Federal Court of Appeal Cour d'appel fédérale

Date: 20221215

Docket: A-325-21

Citation: 2022 FCA 220

CORAM: **STRATAS J.A.**
RIVOALEN J.A.
MONAGHAN J.A.

BETWEEN:

RIGHT TO LIFE ASSOCIATION OF TORONTO AND AREA, BLAISE ALLEYNE and MATTHEW BATTISTA

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 15, 2022.

REASONS FOR ORDER BY: MONAGHAN J.A.

CONCURRED IN BY: STRATAS J.A.
RIVOALEN J.A.

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REASONS FOR ORDER

MONAGHAN J.A.

[1] The appellants have appealed a decision of the Federal Court (2021 FC 1125 *per* Kane J.) dismissing an application for judicial review of a decision of the Minister of Employment, Workforce, and Labour (the Minister). The respondent has brought a motion to strike the appeal on the ground that it is moot. The appellants oppose the motion.

[2] The Minister's impugned decision (the Decision) was "to add to the application for funding under the [2018] Canada Summer Jobs ("CSJ") program … the requirement that the applicants attest" that "the job [for which funding was sought] and the organization's core mandate respect individual human rights in Canada, including the values underlying the Canadian Charter of Rights and Freedoms as well as other rights." The attestation made specific reference to reproductive rights and the Applicant Guide for the 2018 CSJ program explained that human rights include reproductive rights and the right to access safe and legal abortions.

[3] In its application for funding under the 2018 CSJ program, the appellant, Right to Life Association of Toronto and Area (TRTL), did not make the attestation. Rather, it enclosed a letter objecting to it, asserting the Minister did not have the jurisdiction to compel TRTL to make a statement that conflicts with its conscience rights or to compel speech. It offered an alternative attestation. The Minister declined to consider TRTL's application because it was incomplete: TRTL had not made the required attestation. As a result, TRTL did not receive any funding in 2018. The appellant, Blaise Alleyne, is a former president of TRTL and the appellant, Matthew Battista, is a student who hoped to be employed by TRTL in the summer of 2018.

[4] The appellants sought judicial review of the Decision, a declaration that the Decision infringed provisions in the *Canadian Charter of Rights and Freedoms* [Charter], a declaration the Decision was *ultra vires*, made in bad faith and for an improper purpose, and an order in the nature of *mandamus* that the TRTL be awarded the 2018 CSJ program funds that it would have been awarded had its application been considered without regard to the attestation. The

appellants did not seek judicial review of the decision not to review TRTL's application and thereby deny it funding.

[5] The Federal Court decided that the Decision was reasonable, was not *ultra vires* the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, [DESDA] under which it was established, and was not made in bad faith or for an improper purpose. It also concluded that TRTL's section 15 Charter rights were not engaged and, while its section 2(a) and section 2(b) Charter freedoms were engaged, the limitation on those freedoms was justified under section 1, most particularly because it was minimal: "a one-time impact on potential—not certain—funding in 2018". In the Federal Court's view, the limitation reflected a proportionate balancing of those freedoms and the objectives of the DESDA and the 2018 CSJ program. The Federal Court also decided that while Mr. Alleyne, as the face of TRTL and the person required to sign the application on its behalf, had standing, Mr. Battista did not.

[6] In their appeal, the appellants assert that the Federal Court erred in concluding that their section 15 Charter rights were not violated, that the infringements under section 2 were proportionately balanced, and that the Minister did not make the Decision with a closed mind. They also assert that the Federal Court erred in concluding Mr. Battista had no standing. The steps required to set the appeal down for hearing are complete.

[7] The respondent now moves to strike the appeal because it is moot. The respondent says there is no longer a live controversy between the parties. In particular, says the respondent, the impugned attestation was removed from the 2019 application, a fact that the appellants do not

dispute and that was noted in *Redeemer University College v. Canada (Employment, Workforce Development and Labour)*, 2021 FC 686, 334 A.C.W.S. (3d) 679 at para. 8 [*Redeemer University*]. Moreover, says the respondent, the 2018 CSJ program is concluded and available funding has been disbursed.

[8] The appellants submit that the Court should not entertain the respondent's motion because the respondent could have raised mootness earlier and should not be permitted to raise this "new issue" for the first time on appeal. I disagree. While the desirability of addressing mootness at an early stage is obvious, mootness may be raised at any time. It may be raised by the Court if the parties do not raise it: *Canadian Union of Public Employees (Air Canada Component) v. Air Canada*, 2021 FCA 67, [2021] F.C.J. No 286 (Q.L.) [*CUPE*]; *Hakizimana v. Canada (Public Safety and Emergency Preparedness)*, 2022 FCA 33, 87 Imm. L.R. (4th) 175 [*Hakizimana*].

