Federal Court Cour fédérale

Date: 20241128

Docket: T-2536-23

Citation: 2024 FC 1915

Ottawa, Ontario, November 28, 2024

PRESENT: Associate Judge Trent Horne

BETWEEN:

SHAUN RICKARD AND KARL HARRISON

Plaintiffs

and

**HIS MAJESTY THE KING,
THE MINISTER OF TRANSPORTATION AND
THE ATTORNEY GENERAL OF CANADA**

Defendants

ORDER AND REASONS

I. Overview

[1] The amended statement of claim ("Claim") seeks damages pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("*Charter*"). In general terms, the plaintiffs allege that their section 6, 7, and 15 *Charter* rights were infringed by a number of "vaccine mandates" that required mandatory vaccination against COVID-19 for air, rail, and marine

transport. All references to sections in these reasons are to sections of the *Charter*, unless otherwise indicated.

[2] More specifically, the Claim asserts that a series of Interim Ministerial Orders ("IMOs") made pursuant to the *Aeronautics Act*, RSC 1985 c A-2 and the *Railway Safety Act*, RSC 1985 c 32 (4th Supp) were discriminatory in that they segregated Canadians into two groups: vaccinated and unvaccinated. The plaintiffs state that they made a personal medical choice to forego vaccination against COVID-19, and therefore could not travel by air or rail until the IMOs were rescinded in June 2022. Inability to travel by air resulted in the plaintiffs being unable to visit their respective parents, who are stated to reside in the United Kingdom and be in poor health. It is also claimed that the plaintiff Karl Harrison could not travel to the United Kingdom to attend to his businesses.

[3] The defendants ("Crown") have brought a motion to strike the Claim in its entirety, without leave to amend, with the limited exception that leave to amend should be granted in respect of claims by Mr Harrison based on subsection 6(1) as they apply to international air travel. The motion is granted in part.

II. The Plaintiffs' Motion

[4] On the same day as they filed a responding record on the Crown's motion to strike, the plaintiffs also filed a separate motion to permit the filing of a further amended statement of claim ("Proposed Claim"). The Proposed Claim adds claims and causes of action based on section 12, as well as the *Immigration and Refugee Protection Act*, SC 2001 c 27 ("IRPA") and the

International Covenant on Civil and Political Rights, Can TS 1976 No. 47 ("ICCPR"). The plaintiffs' motion was not contemplated in the July 31, 2024 direction that set a timetable for the Crown's motion to strike. Neither the Court nor the Crown had notice of this motion before it was served.

[5] The service of the plaintiffs' motion was improper. I agree with the defendants that the Proposed Claim may be helpful to demonstrate how the plaintiffs can cure the defects in their pleadings, however the plaintiffs should not attempt to amend their pleading while a motion to strike is pending.

[6] I apply the following principle articulated in *Bruce v John Northway & Son Ltd.*, [1962] OWN 150 at 151:

> After service of a notice of motion, as a general rule, any act done by any party affected by the application which affects the rights of the parties on the pending motion will be ignored by the Court.

[7] The Crown's rights as a moving party cannot be defeated by a subsequent step taken by the plaintiffs (*Kornblum v Canada (Human Resources and Skills Development)*, 2010 FC 656 at para 29; see also *Viiv Healthcare Company v Gilead Sciences Canada, Inc*, 2020 FC 11 at para 26).

[8] While the plaintiffs' motion did not directly conflict with the motion to strike (for example, when a party facing a motion to strike moves for summary or default judgment), it was improper because it was effectively used to split the argument on the main motion, and create a vehicle for making representations twice. The *Federal Courts Rules*, SOR/98-108 ("Rules") do

not expressly limit the length of written representations on a motion. This can be contrasted to memoranda of fact and law, which are limited to 30 pages (Rule 70). There is, however, a strong expectation that written representations on a motion will not exceed 30 pages. By filing written argument twice on the same issues, the plaintiffs exceeded that limit.

[9] At the hearing of the motion, the plaintiffs submitted that there was nothing prejudicial about adding a motion to amend because "all roads lead to Rome," and the amendment would have been before the Court in any event. That may be, but this route to Rome has been circuitous. With a stated intention by the plaintiffs to make further requests to amend, it is not apparent that the Rubicon has been crossed. Multiple versions of the statement of claim have increased the burden for the Crown. A statement of claim cannot be a constantly evolving document. At some point, the plaintiffs must plant a flag with the claim they want to pursue. The Crown should not be faced with a moving target on a motion to strike.

