Federal Court Cour fédérale

Date: 20230719

Docket: T-1736-22

Citation: 2023 FC 985

Toronto, Ontario, July 19, 2023

PRESENT: Madam Justice Go

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

Appellants (Applicants)

and

ATTORNEY GENERAL OF CANADA

Responding Party (Respondent)

ORDER AND REASONS

I. Overview

[1] This is an appeal brought under Rule 51 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] of a judgment rendered by Associate Judge Horne [Motions Judge], dated March 16, 2023, striking the Applicants' Notice of Application for judicial review [Application]. The

Motions Judge found that the Application is moot and refused to exercise the Court's discretion to hear it [Decision].

[2] The Applicants, who are Appellants by appeal, are 11 Canadian citizens who entered Canada by air or land between April and July 2022 and refused to comply with COVID-19 related public health measures put in place through Orders in Council [OICs] made pursuant to section 58 of the *Quarantine Act*, SC 2005, c 20 [*Quarantine Act*]: see Appendix A. The OICs, which were ultimately repealed on September 30, 2022, contained measures that required (1) persons entering Canada to provide health and travel information through the ArriveCAN electronic application, and (2) unvaccinated persons to quarantine for 14 days upon entry. The Applicants, except for Alexander Macdonald, each received a fine for non-compliance with these measures. Seven of these fines remained outstanding as of the time the hearing of this appeal was heard.

[3] The Applicants brought their Application in August 2022 challenging the constitutionality and *vires* of the OICs, seeking the following relief:

A. A declaration pursuant to section 52 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act,* 1982, enacted as Schedule B to the *Canada Act 1982*, 1982 c 11 (UK) [*Charter*], that the OICs breached sections 2(a), 6, 7, 8, 9, 10(b) and 15 of the *Charter* in a way not justified under section 1;

B. A declaration that the border measures are *ultra vires* the scope of section 58 of the *Quarantine Act;*

C. Damages pursuant to subsection 24(1) of the *Charter* amounting to $1,000 per Applicant; and

D. An order pursuant to subsection 18(1) of the *Federal Courts Act*, RSC, 1985, c F-7 and subsection 24(1) of the *Charter* in the nature of *certiorari*, quashing the OICs.

[4] In response to the Application, the Respondent brought a motion in writing on November 28, 2022 pursuant to Rules 369 and 221 of the *Rules* for an order striking the Application for mootness [Motion].

[5] In the Motion, both parties relied on the well-established two-part test for mootness as enumerated by the Supreme Court of Canada [SCC] in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] at 353: (1) whether the dispute giving rise to the proceedings has disappeared; and (2) if so, whether the Court should nevertheless exercise its discretion to hear the case.

[6] In a separate matter, nine of the 11 Applicants also brought a parallel, simplified action before this Court in January 2023 against the Respondent for *Charter* damages [Action]. The basis of the Action is that the *Rules* do not allow for a remedy of *Charter* damages within an application. The Applicants indicate their intention is to have the Application and Action heard simultaneously.

[7] The Motions Judge found the Application moot and refused to exercise his discretion to hear the moot case. As such, he granted the Respondent's Motion with costs.

[8] For the reasons set out below, I dismiss the appeal with costs.

II. Issues and Standard of Review

[9] The substantive issues raised by the Applicants are addressed in the following order:

A. Did the Motions Judge err in determining that the Application is moot?

B. Did the Motions Judge err in exercising his discretion to not hear the Application?

[10] The parties agree that the appellate standards of review as set out in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] are applicable to appeals of discretionary orders by an Associate Judge: *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 28. For questions of law and mixed fact and law where a legal question is extricable, the standard is correctness: *Housen* at paras 8 and 27. For questions of fact and question of mixed fact and law without an extricable legal question, the standard is whether the decision-maker made an overriding and palpable error: *Housen* at paras 10 and 28.

[11] The parties however are in disagreement as to the characterization of the issues before this Court for the purposes of identifying the applicable standard of review. In their written submissions, the Applicants argue that the Motions Judge's findings on both steps of the *Borowski* test, namely whether the Application is moot and whether the Court should exercise its discretion to hear it, are exercised as matters of law, and therefore correctness applies.

