S.C.C. File Nos. 41081, 41082

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE HONOURABLE MAXIME BERNIER

Applicant
(Appellant)

- and -

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

AND BETWEEN:

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

Applicants
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

RESPONSE OF THE RESPONDENT
TO THE APPLICATIONS FOR LEAVE TO APPEAL
(*pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*, SOR/2002-156*)

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TABLE OF CONTENTS

RESPONDENT'S MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This Court's decision in *Borowski v Canada*[1] (***Borowski***) respecting the factors a court must consider when deciding whether to exercise its discretion to consider a moot matter has been, and remains, instructive and flexible, giving guidance, not restriction, on how to exercise that discretion. It allows a court to account for the particular facts and circumstances of any matter brought before it, including challenges to temporary measures, such as those at issue here. None of the issues raised by the Applicants demonstrates that the test needs to be reconsidered or raise an issue of public importance or a matter otherwise requiring consideration to warrant the granting of leave.

B. Facts

2. While the Attorney General of Canada (**Canada**) generally agrees with the facts as set out by the Applicants, it does not agree with certain of them. In particular, the "underlying facts" asserted in the overview[2] are not established in the record presented to this Court and were not found as facts by either the Federal Court or Federal Court of Appeal. Similarly, the suggestions that any measures introduced in response to the COVID-19 pandemic, specifically those challenged in the Applications below, were "harsh", "subject to caprice", or "guided by improper motivation"[3] have not been established. They are argument and should be read as such.

3. The relevant facts follow.

4. The Applicants were one of a group of parties challenging, in part, a series of Interim Orders implemented pursuant to the *Aeronautics Act*[4] (**Interim Orders**), which generally

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[1] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [***Borowski***].
[2] Applicants' memorandum of argument at para 2.
[3] Applicants' memorandum of argument at paras 38, 43.
[4] *Aeronautics Act*, RSC 1985, c A-2.

required individuals using commercial aircraft within or from Canada to have been fully vaccinated against COVID-19.[5]

5. The *Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to Covid-19, No. 3* ceased to have effect on June 20, 2022.[6] It was not replaced by another Interim Order continuing the vaccination mandates.

6. After the Interim Orders were repealed,[7] Canada brought a motion to dismiss the Applications as moot[8] which the Federal Court granted. In its reasons, the Federal Court identified the applicable test for a motion to dismiss a moot matter as that established in *Borowski*.[9] First, the court should determine whether the matter is moot; whether there is a live controversy. Second, if the matter is moot, the court should determine whether it should exercise its discretion to hear the matter.[10]

7. After determining the Applications were moot, the Federal Court then identified the three *Borowski* factors – the presence of an adversarial context, the concern for judicial economy, and the need for the Court to be sensitive to its role in the political framework – to determine if it should nonetheless consider the Applications. As there was no question that there was a continuing adversarial context, only the two other factors were relevant. Notwithstanding that the parties had invested significant resources, the Federal Court found that there was no important public interest or inconsistency in the law that would justify allocating significant judicial resources to hear the Applications over a five-day hearing; there was no uncertainty in the jurisprudence requiring attention; and the Interim Orders were not evasive of judicial review.[11]

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[5] *Ben Naoum v Canada (Attorney General)*, 2022 FC 1463 [**FC Decision**] at paras 1–10.
[6] *Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to COVID-19, No 3*, s 36 (Repealed).
[7] *Interpretation Act*, RSC 1985, c I-21, s 2(2).
[8] FC Decision at para 3.
[9] *Borowski*.
[10] FC Decision at para 15.
[11] FC Decision at paras 40–43.

8. The Federal Court of Appeal dismissed the subsequent appeal.[12] It noted that it could not identify any reviewable error in the Federal Court decision and that, absent a palpable and overriding error, or an extricable error of law, the discretion to consider the moot Applications lay with the Federal Court, not the Federal Court of Appeal.[13]

PART II – QUESTION IN ISSUE

9. The only issue in an application for leave to appeal is whether the Applicants have proposed any issues of public importance or matters that otherwise warrant consideration by this Court.[14] The Applicants have not met this test.

