue can be, or will be, be addressed in that action.

(2) Janzen

[33] The Janzen applicants submit that their proceeding is notably different from Yates on the basis that the Janzen applicants are not challenging the requirement to quarantine, and are not seeking damages. The Janzen applicants also note that they do not seek relief under sections 2, 6, or 15 of the *Charter*. The Janzen applicants further submit that they do not challenge quarantine requirements, "but rather challenge the factual legality of the ArriveCAN requirement, and alternatively challenge the orders on privacy grounds". For the purposes of determining whether the Court should exercise its discretion to hear a moot proceeding, these are a distinctions without a difference.

[34] As in Yates, the Janzen applicants point to the fact that Cody Tilbury has an outstanding ticket for $6,255.00. The result is the same as in Yates – Mr Tilbury is free to seek a determination on the constitutionality of the impugned provisions in that prosecution if he so chooses.

[35] The Janzen applicants also submit that they and others would "benefit from clarity" about the legality of ArriveCAN or a decision about whether it unjustifiably infringes privacy rights. Benefit of clarity is not the test. A party asking the Court to hear a moot proceeding must demonstrate a practical utility that will be achieved if the matter was to proceed and consume scarce judicial resources along the way. I am not satisfied that the applicants have demonstrated such a practical utility.

V. Costs

[36] The Court has full discretionary power over the amount and allocation of costs (subrule 400(1)).

[37] The respondent seeks its costs of the motions. The applicants submit that there should be no award of costs because this is public interest litigation.

[38] Costs should follow the result. I note that in *Kakuev*, costs were awarded against a self-represented plaintiff. Costs will be fixed with reference to Column III of the Tariff.

THIS COURT'S JUDGMENT IS that:

1. The application in T-1736-22 is struck for mootness.

2. Costs in T-1736-22 are payable by the applicants to the respondent, fixed at $800.00.

3. The application in T-1738-22 is struck for mootness.

4. Costs in T-1738-22 are payable by the applicants to the respondent, fixed at $800.00.

"Trent Horne"
Associate Judge