[12] At the hearing before me, the Applicants appeared to have narrowed down to two issues that they submit attract the correctness standard:

1) The error made by the Motions Judge in his interpretation of the Federal Court of Appeal [FCA]'s decision in *Spencer v Canada (Attorney General)*, 2023 FCA 8 [*Spencer FCA*], and

2) The Motions Judge's inadequate reasons for the Decision.

[13] I find neither of these two alleged errors reviewable on the correctness standard. Instead, the only question in this case that is subject to a correctness review is whether the Motions Judge identified the correct legal test and the legal factors to determine if the Application is moot. How the Motions Judge applied the appropriate test to the facts before him is a question of mixed fact and law, to which the deferential standard of palpable and overriding error applies.

[14] The Applicants argue that because the "factual error" allegedly made by the Motions Judge does not arise from the facts of this case, but rather from how *Spencer FCA* should be read, the error should be considered a legal error. I reject this argument. Whether or not the Motions Judge made a factual error with respect to what was argued before the FCA in *Spencer FCA*, any alleged misinterpretation of what that case stands for in the context of the Motion is not one where a legal question is extricable. Instead, it is a question of mixed fact and law subject to a deferential review.

[15] With regard to the adequacy of reasons, as the Respondent rightly points out, it is no longer a standalone basis for quashing a decision. Rather, reasons must "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 304.

[16] In *Canada v Greenwood*, 2021 FCA 186, the FCA stated at para 101:

> … Reasons serve many purposes, including explaining the result and why the party who lost was unsuccessful, providing the basis for meaningful appellate review and satisfying the public that justice has been done…

[17] The FCA cited a number of decisions including *R v REM*, 2008 SCC 51 at para 35, which reviewed the jurisprudence on reasons and summarized it as follows:

> [35] In summary, the cases confirm:
>
> (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at p. 524).
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.
>
> This summary is not exhaustive, and courts of appeal might wish to refer themselves to para. 55 of *Sheppard* for a more comprehensive list of the key principles.

[18] In view of the above cited jurisprudence, I agree with the Respondent that the adequacy of reasons also does not attract a correctness standard of review.

[19] Further, I agree with the Respondent that the Motions Judge's exercise of discretion in balancing the *Borowski* factors to determine whether a moot matter should be heard involves questions of mixed fact and law, and as such the standard of palpable and overriding error applies: *Plato v Canada (National Revenue)*, 2015 FCA 217 at para 4; *Gupta v Canada (Attorney General)*, 2021 FCA 202 at para 3; *Décor Grates Incorporated v Imperial Manufacturing Group Inc*, 2015 FCA 100 at paras 18-29.

[20] The Respondent relies on Justice Stratas' comment in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 [*South Yukon Forest*] at para 46 on the "highly deferential" nature of the palpable and overriding error standard:

> …"Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[21] The Respondent further relies on the examples provided by Justice Stratas in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*] at para 62 of palpable errors:

> … Examples 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.

[22] I will adopt the above guidance from Justice Stratas in conducting my assessment of the aspects of the Decision that are to be reviewed on a deferential standard.

III. Analysis

A. *Did the Motions Judge err in determining that the Application is moot?*

[23] The Applicants argue that the Motions Judge erred in finding the Application moot, as there is a live controversy based on the fact that many of them face outstanding fines resulting from the violations of the OICs. Relying on *Borowski*, the Applicants note that indicators of whether a live controversy exists include whether the question is hypothetical or abstract, whether a decision will have a practical effect on the rights of the parties, and whether the issue has become academic: at 353.

[24] The Applicants submit that the issue is not abstract, as the OICs were made, implemented, and enforced, which has resulted in the significant fines facing them.

[25] The Applicants also submit that there is a tangible benefit in determining the disposition of these fines. The Applicants distinguish this case from *Lavergne-Poitras v Canada (Attorney General)*, 2022 FC 1391 [*Lavergne-Poitras*], where the Court found that there was no longer a tangible and concrete dispute between the parties as the impugned policy was suspended, and the applicant obtained the interim relief sought in the underlying application: at para 14.