10. Regarding the specific issues proposed by the Applicants, Canada responds as follows:

> (a) The well-established existing test set out in *Borowski* that guides a court in determining whether it should exercise its discretion to consider a moot matter is flexible and allows the court to consider the nature and circumstances of the matter. This Court does not need to alter this test to account for the existence or use of "emergency orders"; and
>
> (b) It would be inappropriate for this Court to make any pronouncement concerning hypothetical future measures as the Applicants invite it to do.

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[12] *Peckford v Canada (Attorney General)*, 2023 FCA 219 [**FCA Decision**].
[13] FCA Decision at paras 19, 27.
[14] *Supreme Court Act*, RSC 1985, c S-26, s 40.

PART III – STATEMENT OF ARGUMENT

A. Preliminary issue

11. Though the Applicants use the terms "emergency power", "emergency orders", and "modern-day emergency order" throughout their submissions,[15] they do not define such terms. While it can be inferred that the Applicants intend to refer generally to the various suites of measures various Canadian public authorities introduced during, and in response to, the COVID-19 pandemic,[16] the use of these chosen terms as a catch-all for those measures is misleading. To clarify, in the underlying Applications the Applicants challenged a series of Interim Orders[17] in respect of the health security of civil aviation issued on a temporary basis during the COVID-19 pandemic and which have long been repealed.

B. The *Borowski* Test

12. Canada agrees with the Applicants that this Court's decision in *Borowski*[18] remains the standard for determining whether a court should proceed in deciding an otherwise moot matter.[19] The relevant factors to be considered in that analysis are:

(a) The presence of an adversarial context;

(b) The concern for judicial economy; and

(c) The need for the Court to be sensitive to its role as the adjudicative branch in our political framework.[20]

13. It is important to note that this Court specifically rejected any formalistic or categorical application of these factors, stating:

> In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical

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[15] See Applicants' memorandum of argument at paras 1, 4–6, 17, 19, 20, 24, 25, 29, 30, 33, 38, 40–42, 44, 46, 48.
[16] Applicants' memorandum of argument at para 1.
[17] FC Decision at paras 1–10.
[18] *Borowski*.
[19] Applicants' memorandum of argument at para 18.
[20] See also FCA Decision at para 10; FC Decision at para 34.

> process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.[21]

14. As stated elsewhere, the factors should not be examined in a rigid fashion.[22] It is this flexibility which demonstrates that there is no need for this Court to reconsider the test.

C. Judicial Economy

15. As the Federal Court of Appeal noted,[23] this Court's direction in *Borowski* indicates that a court should consider the following under this factor:

> (a) whether the court's decision will have some practical effect on the rights of the parties;
>
> (b) whether the case is of a recurring nature but brief duration that might be evasive of review; and
>
> (c) whether the case raises an issue of such public importance that a resolution is in the public interest.

16. Consideration of judicial economy involves more than simply the two concerns that the Applicants have raised. The hearing of a moot matter necessarily means that other litigation will be delayed, which affects access to justice.[24] That impact should not be discounted as a matter for consideration, as a waste of resources necessarily will not serve judicial economy.[25] The Federal Court was alive to this concern, noting that extensive court resources would be expended to consider an extensive record on judicial review, the result of which would have had no practical effect for the Applicants.[26]

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[21] *Borowski* at 363; *Association des juristes d'expression française du Nouveau-Brunswick v Office of the Commissioner of Official Languages for New Brunswick*, 2023 NBCA 7 at para 42; leave to appeal to SCC dismissed, 40684 (26 October 2023).
[22] *Wilson Olive and Friends of the Aquifer v Keys (Rural Municipality)*, 2020 SKCA 124 at para 17.
[23] FCA Decision at para 14.
[24] *Pelletier v Fort William First Nation*, 2021 FC 562 at para 17.
[25] *Amgen Canada Inc. v Apotex Inc.*, 2016 FCA 196 [***Amgen***] at para 22.
[26] FC Decision at paras 40, 41.

