IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Taylor v. Newfoundland and Labrador*, 2023 NLCA 22
Date: August 14, 2023
Docket Number: 202001H0067 & 202001H0073

BETWEEN:

KIMBERLEY TAYLOR	FIRST APPELLANT/ RESPONDENT BY CROSS APPEAL

AND:

CANADIAN CIVIL LIBERTIES ASSOCIATION	SECOND APPELLANT/ RESPONDENT BY CROSS APPEAL

AND:

HIS MAJESTY THE KING IN RIGHT OF NEWFOUNDLAND AND LABRADOR	FIRST RESPONDENT/ APPELLANT BY CROSS APPEAL

AND:

JANICE FITZGERALD, CHIEF MEDICAL OFFICER OF HEALTH	SECOND RESPONDENT/ APPELLANT BY CROSS APPEAL

Filed Aug. 14/23 CA

Coram: D.E. Fry C.J.N.L, F.P. O'Brien and D.M. Boone JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 202001G2342 (2020 NLSC 125)

Appeal Heard: June 13, 2023
Judgment Rendered: August 14, 2023

Reasons for Judgment: By the Court

Counsel for the First Appellant: John F.E. Drover
Counsel for the Second Appellant: Shantona Chaudhury and Paul J. Pape
Counsel for the First and Second Respondents: Justin S.C. Mellor and Mark P. Sheppard

Authorities Cited:

CASES CITED: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Newfoundland and Labrador (Information and Privacy Commissioner) v. Beverage Industry Association of Newfoundland and Labrador*, 2023 NLCA 2; *Z.B. v. Provincial Director of Adults in Need of Protective Intervention*, 2020 NLCA 17, 5 C.A.N.L.R. 450; *M.S. v. Newfoundland and Labrador (Child and Youth Services)*, 2020 NLCA 43, 6 C.A.N.L.R. 191; *Powers v. Mitchell*, 2019 NLCA 16, 4 C.A.N.L.R. 231; *Rees v. Fong*, 2018 NLCA 60, 3 C.A.N.L.R. 437; *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591; *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887; *Spencer v. Canada (Attorney General)*, 2023 FCA 8.

STATUTES CONSIDERED: *Public Health Protection and Promotion Act*, SNL 2018, c. P-37.3, sections 28(1)(h), 13; *Canadian Charter of Rights and Freedoms*, sections 6, 7, 1.

BY THE COURT:

[1] The parties to this appeal agree there is no longer a live controversy for this Court to determine and therefore that the appeal is moot. However, this Court has discretion to hear a moot appeal. The parties all asked the Court to do so.

[2] The Court has concluded that this is not an appropriate case for the Court to exercise its discretion to hear this moot appeal.

BACKGROUND

[3] The provincial government declared a public health emergency in the early days following the onset of the global COVID-19 pandemic. The government then took steps regulating travel into the province by non-residents. These steps were implemented by several Special Measures Orders issued by the Chief Medical Officer of Health (the "Medical Officer") pursuant to her authority under section 28(1)(h) of the *Public Health Protection and Promotion Act*, SNL 2018, c. P-37.3 (the "*Public Health Act*").

[4] The province first imposed restrictions on travel into the province by Special Measures Order, Amendment No. 11, which came into effect on May 4, 2020 ("Order 11"). On May 5, exceptions, and a process for people not within the excepted categories to apply for exemptions came into effect.

[5] The travel restriction impacted Kimberley Taylor's ability to enter the province for a brief period. On May 5, Ms. Taylor's mother, a resident of Newfoundland and Labrador, passed away. On May 6, Ms. Taylor requested a travel exemption so that she could attend her mother's funeral. The Medical Officer denied this application on May 8. On May 14, Ms. Taylor applied for reconsideration. The Medical Officer granted her an exemption on May 16 and Ms. Taylor travelled to Newfoundland and Labrador.

[6] Ms. Taylor initiated a challenge to the legal validity of the restrictions. On May 20, she applied to the Supreme Court for a declaration that section 28(1)(h) of the *Public Health Act* and Order 11 were unconstitutional. She argued that the *Public Health Act* exceeded the constitutional legislative authority of the province. She further argued that the travel restrictions in Order 11 violated her right to mobility under section 6, and her right to liberty guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*, in a manner that could not be justified under section 1 of the *Charter*.