[26] On the other hand, the Applicants analogize this case to *Thermolec Ltée v Stelpro Design Inc*, 2019 FCA 301 [*Thermolec*], where the FCA found that a live controversy remained because the decision would impact parallel proceedings before a provincial court, and concluded that the issue of the validity of a patent was not rendered moot by the patent's expiration: at para 2. In

this case, the Applicants contend that the resolution of the issues raised in the Application would have the effect of resolving issues arising in the ticketed Applicants' provincial matters and in the Action before this Court. Accordingly, the Applicants also argue that the matter is not merely academic.

[27] Further, the Applicants cite *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 [*Heiltsuk*], where the FCA held that a decision that can dispose of a collateral issue, partially or wholly, demonstrates the existence of a live controversy: at paras 74-76.

[28] In my view, the Motions Judge did not err in finding the Application moot on the basis that there is no live controversy between the parties.

[29] I note, first of all, that the Motions Judge identified the correct test and legal principles when deciding whether the Application was moot, citing the relevant passages in *Borowski*.

[30] One of the main issues of contention in this case is what constitutes "a live controversy" under the first step of the *Borowski* test. Does the fact that seven of the Applicants are still facing outstanding prosecution due to their refusal to comply with the OICs make this "a live controversy", as the Applicants submit? Or does the repeal of the OICs mean there is no longer a live controversy, as the Motions Judge concluded?

[31] As Justice Sopinka, as he then was, of the SCC explained in *Borowski* at 353:

> … 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. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.
>
> [Emphasis added]

[32] The SCC went on to cite several case examples to elaborate on when an appeal is moot, including, among other things, the inapplicability of a statute to the party challenging the legislation: at 355.

[33] One of the cases cited by the SCC was *Vic Restaurant Inc. v City of Montreal,* [1959] SCR 58 [*Vic Restaurant*], a case heavily relied on by the Applicants for their argument under both steps of the mootness test. In *Vic Restaurant*, the plaintiff company seeking mandamus for the renewal of a liquor licence had been sold, and the issue was therefore moot: *Borowski* at 355. However, due to outstanding prosecutions for violations of a municipal by-law, which was the subject of the legal challenge, determination of the validity of the by-law was a collateral consequence that provided the appellant with a necessary interest under the second step of the mootness test: *Borowski* at 359.

[34] Thus, contrary to the Applicants' assertion, the Motions Judge did not err by not following *Vic Restaurant* to find the Application moot, since that case was in fact moot, as

confirmed in *Borowski*. By analogy, while many of the Applicants in this case face outstanding prosecution for violating the OICs, this does not give rise to a live controversy between the parties given the repeal of the impugned measures. Rather, the outstanding prosecution would come into play at the second step of the analysis, a point that I will return to later in my decision.

[35] In this case, the Motions Judge relied on the repeal of the impugned OICs since September 30, 2022 to find that there is no longer a live controversy between the parties, commenting that "the substratum of these proceedings, their *raison d'être*, has disappeared." The Motions Judge's conclusion is supported by SCC jurisprudence: *Borowski* at 357.

[36] Further, I agree with the Respondent that the Decision is consistent with recent jurisprudence regarding the mootness of repealed public health measures, as addressed by the Motions Judge in the Decision: see para 75 below; see also *Work Safe Twerk Safe v Ontario (Solicitor General)*, 2021 ONSC 6736 [*Work Safe*]. In many of these cases, courts have pointed to the relief sought by applicants in the form of a declaration of invalidity to find an application moot, as there was nothing to declare invalid with the repeal of the challenged measures: see for example *Ben Naoum v Canada (Attorney General)*, 2022 FC 1463 [*Ben Naoum*] at para 32; *Lavergne-Poitras* at para 14; *Work Safe* at paras 1 and 6. I find the Motions Judge's Decision akin to this reasoning.

[37] I do not find that the cases cited by the Applicants assist them, as both *Thermolec* and *Heiltsuk* are distinguishable on the facts. In neither of these cases did the applicant seek

declaratory relief to invalidate legal measures that have been repealed, which, as the Ontario Superior Court stated, "is a classic example of mootness": *Work Safe* at para 5.