[10] The plaintiffs' motion will be adjudicated, but the inefficiencies arising from the evolving nature of the proposed statement of claim is a factor that will be considered in the assessment of costs.

III. Law on Motions to Strike

[11] The legal principles applying to motions to strike are well known. The threshold to strike a claim is a high one.

[12] To strike a statement of claim it must be plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. It needs to be plain and obvious that the action is certain to fail because it contains a radical defect (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 ("*Imperial Tobacco*")). Pleadings must be read as generously as possible (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at paras 88–90).

[13] A motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. On such a motion, the Court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial (*Imperial Tobacco* at para 21; *La Rose v Canada*, 2023 FCA 241 at para 109 ("*La Rose*")).

[14] To disclose a reasonable cause of action, a claim must: (a) allege facts that are capable of giving rise to a cause of action; (b) disclose the nature of the action which is to be founded on those facts; and (c) indicate the relief sought, which must be of a type that the action could produce and the court has jurisdiction to grant (*Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 5).

IV. Analysis

A. *The Application for Judicial Review*

[15] Before filing the Claim, the plaintiffs commenced an application for judicial review in Court file T-1991-21 seeking declarations that the IMOs were unconstitutional, and orders that

the IMOs be struck. The notice of application relied on sections 6, 7, and 15. This application, and other applications for judicial review seeking the same or similar relief, were dismissed as moot after the IMOs were repealed (*Ben Naoum v Canada (Attorney General)*, 2022 FC 1463, aff'd *Peckford v Canada (Attorney General)*, 2023 FCA 219, application for leave to appeal to the Supreme Court dismissed *Honourable A Brian Peckford v Attorney General of Canada*, 2024 CanLII 80711).

[16] I give no weight to the plaintiffs' argument that the Attorney General did not take the position in the application that the *Charter* claims lacked a reasonable prospect of success by bringing a motion to strike, and therefore the Crown's position on this motion is a disingenuous attempt to delay a meritorious claim that has been founded on a comprehensive evidentiary record.

[17] Judicial review is meant to be a timely, summary proceeding allowing the state to implement its administrative decisions with minimal delay if the decision is challenged and found lawful or, if found unlawful, to quickly make corrective measures so that the decision complies with law and can take effect (*Wildchild Stockholm, Inc v Canada (Attorney General)*, 2019 FC 874 at para 50). The Court discourages interlocutory motions in applications for judicial review *(Canadian Generic Pharmaceutical Association v Canada (Governor in Council)*, 2007 FC 154 at para 25). This specifically applies to motions to strike. Respondents are encouraged to speak to deficiencies in the notice of application at the hearing, not on motions to strike (*Eidsvik v Canada (Fisheries and Oceans)*, 2011 FC 940 at paras 15-27).

[18] There is no parallel expectation in an action, or jurisprudence that encourages parties to wait until trial to request that claims or causes of action be struck. There is no indication that, in the earlier application, the Crown conceded or admitted that claims based on sections 7, 12, and 15 were properly before the Court. There is no estoppel argument in this respect. Whether the Claim discloses a cause of action will be determined without regard to the proceedings in T-1991-21.

B. *Section 6*

[19] Subsection 6(1) provides that "every citizen of Canada has the right to enter, remain in and leave Canada." The Claim does not state that the plaintiffs are Canadian citizens. Taking the Claim at face value, and assuming the allegations to be true, it is fundamentally flawed, and must be struck.

[20] Striking a pleading without leave to amend is a power that must be exercised with caution. If a statement of claim shows a scintilla of a cause of action, it will not be struck out if it can be cured by amendment (*Al Omani v Canada*, 2017 FC 786 at paras 32-35).

[21] The Crown concedes that Mr Harrison is able to plead a cause of action under subsection 6(1) if there is, among other things, an assertion that he was a citizen of Canada at the material time. The Proposed Claim includes such a statement, and I am satisfied that these deficiencies in the Claim can be cured by an amendment as they relate to Mr Harrison.

[22] I reach a different conclusion in respect of Mr Rickard, who was not a citizen of Canada at the material time. Subsection 6(1) is plainly limited in its application to Canadian citizens. This can be contrasted to subsection 6(2), which applies to both citizens and permanent residents. I cannot accept the plaintiffs' argument that there is a gap in the Constitution that is capable of being filled by the jurisprudence. Extending the application of subsection 6(1) to permanent residents would plainly require a constitutional amendment.