[7] The applications judge granted the Canadian Civil Liberties Association (the "CCLA") public interest standing to support Ms. Taylor's application.

[8] The applications judge decided that:

- Section 28(1)(h) of the *Public Health Act* was within the legislative competence of the province as a valid public health measure falling under the provincial powers over matters of a local or private nature in the province, or alternatively, property and civil rights;

- Section 6(1) of the *Charter* guarantees Ms. Taylor and other Canadian citizens the right to travel anywhere in Canada;

- Section 6(2) of the *Charter* only guarantees to a non-resident of a province the right to travel to that province to earn a livelihood or take up residence, and not to travel for the purpose intended by Ms. Taylor;

- Order 11 did not violate Ms. Taylor's right to liberty guaranteed by section 7 of the *Charter;*

- Order 11 violated Ms. Taylor's right to travel anywhere in Canada guaranteed by section 6(1) of the *Charter*; and

- The province had demonstrated under section 1 of the *Charter* that the circumstances of the pandemic justified that infringement of s. 6(1) of the *Charter*.

[9] Therefore, the applications judge dismissed Ms. Taylor's application.

[10] Ms. Taylor and the CCLA appealed from the decision, and the province cross-appealed. Ms. Taylor intends to argue on appeal that the applications judge erred in finding that the violation of her section 6 rights by Order 11 was justified under section 1 of the *Charter*. The CCLA intends to argue that the applications judge was wrong to find that section 6(1) guaranteed Ms. Taylor's right to travel anywhere in Canada and wrong to find that section 6(2) did not do so. The province cross-appealed and intends to argue that the applications judge erred in finding that section 6(1) guarantees an interprovincial mobility right.

[11] The only issues on appeal would be whether Order 11 violated Ms. Taylor's rights under either sections 6(1) or (2) of the *Charter*, and, if so, whether the applications judge erred in finding that any infringement of Ms. Taylor's rights was justified under section 1. The constitutional validity of section 28(1)(h), or any other section of the *Public Health Act*, is not in issue.

[12] Order 11 is no longer in effect. The Medical Officer had gradually eased pandemic-related restrictions from 2020 to 2022 and vacated all mandatory travel restrictions in February 2022. In March 2022, the province declared the public health emergency caused by the COVID-19 pandemic no longer in effect.

[13] All parties agree that the end of the travel restrictions and the public health emergency have rendered the appeal and cross-appeal moot. There is no Special Measures Order, including Order 11, and therefore no government action to examine for constitutional validity.

[14] All parties argue that this Court ought nevertheless to hear and decide this matter on the merits. They urge the Court to decide whether section 6 of the *Charter* protects a right of interprovincial travel because doing so would assist government and the public in planning for a future pandemic. They say that this Court ought to decide this case because appellate courts will not often get the opportunity to review government responses to public health emergencies before fast-moving circumstances, and the forms of government response to them, change.

ISSUE

[15] This Court has the discretion to hear and decide a moot appeal. The only issue in this matter is whether the Court ought to exercise its discretion to hear and decide the merits of this appeal.

ANALYSIS

[16] The Supreme Court of Canada established the considerations that the Court must consider when determining whether to hear a moot appeal in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pages 358-363. These principles have been applied by this Court on numerous occasions, including in *Newfoundland and Labrador (Information and Privacy Commissioner) v. Beverage Industry Association of Newfoundland and Labrador*, 2023 NLCA 2; *Z.B. v. Provincial Director of Adults in Need of Protective Intervention*, 2020 NLCA 17, 5 C.A.N.L.R. 450; *M.S. v. Newfoundland and Labrador (Child and Youth Services)*, 2020 NLCA 43, 6 C.A.N.L.R. 191; *Powers v. Mitchell*, 2019 NLCA 16, 4 C.A.N.L.R. 231; and *Rees v. Fong*, 2018 NLCA 60, 3 C.A.N.L.R. 437.

[17] The *Borowski* principles are based on the basic rationale for the doctrine of mootness and require consideration of the following:

- the presence of an adversarial context;
- judicial economy; and
- sensitivity to the role of the Court as the adjudicative branch in the Canadian political and constitutional framework.

[18] The exercise of discretion requires consideration of each of the rationale in a process that recognizes that neither is necessarily more important than the others and the outcome will depend on the particular facts and context of each case (*Borowski*, at 363):

> 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.