[38] I acknowledge that none of the existing cases that sought to challenge repealed COVID-19 measures involved outstanding fines as a factor playing into the first step of the mootness analysis. However, I note that a declaration in this Court would not be binding on the provincial prosecution of these fines (see para 77 below), and that *Vic Restaurant* suggests that the existence of an outstanding fine is more appropriately dealt with in the second stage of the mootness test. Accordingly, I do not find that the Applicants' outstanding fines give rise to a live controversy before this Court. As the Respondent points out, based on the declaratory relief sought by the Applicants, the fact that the impugned OICs are repealed necessarily means there is nothing to declare invalid.

[39] The Motions Judge also held that the Applicants' claim for *Charter* damages was not properly before the Court, as damages are unavailable in an application for judicial review: *Philipps v Canada (Librarian and Archivist)*, 2006 FC 1378 at para 71. The Motions Judge concluded that the Application is moot for this reason as well.

[40] The Applicants interpret the Motions Judge's finding as resulting from them having filed the separate Action. The Applicants acknowledge that this Court has found that "potential future litigation is insufficient to raise a live controversy": *Cheecham v Fort McMurray #468 First Nation*, 2020 FC 471 [*Cheecham*] at para 27. However, they assert that in this case, there is

actual litigation related to issues in the Application that, if decided, would resolve an area of live controversy – namely, whether the impugned measures violated their *Charter* rights.

[41] I reject the Applicants' submissions. To start, I do not share the Applicants' interpretation of the Motions Judge's finding.

[42] Next, while the possibility of consolidation of the Action and Application may be a relevant factor, the actual consolidation is still an 'intention' that has not been actualized yet: see for example *Lavergne-Poitras* at para 15. The Applicants' separate Action was not before the Motions Judge, whose sole role was to determine the mootness of the Application. I see no error in the Motions Judge's finding that damages cannot be awarded in this Application.

[43] I also reject the Applicants' argument that the invocation of *Charter* rights saves an application from being rendered moot. As the Respondent notes, this Court has found that seeking declaratory relief "does not automatically convert a moot application into a live controversy nor does it require the Court to exercise its discretionary authority to hear a moot application": *Rebel News Network Ltd v Canada (Leaders' Debates Commission)*, 2020 FC 1181 at para 49. That the Applicants have made a claim for *Charter* damages in a separate Action does not save the Application for declaratory relief from being moot.

[44] In sum, I find that the Motions Judge correctly identified the legal test in determining whether the Application was moot, and in applying the test to the case before him, he committed no reviewable errors.

B. *Did the Motions Judge err in exercising his discretion to not hear the moot Application?*

[45] Under the second stage of the mootness test, the Motions Judge declined to exercise his discretion to hear the Application after applying the three *Borowski* factors. First, the Motions Judge distinguished the case at bar from existing COVID-19 measure related cases where courts have exercised their discretion to hear an otherwise moot matter. The Motions Judge did not find that the impugned OICs here would have a reasonable prospect of being reinstated, as opposed to the case in *Canadian Society for the Advancement of Science in Public Policy v British Columbia*, 2022 BCSC 1606 [*CSASPP*] at paras 69-70. The Motions Judge also distinguished this case from *Harjee v Ontario*, 2022 ONSC 7033 [*Harjee*], where the respondent was ready to argue the moot case on its merits, and the court had the benefit of a complete evidentiary record: at paras 24-25.

[46] As such, the Motions Judge found that the circumstances in this case were not sufficiently different from the cases cited by the Respondent where courts have refused to exercise their discretion to hear a moot case challenging various COVID-19 related measures. The Motions Judge also relied on *Spencer FCA*, which the FCA ultimately dismissed as moot, finding that the issues in the case at bar are of "close similarity" to those considered in *Spencer FCA*.

[47] The Motions Judge agreed with the Respondent that the Applicants can "seek a determination on the constitutionality of the impugned provisions" in the prosecutions regarding the outstanding fines. With respect to the Action filed by nine of 11 Applicants, the Motions

Judge did not see a benefit in "permitting this Application to proceed if the same issue can be, or will be, be [*sic*] addressed in that action."

[48] As such, the Motions Judge did not find that the conceded presence of an adversarial context based on the existence of the outstanding fines warranted his exercise of discretion to allow the Court to hear the moot Application.