17. The Applicants raise two concerns in respect of judicial economy but do not explain why they should trump the broader considerations in this factor, and do not indicate why those concerns cannot be addressed within the existing test. They do not demonstrate a need for any revision of the second *Borowski* factor.

i. The Interim Orders were neither recurring, nor evasive of review

18. Canada does not dispute that a court may exercise its discretion to consider a moot matter where the issues raised are both of a recurring nature and evasive of review.[27] However, the introduction of measures in response to a global pandemic should not be equated to frequently recurring legal processes such as bail hearings or applications for *habeas corpus* in respect of inmate security reclassification.

19. It is the case that the vaccine mandates pursuant to Interim Orders were not of a recurring nature despite their renewal during a limited period. The possibility that similar vaccine mandates could be reintroduced was dismissed as speculative.[28] Indeed, despite the passage of time since the relevant Interim Orders were repealed, the federal government has not reissued any similar vaccination measure for air travel.

20. Additionally, the impugned Interim Orders were not evasive of review. As was noted by the Federal Court,[29] the same series of orders was reviewed by the Québec Superior Court in *Syndicat des métallos, section locale 2008 c Procureur général du Canada.*[30]

21. Further, as the Federal Court also noted, a series of temporary federal and provincial measures implemented in response to the COVID-19 pandemic had been challenged before various courts, demonstrating that such measures were generally not evasive of review.[31] As a specific example, constitutional challenges to the Public Health Agency of Canada's

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[27] *Borowski* at 364; *Mission Institution v Khela*, 2014 SCC 24 at para 14; FCA Decision at para 14.
[28] FC Decision at para 29.
[29] FC Decision at paras 44–45.
[30] *Syndicat des métallos, section locale 2008 c Procureur général du Canada*, 2022 QCCS 2455.
[31] FC Decision at paras 42–43; see citations therein.

quarantine measures in 2021 demonstrate that public health orders similar in nature to the Interim Orders, which required repeated review, updating, and reimplementation, can be reviewed. In those cases, different applicants challenged measures under the *Quarantine Act*,[32] implemented through successive Orders in Council,[33] at both the Ontario Superior Court of Justice[34] and the Federal Court.[35] Those courts determined the challenged Orders in Council were constitutionally valid.

22. Even if similar vaccination mandates were to be implemented in the future, it would again be speculative to argue that they would then be evasive of review.[36] That would properly be a matter for a court faced with a challenge to those mandates to consider.

ii. Public Interest is already defined

23. Simply because an expired measure may have affected, and may be of interest to a small, or even a significant, portion of the public[37] does not mean that a moot challenge to that measure is a matter of public interest requiring resolution before a court.

24. In *Borowski*, this Court answered the question of what constitutes public interest in this context. The public interest in having a moot matter determined is engaged where there is a social cost of continued uncertainty in the law.[38] It does not follow from the number of parties interested in the matter. Here, there was no continuing uncertainty in the relevant law requiring the court's attention. "Deciding the 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."[39]

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[32] *Quarantine Act*, SC 2005, c 20.
[33] Notably *contra* Applicants' memorandum of argument at para 24.
[34] *Canadian Constitutional Federation v AGC*, 2021 ONSC 2117.
[35] *Spencer v Canada (Health)*, 2021 FC 621, affd 2023 FCA 8.
[36] FCA Decision at para 37.
[37] Applicants' memorandum of argument at para 36.
[38] *Borowski* at 362.
[39] FC Decision at para 42.

D. Considerations respecting the Court's proper adjudicative role do not require redefinition

25. Canada agrees with the Applicants that a court faced with a request to adjudicate a matter that has become academic must "be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch."[40]

26. The Applicants' argument that an absence of Parliamentary debate in respect of a public measure should override the other *Borowski* factors or create an exception to the test is unsupported. Regardless of whether a contested law was passed by Parliament or by a sub-legislative body, judicial pronouncement in respect of expired legislation should generally be avoided. As the Federal Court of Appeal has stated:

> …gratuitously interpreting the former wording of a provision in issue, in a case with no practical consequences, just to create a legal precedent, would be a form of law making for the sake of law-making. That is not our proper task.[41]

27. Effectively, it is not the *Borowski* test with which the Applicants take issue; it is simply the result of the Federal Court's exercise of discretion in this case they challenge.