The presence of an adversarial context

[19] The parties argue that the necessary adversarial context exists because, in their written arguments, they vigorously argued their respective positions, and counsel are prepared to continue to do so on the hearing of the merits. In some cases, such conditions have resulted in appellate courts finding a sufficiently adversarial context.

[20] However, an adversarial context requires more than parties willing to present opposing positions. This factor was described in this way in *Borowski* at pages 358-359:

> The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct

> interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context…

[21] The lack of an adversarial context was an important factor in this Court refusing to entertain a moot appeal in *Powers*. The Court found that the adversarial relationship among the parties had disappeared with the amendment of the impugned legislative provisions:

> 11 Ms. Mitchell, who began the litigation with her application challenging the provisions in the *Act* regarding voting by special ballot, submitted that the Court should decline to hear this appeal because the adversarial context has disappeared with the passage of time and amendments to the *Act*.
>
> 12 The Attorney General took the position that, although the legislation had been amended, this Court's review of the previous legislation may assist government in the future when considering or proposing further amendments. In my view, this is not a persuasive reason for proceeding with the moot appeal. If an opinion on the constitutional validity of current or future legislation is desirable, it is open to the Lieutenant-Governor in Council to put a reference to this Court pursuant to section 24 of the *Court of Appeal Act*, SNL 2017, c. C-37.002. A reference would allow the Lieutenant-Governor in Council to request the opinion of the Court on current or draft legislation or on specific questions put in the reference.
>
> 13 Finally, it is difficult to see how the Election Officials would have an interest in the constitutional validity of the previous legislative provisions since it would be their responsibility simply to apply the legislation in place at the time of an election.
>
> 14 It follows that, in these circumstances, the adversarial context rationale would not support proceeding to hear this moot appeal

[22] The right to interprovincial mobility for the purpose of pursuing a livelihood is protected by the *Charte*r (see *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591). The question before the applications judge in the instant case was whether section 6 or section 7 of the *Charter* protects a right to travel *simpliciter* - to travel from one province to another for any other purpose, or indeed, no purpose other than travel itself.

[23] However, the parties to this appeal do not agree on the questions that they want this Court to decide. The province and the CCLA disagree on whether section 6(2) protects a right to interprovincial travel, but both take the position that the applications judge erred when he found that section 6(1) guarantees such a right. Ms. Taylor did not submit any argument on that issue. Therefore, no party

is arguing that this Court ought to uphold the decision of the applications judge that section 6(1) protects a right to interprovincial travel *simpliciter*.

[24] More importantly, the real world questions in this case are whether there is a right to interprovincial travel *simpliciter* at all, and if so, where this right is found.

[25] There are other arguable sources for a right to interprovincial travel *simpliciter* than section 6(1) of the *Charter*. The CCLA presented alternative arguments to the applications judge that either section 6(2) or section 7 of the *Charter* guarantees this right. Before the *Charter* was enacted, the Supreme Court suggested that the right to travel anywhere in the country was an incidence of citizenship: *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887. In *Black*, at page 612, the Supreme Court said that this incidence of citizenship may now be subsumed under the protections of section 6 of the *Charter*, but only insofar as to protect the "right to reside wherever one wishes in the country and to pursue the gaining of a livelihood without regard for provincial boundaries". The other possible sources for protection of a right to interprovincial travel *simpliciter* demonstrate that answering the questions that the parties to this appeal wish to argue will not necessarily resolve the real question as to whether there is such a right.

Judicial Economy

[26] In determining whether a court should hear a moot appeal, the factor of judicial economy recognizes that the resources available in the Court system are limited. Priority should be given to resolving disputes that will have a real immediate impact on the parties or society.

[27] The Supreme Court in *Borowski*, at pages 361-362, gave examples of categories of cases where the use of scarce judicial resources to decide a moot appeal might be justified. These include circumstances where:

- special circumstances warrant resolution of the dispute;
- a decision, while not resolving the parties' dispute, will nevertheless have some practical effect on their rights;

- an important issue of a recurring nature, but brief duration, may evade judicial review because the issue will virtually always disappear before it is ultimately resolved; and

- the issue is of public importance and its resolution is in the public interest.

[28] The parties say that using judicial resources to decide the issues in this case is justified for three reasons. First, the ability of governments to control movement through the country is an important public issue. Second, that issue will recur during future pandemics. Third, government response to pandemics is evasive of judicial review because the circumstances of such emergencies change too rapidly to be meaningfully reviewed by appellate courts.