[49] The Applicants raise several arguments to challenge the Motions Judge's refusal to exercise his discretion. I will address each of these arguments in turn.

(1) Application of *Spencer FCA* & additional affidavit

[50] The Applicants raise a standalone issue related to the Motions Judge's understanding of *Spencer FCA.* Specifically, the Applicants take issue with the Motions Judge's comment pointing out that one of the applicants in that case, Mr. Colvin, was fined $3,000 in lieu of an airport quarantine.

[51] The Applicants submit that the Motions Judge committed an error of fact in his understanding of *Spencer FCA*, and by relying on that case for the premise that an outstanding ticket did not amount to an adversarial context. The Applicants submit an affidavit on appeal to show that Mr. Colvin abandoned their argument regarding the defence of their fine during oral submissions, since the outstanding tickets were resolved prior to the hearing. As such, the Applicants take issue with the Motions Judge's reliance on *Spencer FCA* as it did not actually consider the issue of outstanding prosecutions.

[52] The Respondent raises a preliminary issue that the additional affidavit evidence is inadmissible on this appeal, as the Applicants have not brought a motion under Rule 351 of the *Rules*, which allows for the admission of new evidence in special circumstances.

[53] At the hearing, I invited the Applicants to respond to the Respondent's objection. The Applicants submitted that there are special circumstances in this case as the Motions Judge took the extraordinary step of reviewing the appellants' written submissions in *Spencer FCA* to support his understanding of the case; namely, that the applicants had advanced an argument that the penal consequences of the impugned measures create a further adversarial relationship between the parties. The Motions Judge therefore ought to have reviewed the entire transcript of the hearing before the FCA prior to rendering the Decision, argued the Applicants.

[54] I am not convinced by the Applicants' arguments.

[55] First, the Motions Judge's understanding of the appellants' position in *Spencer FCA* was not based on the appellants' written submissions alone. Rather it was informed in part by this Court's prior decision in *Spencer v Canada (Health)*, 2021 FC 621 [*Spencer FC*]. Specifically, the Motions Judge noted *Spencer FC* at para 18, where Mr. Colvin's counsel argued before this Court that the determinations made on his application would be germane to the defence of his $3,000 fine.

[56] Second, even if there were special circumstances that warrant the admission of new evidence, the Applicants still ought to have brought a motion before this Court. The Applicants never provided any explanation as to why they chose not to.

[57] Third, I agree with the Respondent that the Applicants' arguments about the Motions Judge's reliance on *Spencer FCA* present a red herring and are irrelevant to this present appeal. I agree that the Motions Judge did not find that "outstanding charges do not create an adversarial context." Rather, as the Respondent notes, the question of ongoing litigation is related to collateral consequences and their impact on the presence of an adversarial context, which the parties, and the Motions Judge, acknowledged exists based on the ongoing prosecution of the fines. Indeed, throughout the Decision, the Motions Judge was alive to the issue of ongoing prosecutions and considered this as a factor in deciding whether or not to hear the moot Application.

[58] For all the reasons noted above, I decline to consider the new evidence submitted by the Applicants. I also find that the Motions Judge did not commit a palpable and overriding error by relying on *Spencer FCA* as part of his analysis of the Motion. The Motions Judge's error, if any, with respect to what *Spencer FCA* stands for is not an error that "goes to the very core of the outcome of the case": *South Yukon Forest* at para 46.

(2) Adversarial context

[59] The Applicants argue that the Motions Judge erred by finding no adversarial context or that the adversarial context did not warrant the Court's discretion to hear the case. In addition to

their above arguments contending that the Motions Judge erred in his understanding of *Spencer FCA*, the Applicants also submit that he failed to provide a basis for departing from *Vic Restaurant.*

[60] I find the Applicants' submissions lack merit. The Respondent conceded that there was an adversarial context, and the Motions Judge so noted in the Decision when he stated what he presumed to be true: that the Applicants, with the exception of Alexander Macdonald, received a fine for non-compliance with border measures. The Motions Judge also considered the Applicants' argument that the findings in this Application, if permitted to proceed, would impact the prosecution of those outstanding charges. However, he concluded that the Applicants are free to seek a determination on the constitutionality of the impugned provisions in those prosecutions if they so choose.