E. Conclusion

28. That different courts have come to different conclusions in their application of *Borowski* in respect of measures in response to COVID-19 does not indicate that it needs reconsideration. Instead, it illustrates that courts may in their exercise of discretion consider the relevant factors as being of greater or lesser import given the circumstances before them – the very approach this Court considered appropriate in *Borowski*.

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[40] *Borowski* at 362; *Amgen* at para 16; Applicants' memorandum of argument at para 38.
[41] *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 13.

29. The suggestion the *Borowski* test must be modified to avoid the possibility that governments will have "*carte blanche*" to act without "accountability or consequence",[42] or pursuant to "bad faith and improper purpose",[43] is undemonstrated and unwarranted.

30. It is entirely a matter of speculation that a future government will introduce temporary measures similar to those found in the challenged Interim Orders, and which will also expire before a court could consider a challenge to them. In any event, were such to occur, this Court has already provided a workable, principled approach by which courts could determine whether they should hear such matters, including challenges to expired "emergency" measures. There is no issue of public interest or one otherwise requiring this Court's attention. The applications should be dismissed.

PART IV – COSTS

31. In accordance with the usual practice of awarding costs to the successful party, Canada seeks its costs in responding to these applications.

PART V - ORDER SOUGHT

32. Canada requests that the Court dismiss the applications for leave to appeal with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Ottawa, in the Province of Ontario, this 7th day of February, 2024.

J. Sanderson Graham

J. Sanderson Graham
Robert Drummond
Virginie Harvey

Counsel for the Respondent, Attorney General of Canada

[42] Applicants' memorandum of argument at para 48.
[43] Applicants' memorandum or argument at para 42.

PART VI – TABLE OF AUTHORITIES

Statutes and Regulations			**Cited at Paragraph(s)**
1.	*Aeronautics Act*, RSC 1985, c A-2	*Loi sur l'aéronautique*, LRC (1985), ch A-2	4
2.	*Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to COVID-19, No 3* (Repealed) s 36	*Arrêté d'urgence no 3 pour l'aviation civile visant les exigences relatives à la vaccination en raison de la COVID-19* (Abrogé) Art 36	5
3.	*Interpretation Act*, RSC 1985, c I-21 s 2(2)	*Loi d'interprétation*, LRC (1985), ch I-21 Art 2(2)	6
4.	*Quarantine Act*, SC 2005, c 20	*Loi sur la mise en quarantaine*, LC 2005, ch 20	21
5.	*Supreme Court Act*, RSC 1985, c S-26 s 40	*Loi sur la Cour suprême*, LRC (1985), ch S-26 Art 40	9

Case Law		**Cited at Paragraph(s)**
6.	*Amgen Canada Inc. v Apotex Inc.*, 2016 FCA 196	16, 25
7.	*Association des juristes d'expression française du Nouveau-Brunswick v Office of the Commissioner of Official Languages for New Brunswick*, 2023 NBCA 7; leave to appeal to SCC dismissed, 40684 (26 October 2023)	13
8.	*Ben Naoum v Canada (Attorney General)*, 2022 FC 1463	4, 6, 7, 11, 12, 16, 19, 20, 21, 24

Case Law		**Cited at Paragraph(s)**
9.	*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342	1, 6, 7, 10, 12, 13, 15, 17, 18, 24, 25, 26, 27, 28, 29
10.	*Canadian Constitutional Federation v AGC*, 2021 ONSC 2117	21
11.	*Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67	26
12.	*Mission Institution v Khela*, 2014 SCC 24	18
13.	*Peckford v Canada (Attorney General)*, 2023 FCA 219	8, 12, 15, 18, 22
14.	*Spencer v Canada (Health)*, 2021 FC 621, affd 2023 FCA 8	21
15.	*Syndicat des métallos, section locale 2008 c Procureur général du Canada*, 2022 QCCS 2455	20
16.	*Wilson Olive and Friends of the Aquifer v Keys (Rural Municipality)*, 2020 SKCA 124	14