[29] The record in this case does not support the parties' position. The COVID-19 pandemic lasted for approximately two years. Various forms of travel restrictions and exemptions remained in place during a considerable part of that time, from the spring of 2020 to the winter of 2022.

[30] More importantly, a significant issue in the proposed appeal would be the application of section 1 of the *Charter* to the question of whether the travel restrictions were a justified infringement on Ms. Taylor's rights. Although the parties are perhaps correct in suggesting that the scientific evidence in the record suggests that another pandemic will happen in the future, there is no certainty that the section 1 analysis engaged in by this Court in the present context will be of real assistance in assessing the propriety of measures in a future pandemic.

[31] The province urges this Court to decide the narrow questions on this appeal because it is crucial for the government to know whether there is a constitutional right to interprovincial travel that it should consider in fashioning future pandemic responses. But answering the narrow questions presented by this appeal will not necessarily provide this guidance. The next pandemic will not necessarily take the same form as COVID-19 in its consequences or communicability, or in the science of detection and treatment that the government can employ in response. It will be the specific government response to the particulars of any future pandemic that would be the subject of any future challenge. As indicated, what the Court is being asked to do in the present appeal is opine on the reasonableness of a past government response, which no longer exists. It is difficult to see how this would assist government in fostering a response to a future pandemic.

[32] This Court could not provide helpful guidance on what, if any, degree of travel restriction might be acceptable in a future public health emergency without a meaningful factual context.

[33] Further, in the proposed appeal, the parties have not challenged the constitutional validity of the legislation on which government response to public health emergencies is based, but only the specific and time-limited action set out in Order 11, which no longer exists.

[34] The circumstances here contrast, for example, with the circumstances in *Z.B.* in which this Court agreed to hear a moot appeal. The difference in that case was that the factual context involved a type of situation known to recur in repetitively similar factual contexts. Therefore, the guidance of this Court would be of assistance in future situations.

[35] Quite apart from the above considerations, the Court also notes that the *Public Health Act* already contains an internal restriction on government action that would have to be considered in assessing a response to a future pandemic:

> 13. Where an individual's rights or freedoms are restricted as a result of the exercise of a power or the performance of a duty under this Act, the regulations or an order made under this Act or the regulations, the restriction shall be no greater than is reasonably required in the circumstances to respond to a communicable disease, health hazard, public health emergency or contravention of this Act, the regulations or an order made under this Act or the regulations.

Sensitivity to the adjudicative role of the Courts

[36] The parties say that this factor weighs in favour of this Court deciding the matter on the merits because it is the role of the courts to review the validity of legislation against *Charter* rights and values.

[37] However, the strength of that consideration is muted when there is no extant legislation or government action under consideration. The Supreme Court noted in *Borowski*, at page 365, that a case that raises an abstract question regarding the impact of the *Charter* in the absence of government action is really a request for a constitutional opinion that "would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact".

[38] Exercising discretion to hear a moot appeal when the legislation or government action giving rise to the litigation no longer exists would be outside the traditional role of the court (see, from this Court, *Powers,* and, from the Federal Court of Appeal dismissing as moot an appeal regarding the constitutionality of discontinued federal pandemic travel restrictions, *Spencer v. Canada (Attorney General)*, 2023 FCA 8). To do so at the instance of parties such as the appellants would "turn this appeal into a private reference" (*Borowski*, at 365).

[39] Moreover, courts need to be especially mindful when asked to opine on the constitutionality of government action that has been discontinued. Doing so would involve the Court telling governments what they can or cannot do in the future, rather than opining on the validity of existing government action. The other *Borowski* factors do not justify this Court taking such a step in this case.

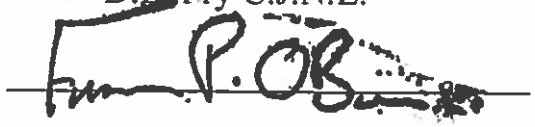
CONCLUSION AND DISPOSITION

[40] Having considered the *Borowski* factors, we conclude that the Court should not exercise its discretion to hear this moot appeal.

[41] The appeal and cross-appeal are dismissed.

[42] In the circumstances, there shall be no order as to costs.

D.E. Fry C.J.N.L.



F.P. O'Brien J.A.

D.M. Boone J.A.