[61] Thus, far from finding that there is no adversarial context, the Motions Judge acknowledged that such a context exists but ultimately decided that it was insufficient to warrant his exercise of discretion to hear the case.

[62] The exercise of judicial discretion is highly contextual. I see no merit in the Applicants' submission that the Motions Judge must abide by *Vic Restaurant*, a case that was decided on a different set of facts, and under different circumstances. I note, for instance, in *Vic Restaurant*, while the restaurant itself had been sold and the issue of the permit was therefore moot, the by-law that gave rise to the prosecutions was still in force, which is just one factor that distinguishes *Vic Restaurant* from the case at bar: at 90-91.

[63] The Applicants, in my view, are inviting this Court to conduct a *de novo* assessment of the Motion by essentially rearguing the case before me, without demonstrating any palpable and overriding error on the part of the Motions Judge.

[64] Given the discretionary nature of the Decision, heeding Justice Stratas' advice in *Mahjoub*, I see no basis to interfere with the Motions Judge's analysis concerning the adversarial context. There is no obvious illogic in the reasons, findings based on improper inferences or logical errors, or any failure to make findings due to a complete or near-complete disregard of evidence.

(3) Judicial economy

[65] The Applicants argue that the Motions Judge erred in finding that judicial economy did not warrant the hearing of the Application on its merits, and maintains that there are "special circumstances of the case [that] make it worthwhile to apply scarce judicial resources to resolve it": *Borowski* at 360. The Applicants note that such circumstances may arise where:

> A. A decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action; or
>
> B. The issue at the heart of the case is of a recurring nature, but brief in duration.
>
> *Borowski* at 360.

[66] The Applicants argue that the Motions Judge erred by finding that having "duplicative proceedings addressing the same issues would be a waste of judicial resources." The Applicants take issue with the brevity of the Motions Judge's reasons for this *Borowski* factor limited to two

paragraphs, which they submit fail to explain to the parties and the reviewing Court the basis for his findings: *R v Sheppard*, 2002 SCC 26 [*Sheppard*] at paras 55 and 57-67. Specifically, the Applicants assert that the Decision failed to address their arguments relating to the OICs' evasiveness of review and the practical impact a decision on its merits will have. For example, the Applicants contend that the Motions Judge's finding that the Applicants are "free to seek a determination on the constitutionality of the impugned provisions" in the outstanding prosecutions of the fines creates a far greater burden on judicial resources.

[67] I reject the Applicants' arguments, both with respect to the practical utility of hearing the Application and the evasive nature of the emergency-based OICs in question.

[68] To start, I note that in advancing these arguments, the Applicants have not raised any palpable and overriding errors in the Motions Judge's assessment of this second *Borowski* factor. Rather, the Applicants' submissions amount to a disagreement with the Motions Judge's exercise of his discretion.

[69] It is not necessary for me to address all the cases cited by the Applicants where courts decided to grant declaratory relief regarding a past breach of a *Charter* or other right. Some of these cases, such as *Trang v Alberta (Edmonton Remand Centre)*, 2005 ABCA 66, is not on point as it was decided under the first step of the mootness test: see paras 4-5. Others, like *Harjee*, is distinguishable as the parties in that case were prepared to argue the matter on its merits, and a complete evidentiary record was present: see paras 24-25.

[70] Nor do I accept the Applicants' assertion that this Application has precedential value on public interest grounds on the basis that it would determine limits on mandatory disclosure of private medical information, which the SCC found Canadians have the right to keep private: *R v Cole*, 2012 SCC 53 at paras 46-47. As the Respondent submits, and I agree, the Application involved applying settled *Charter* jurisprudence to a specific set of facts arising in an exceptional context, namely a specific point of the COVID-19 pandemic: see *Ben Naoum* at para 42.

[71] The Applicants further argue that public health measures by nature are evasive of review, and that as a result, "unless the court grapples with a test case, even though it may be moot, the constitutionality of the [measures] may never be examined": *McCorkell v Director of Riverview Hospital*, 1993 CanLII 1200 (BCSC) at para 29. Here, the Applicants submit that the novel and unprecedented issues raised by the COVID-19 public health measures has resulted in the fact that the impact of the impugned OICs on constitutionally protected privacy rights has not been considered properly.