[23] *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, appeal dismissed as moot *Taylor v Newfoundland and Labrador*, 2023 NLCA 22, leave to appeal to the Supreme Court of Canada granted *Canadian Civil Liberties Association v His Majesty the King in Right of Newfoundland and Labrador*, 2024 CanLII 35287 ("*Taylor*") does not assist the plaintiffs. There, the applicant was a Canadian citizen who was unable to travel from Nova Scotia to Newfoundland for her mother's funeral as a result of travel restrictions put in place pursuant to subsection 28(1)(h) of the *Public Health Protection and Promotion Act*, SNL 2018, c P-37.3. Ms Taylor claimed that this section was beyond the legislative authority of the province, and alternatively that the travel restriction violated her right to mobility and right to liberty as guaranteed by sections 6 and 7. The Supreme Court of Newfoundland and Labrador, General Division, concluded (para 301) that the right to "remain in" Canada, as embodied in subsection 6(1), includes the right of Canadian citizens to travel in Canada for lawful purposes across provincial and territorial boundaries, I read nothing in *Taylor* that would extend the mobility rights in subsection 6(1) beyond citizens to also include permanent residents.

[24] The plaintiffs also rely on *Sahakyan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1542 ("*Sahakyan*") for the proposition that permanent residence, like citizenship, carries privileges, one being the right to leave Canada in the knowledge that one is entitled to return, provided residency requirements are maintained (para 38). This decision is not instructive. *Sahakyan* does not consider section 6 at all, and does not support an argument that subsection 6(1) can somehow be expanded beyond its plain meaning to apply to permanent residents. I am not aware of any jurisprudence that concludes, or even suggests, that the subsection 6(1) mobility right extends to, or can possibly extend to, permanent residents.

[25] The plaintiffs caution against taking what they describe as an "originalist" approach to subsection 6(1). I disagree that taking the subsection as it is written, including its express limitations, is overly narrow or "originalist." The subsection says what it says. If there is to be an evolution in thinking to address a perceived gap in subsection 6(1), as the plaintiffs argue, that gap must be filled by way of a constitutional amendment. I fail to see how the Courts have the power to do so.

[26] The Claim does not expressly rely on subsection 6(2), which relates to interprovincial mobility rights. This subsection provides that Canadian citizens and permanent residents have the right "to move to and take up residence in any province," and "to pursue the gaining of a livelihood in any province." The plaintiffs have not pleaded any limit on their interprovincial mobility rights, and indicated at the hearing of the motion that subsection 6(2) is not in issue.

[27] While the Claim refers to IMOs that placed restrictions on rail travel, there are no material facts in any version of the statement of claim to support a claim for damages arising from an inability to travel by rail. The Crown's written representations in their moving motion materials state:

> 29. Therefore, it is unclear how the Ministerial Orders in respect of rail had any impact on the Plaintiffs whatsoever, and certainly not in a manner that infringed their *Charter* rights. The Amended Statement of Claim fails to plead the elements necessary to satisfy section 6 of the *Charter*, and as such fail to disclose a reasonable cause of action in relation to rail.

[28] The plaintiffs' responding materials and Proposed Claim do not answer this challenge. Having had three opportunities to do so, I am not satisfied that the plaintiffs are able to plead material facts to support a claim for damages arising from an inability to travel by rail.

[29] The plaintiffs submit that they are able to challenge IMOs as they relate to rail travel because an intention to travel by rail at the material time is irrelevant; they say the inability to travel by rail alone triggers the ability to advance a claim. I cannot agree. There is no indication in any version of the statement of claim that the plaintiffs ever intended to travel by rail when the IMOs were in place. There is no loss or harm, and no basis to claim damages, in this respect. A claim for damages based on railway travel would be an abstract complaint about a government restriction that had no impact or consequence on the plaintiffs. I fail to see how either of the plaintiffs have standing to advance a claim for damages based on a method of transportation they did not use, and expressed no interest in using. At the hearing, the plaintiffs directly stated that they are not advancing a claim based on public interest standing. Leave to amend in this respect is refused.

[30] The Claim makes a single passing reference to federally regulated marine transportation. There are no material facts in any version of the statement of claim that the plaintiffs ever used marine transportation, intended to use marine transportation, or that the IMOs impaired their ability to travel over water. I reach the same conclusion for marine transportation as I did for rail travel. I am not satisfied that the plaintiffs are able to plead material facts to support a claim for damages arising from marine travel. Leave to amend in this respect is refused.