[9] Thus, the first question to answer is whether the appeal is moot. If it is, then this Court must decide whether it will nevertheless exercise its discretion to hear the appeal, having regard to the factors from *Borowski v. Canada*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 [*Borowski*].

I. Is the appeal moot?

[10] Here, the subject of the judicial review was the Decision to add the attestation to the application under the 2018 CSJ program. It was not a judicial review of the decision not to

consider TRTL's application for funding under that program in the absence of the attestation, or of the refusal to consider or accept TRTL's alternative attestation.

[11] The 2018 CSJ program has ended and the attestation was removed from the application form for the 2019 CSJ program year. Thus, a review of the reasonableness of the Decision to add the attestation to the 2018 application will not serve a useful purpose; the Decision has been overtaken by subsequent events.

[12] The appellants say the appeal is not moot because they seek a declaration of a Charter breach and that constitutes a live controversy, citing *Trang v. Alberta (Edmonton Remand Centre)*, 2005 ABCA 66, 363 A.R. 167 at para. 5 [*Trang 2005*]. TRTL concedes that "in the case at bar … the core remedy sought is a declaration that the Respondent breached the Appellants' *Charter* rights in 2018". I acknowledge that the Court may make a binding declaration and that such a declaration can be an adequate remedy, but whether the Court will make a declaration depends on the circumstances.

[13] A declaration that the Charter was breached may, but does not always, constitute a live controversy. A declaration may be granted only if it will have practical utility, that is, if it will settle a "live controversy" between the parties: *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99 at para. 11; *Solosky v. The Queen*, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745; *Income Security Advocacy Centre v. Mette*, 2016 FCA 167, [2016] F.C.J. No. 587 (Q.L.) at para. 6.

[14] Here, were the appellants successful on appeal, a declaration that Charter rights were violated by the inclusion of the attestation in the application form for a program that is spent, would serve no practical utility and would not resolve any live controversy. If, in the future, a funding program contains a similar attestation requirement, it can be challenged at that time. And, of course, the challenge necessarily would depend on the type of attestation requirement and the reasons behind it. There is a good chance that a decision in this case on these particular facts would be of no use in that later case.

[15] Indeed, in the sequel to *Trang 2005*, the Alberta Court of Appeal stated that "[d]eclarations may not be granted where the dispute has become academic, or will have no practical effect in resolving any remaining issues between the parties": *Trang v. Alberta (Edmonton Remand Centre),* 2007 ABCA 263, 412 A.R. 215, at para. 15, leave to appeal to SCC refused, 32310 (21 February, 2008), [*Trang 2007*]. That decision overturned the lower court's decision to grant a declaration of a breach of Charter rights, explaining why declarations rarely will be granted if they will have no practical effect on the rights of the parties: *Trang 2007* at paras. 13-25.

[16] One relevant consideration to the utility of a declaration is the other remedies, if any, that would be available if the declaration is made. In this appeal, unless this Court is prepared to issue *mandamus* and order the Minister to process TRTL's 2018 CSJ program application and provide it with the funds it would have received had its application been processed, none of the relief claimed in the application for judicial review or the notice of appeal in this Court is of any practical utility.

[17] *Mandamus* is a discretionary remedy that may be granted where the applicant satisfies the eight criteria set out by this Court in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, 162 N.R. 177 (F.C.A.), aff'd [1994] 3 S.C.R. 1100, 176 N.R. 1, or in cases of severe maladministration as described in cases such as *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55, 444 N.R. 93 at para. 14 and *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 at paras. 16-21 [*D'Errico*]. The appellants have not addressed these criteria in their application for judicial review, their notice of appeal, their memorandum of fact and law, or their materials on this motion. In any event, the record discloses no basis for *mandamus*. This augments my view that a declaration that Charter rights were violated would serve no practical utility.

[18] I also observe that even if TRTL's 2018 application had been processed, TRTL may not have received any funding under the 2018 CSJ program. The 2018 CSJ program, like the CSJ program in other years, was oversubscribed. Because demand exceeds available funding, each year the Minister establishes national priorities and eligibility criteria for the CSJ program. As the Federal Court observed, under the 2018 CSJ program, "given other eligibility criteria and the stated priorities and target population, funding was not a certainty" and those other criteria and priorities "do not appear to reflect TRTL's mandate or activities." Absent extreme maladministration, courts grant *mandamus* "only where the outcome on the merits is a foregone conclusion – in other words the evidence can lead only to one result": *D'Errico* at para 16; *Doyle v. Canada (Attorney General)*, 2022 FCA 56, 2022 A.C.W.S. 740.

[19] Thus, in my view, the claim for *mandamus* is not sufficient to render this appeal not moot. Indeed, I am satisfied it is moot.