[72] Based on the relatively short duration of OICs, the Applicants submit that the Decision will insulate the Respondent's exercise of authority from any meaningful judicial review, similar to the evasiveness described in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 20.

[73] I am not persuaded. Indeed, some of the cases cited by the Applicants in support of their appeal were cases in which the Court heard and ruled on the constitutionality of similar OICs

when they were in full force, thus undermining the Applicants' argument regarding the evasiveness of review of the OICs: see *Spencer FC*.

[74] In any event, once again, these arguments amount to a disagreement with the Decision, and do not raise any palpable and overriding errors.

[75] I note also, in all but two of the COVID-19 related cases cited by the Motions Judge where the proceedings were found to be moot, the court decided not to exercise its discretion to hear the matter, based in part on concerns of judicial economy: *Kakuev v Canada*, 2022 FC 1465 at paras 25-33; *Ben Naoum* at paras 35-47; *Lavergne-Poitras* at paras 33 and 41; *Bowen v City of Hamilton*, 2022 ONSC 5977 at paras 23-32; *Gianoulias v Attorney General of Quebec*, 2022 QCCS 3509 at paras 24-35; *Wojdan v Canada (Attorney General)*, 2022 FCA 120 at para 4; and *Spencer FCA*.

[76] As mentioned above, and as addressed in the Decision, the two COVID-19 measure related cases where the court did exercise its discretion to hear a moot challenge involved a finding that the impugned measures could be reinstated in both cases, and the lack of objection from the respective respondent in *Harjee*: see *CSASPP* at para 69 and *Harjee* at paras 24-25. This was not the case here. The Decision is thus in line with jurisprudence dealing with emergency orders made during the global pandemic.

[77] I acknowledge the Applicants' argument that their outstanding prosecutions will be heard in different provinces and over multiple proceedings, which could involve substantial judicial

resources. I also appreciate their desire to seek consistent outcomes by bringing the Application to this Court. But as the Applicants conceded at the hearing, the decision of this Court is not binding on the provincial courts that will ultimately determine the outcomes of the fines. This also calls into question the Applicants' argument about the "practical effect" of this Application on their rights in view of the multiple prosecutions in multiple provinces.

[78] In any event, the Applicants have failed to demonstrate any error on the part of the Motions Judge when he found that the presence of the outstanding prosecutions was insufficient to warrant an exercise of discretion based on the *Borowski* factors, and that the Applicants could seek a determination on the constitutionality of the impugned provisions in these prosecutions.

(4) Court's role

[79] The final *Borowski* factor requires the Court to consider its role, and to limit itself to its proper adjudicative function.

[80] The Applicants argue that the Motions Judge failed to provide sufficient reasons under this consideration of the *Borowski* factors. Relying on *Canuck v Yangarra*, 2022 ABQB 145 [*Canuck*], the Applicants submit that an absence of reasons can amount to an "error in principle because, without reasons, an appellate court is unable to determine what principles" were applied by the judge: at para 53. In determining if such an error was made, the Applicants submit that the threshold is whether the absence of reasons "fails to overcome a legitimate concern" that the judge failed to make an "adequate analysis" of the case: *Canuck* at para 54, citing *Nova v Guelph*, 1989 ABCA 253.

[81] The Applicants note that *Borowski* establishes that all three factors under the second step of the mootness test must be considered, even though not all factors must be met for a court to exercise its discretion to hear a moot case: at 363. As such, the Applicants argue that the Motions Judge's failure to grapple with this final factor regarding the Court's role leaves the parties without an explanation for the basis of striking the matter. The Applicants contend that this omission requires this Court to consider the issue afresh on appeal. Namely, the Applicants argue in substance that:

> (1) there is an adequate factual basis for the court to adjudicate the Application,
>
> (2) a hearing on its merits would not take the Court beyond its adjudicative role, and
>
> (3) this Court is the only one that can grant declaratory relief that the Applicants' *Charter* rights were violated by the OICs made pursuant to delegated authority in the *Quarantine Act* and that the OICs were made *ultra vires* to the scope of section 58 of the *Quarantine Act.*

[82] As such, the Applicants argue that the Application is within the proper adjudicative role of this Court.

[83] As I have already noted above, the issue of adequacy of reasons is not subject to a standard of correctness: *Vavilov* at para 304. Further, giving no reasons is not an error in law *per se*: *Canuck* at para 54.

[84] While I acknowledge the Motions Judge's reasons regarding the Court's proper adjudicative role were limited, I disagree with the Applicants that the Motions Judge has thus committed a reviewable error.

[85] As the SCC stated in *Borowski* at 363, the passage relied on by the Applicants:

> 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 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.

[86] The Motions Judge began his analysis with an acknowledgement in the Decision that a "court would be exceeding its proper role by making law in the abstract, a task reserved for Parliament." While the Motions Judge's reiteration of this principle was in the section where he set out the test for mootness, it nonetheless signals his awareness of the third factor of the *Borowski* test.

[87] That the Motions Judge may not have engaged fully with all three factors of the *Borowski* test, on its own, does not result in any reviewable error. Indeed, as reflected in the above quoted passage in *Borowski*, the SCC anticipated that not all three factors will be present in every case, and that the presence of one or two of the factors may be determinative.

[88] In the context of this case, taking into account the other considerations by the Motions Judge under the second step of the mootness test, the Applicants have not demonstrated that he committed any reviewable error when he decided not to hear the Application.

[89] Finally, the Applicants have not demonstrated that declaratory relief from this Court would have any practical utility on the outstanding prosecutions in light of the non-binding, albeit persuasive, effect of the Court's ruling.

[90] In conclusion, I find that the Motions Judge did not err in law, as he identified the correct legal test to be applied. Nor did the Motions Judge commit any palpable and overriding error when applying the relevant test in deciding not to exercise his discretion to hear the Application.

IV. Costs

[91] The parties will provide submissions on costs within 30 days of this judgment.

ORDER in T-1736-22

THIS COURT ORDERS that:

1. The appeal is dismissed.

2. The parties to provide submissions on costs within 30 days of this judgment.

"Avvy Yao-Yao Go"
Judge

APPENDIX A

***Quarantine Act*, SC 2005, c 20**
***Loi sur la mise en quarantaine*, LC 2005, ch 20**

Emergency Orders **Order prohibiting entry into Canada**	**Urgences** **Interdiction d'entrer**
58 (1) The Governor in Council may make an order prohibiting or subjecting to any condition the entry into Canada of any class of persons who have been in a foreign country or a specified part of a foreign country if the Governor in Council is of the opinion that	**58 (1)** Le gouverneur en conseil peut, par décret, interdire ou assujettir à des conditions l'entrée au Canada de toute catégorie de personnes qui ont séjourné dans un pays étranger ou dans une région donnée d'un pays étranger s'il est d'avis :
(a) there is an outbreak of a communicable disease in the foreign country; **(b)** the introduction or spread of the disease would pose an imminent and severe risk to public health in Canada; **(c)** the entry of members of that class of persons into Canada may introduce or contribute to the spread of the communicable disease in Canada; and **(d)** no reasonable alternatives to prevent the introduction or spread of the disease are available.	**a)** que le pays du séjour est aux prises avec l'apparition d'une maladie transmissible; **b)** que l'introduction ou la propagation de cette maladie présenterait un danger grave et imminent pour la santé publique au Canada; **c)** que l'entrée au Canada de ces personnes favoriserait l'introduction ou la propagation de la maladie au Canada; **d)** qu'il n'existe aucune autre solution raisonnable permettant de prévenir l'introduction ou la propagation de la maladie au Canada.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1736-22
STYLE OF CAUSE:	AMANDA YATES, PATRIC LAROCHE, JENNIFER HARRISON, VICTOR ANDRONACHE, SCOTT BENNETT, BEVERLEY MASON-WOOD, DAWN, BALL, MATTHEW LECCESE, DARLENE THOMPSON, ALEXANDER MACDONALD, AND MARCEL JANZEN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	JUNE 13, 2023
ORDER AND REASONS:	GO J.
DATED:	JULY 19, 2023

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