II. Should the Court hear this moot appeal?

[20] I now turn to consider whether the Court should nevertheless hear the appeal, having regard to the following factors from *Borowski* at 358-363:

(i) the absence or presence of an adversarial context;

(ii) whether there is any practical utility in deciding the matter or if it is a waste of judicial resources; and

(iii) whether the Court would be exceeding its proper role by making law in the abstract, a task that is reserved for Parliament.

See also *CUPE* at para. 9. No one factor is determinative.

[21] I agree with the parties that there is an adversarial context. The issues were fully argued before the Federal Court, which also had the benefit of submissions from two interveners.

[22] However, in my view, the second factor weighs heavily against hearing the appeal. The 2018 CSJ program is expired. The impugned attestation was removed from the application in 2019. The mere fact that the same issue may arise again—and there is no suggestion it will—does not justify hearing a moot appeal: *Hakizimana* at para. 22. We should not hear a case on

mere speculation the same issue may arise. Finally, I am not convinced that if the same issue does arise in the future, it is evasive of court review. See, for example, *Redeemer University, BCM International Canada Inc. v. Canada (Employment, Workforce Development and Labour),* 2021 FC 687, 334 A.C.W.S. (3d) 680 and *Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour),* 2018 FC 102, 288 A.C.W.S. (3d) 333.

[23] I agree a judicial review can be an effective remedy for Charter breaches, in part because it may proceed more quickly than an action for damages and has the potential to cause the decision-maker to respond quickly and change its conduct. In fact, as noted, the application form for the CSJ program was changed after 2018. But the fact that it can be an effective remedy does not mean a particular judicial review, or an appeal of a judicial review decision, should be heard. Even if the appellants were to succeed on this appeal, in my view this is not a case in which this Court should make a declaration on the assumption that the circumstances as they existed in 2018 may exist again in the future: *Fibrogen, Inc. v. Akebia Therapeutics, Inc.*, 2022 FCA 135, 471 D.L.R. (4th) 746 at para. 43. If, as the appellants contend, the application process is amended every year, this Court would be deciding an issue in the absence of an existing factual matrix: *Hakizimana* at para. 19.

[24] The appellants also assert that this Court should hear the appeal because, if it does not, the decision of the Federal Court below will be binding precedent immune from appellate review. This proposition suggests the appellants' interest in the appeal is jurisprudential, which is insufficient to sustain an otherwise moot appeal: *CUPE* at para. 7. Moreover, that argument might be advanced in any circumstance where an appellate court is faced with deciding whether

to hear a moot appeal. Although perhaps a relevant consideration, it cannot be determinative on its own for, if it were, the doctrine of mootness would be significantly weakened. In any event, as I have explained above, a decision in this case may have no jurisprudential impact, as future programs may be based on different criteria.

[25] As previously observed by this Court, raising a constitutional question is not sufficient to justify hearing the appeal unless it can be demonstrated that the social cost of legal uncertainty outweighs the economy of judicial resources; on many occasions, this Court has refused to rule on questions that have become theoretical despite the importance they could assume: *Abel v. Canada (Citizenship and Immigration)*, 2021 FCA 131, [2021] A.C.F. No. 668 at para. 22. Given the nature of the CSJ program and the issues raised on this appeal, I am not convinced that the social cost here outweighs the economy of judicial resources.

[26] Finally, I must consider whether in hearing the appeal the Court would be making law in the abstract. In my view, it would. At this stage, since the impugned attestation has been removed from the application, to consider the issues on appeal "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 [and that] is not our proper task": *CUPE* at para. 13.

[27] Thus, in my view, this Court should not hear this appeal.

III. Conclusion and costs

[28] This appeal is moot and the Court should not exercise its discretion to hear it.

[29] The respondent seeks costs of $800 for this motion. The appellants were silent on the issue of costs. In my discretion, I would not award any costs. Although successful, the respondent should have brought this motion far sooner.

[30] The respondent was originally named as the “Canada (Minister of Employment, Workforce, and Labour)”. Under Rule 303 of the *Federal Court Rules* S.O.R./98-106, the proper respondent in these circumstances is the Attorney General of Canada. This has no bearing on the outcome of this motion and is only a matter of form.

[31] Accordingly, I would amend the style of cause to reflect the Attorney General of Canada as the sole respondent, grant the motion to strike the appeal for mootness, and dismiss the appeal without costs.

"K.A. Siobhan Monaghan"
J.A.

“I agree.
David Stratas J.A.”

“I agree.
Marianne Rivoalen J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-325-21
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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MONAGHAN J.A.
CONCURRED IN BY:	STRATAS J.A. RIVOALEN J.A.
DATED:	DECEMBER 15, 2022

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