[31] The Proposed Claim intends to argue that Mr Rickard's rights under subsection 19(2) of IRPA were breached. This subsection provides permanent residents a right to enter Canada if an officer is satisfied following an examination on their entry that they have that status. Section 19 of IRPA has no application. Mr Rickard was not prevented from getting into Canada, he was unable to get out. More importantly, IRPA does not provide a civil cause of action. There is no nominate tort based on the breach of a statutory provision alone (*R in right of Canada v Saskatchewan Wheat Pool* [1983] 1 SCR 205 at pages 225-226). A claim by Mr Rickard based on IRPA does not assist with advancing a claim for damages under subsection 6(1), particularly when he is not a Canadian citizen. As discussed above, this subsection plainly does not apply to permanent residents. Any claims or causes of action based on IRPA are doomed to fail.

[32] The Proposed Claim also purports to rely on Article 12 of the ICCPR. The plaintiffs intend to rely on the ICCPR for two reasons: to bolster an argument that subsection 6(1) should be read to include permanent residents, and that it provides a stand-alone cause of action. I cannot agree with either argument.

[33] Article 12 of the ICCPR reads:

> ***Article 12***
>
> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country.

[34] The application of the ICCPR to section 6 claims was considered in *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 ("*Divito*"): "as a treaty to which Canada is a signatory, the ICCPR is binding. As a result, the rights protected by the ICCPR provide a minimum level of protection in interpreting the mobility rights under the *Charter*" (para 25). The Federal Court of Appeal in *Canada v Boloh 1(a)*, 2023 FCA 120 applied *Divito*, and concluded that Article 12 "lay behind" section 6 of the *Charter*, and was essential to its interpretation (para 38).

[35] The Crown concedes that an argument based on Article 12 of the ICCPR can be made in support of Mr Harrison's claim for damages under subsection 6(1).

[36] I cannot accept that the ICCPR, or other treaties to which Canada is a signatory, can be applied to amend or override the express language of the *Charter* as written, specifically to extend the subsection 6(1) mobility rights beyond citizens to also include permanent residents.

[37] The Court in *Taylor* stated that Article 12 can be used to consider section 6 mobility rights (paras 332-336), however I find no support in this decision, or elsewhere in the jurisprudence, for the proposition that *Charter* rights can be expanded, beyond their clear and express meaning, with reference to international treaties.

[38] The Crown relies on *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, aff'd 2022 SCC 30:

> [80] For this fundamental reason, international instruments cannot become Canadian law without domestic legislative action. Put another way, international instruments are not self-executing in Canadian domestic law. They must be incorporated into Canadian domestic law by legislation that adopts the international instrument in whole or in part or enacts standards borrowed from or related to that instrument: *Capital Cities Comm. v. C.R.T.C.*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141, (1977), 81 D.L.R. (3d) 609, at pages 171–172 S.C.R.; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, (1999),174 D.L.R. (4th) 193 [*Baker*]; and many others. If Parliament decides not to adopt a particular international instrument, that instrument does not become binding domestic law: *Ordon Estate v. Grail*, 1998 CanLII 771 (SCC), [1998] 3 S.C.R. 437, (1998), 166 D.L.R. (4th) 193, at paragraph 137. Those who want it to be binding law have only one recourse: they must persuade some politicians to make it so.

[39] The ICCPR preceded the *Charter*. To the extent the ICCPR was adopted in Canada, it was in the language of section 6.

[40] Unless a treaty provision expresses a rule of customary international law or a peremptory norm, that provision will only be binding in Canadian law if it is given effect through Canada's domestic law-making process (*Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 149). Mobility rights of permanent residents (as opposed to citizens) is not rule of

customary international law or a peremptory norm. Article 4, paragraph 2, of the ICCPR states that there will be no derogation from certain Articles. Article 12 is not one of them. Further, Article 12 is not absolute. Paragraph 3 provides an express exception for laws necessary to protect national security, public order, public health, or the rights and freedoms of others.

[41] The Proposed Claim does not request damages for breach of Article 12, however the plaintiffs indicated at the hearing that this was an oversight, and that a further amendment would be sought in this respect. I am not satisfied that there is a cause of action for an alleged breach of rights under the ICCPR alone.

[42] In *Canada* (*Minister of National Revenue) v MacIver*, 2002 FCT 877 at para 15 ("*MacIver*"), the Court considered a claim based on the *Universal Declaration of Human Rights, 1948*, and concluded that the declaration "forms no part of domestic law, and cannot be relied on to create substantive rights." The same applies here. The ICCPR forms no independent part of domestic law. To the extent it is incorporated in the *Charter*, damages can be claimed for any infringement of *Charter* rights. I do not read anything in *Divito*, *MacIver*, or any other decision that permits the ICCPR to ground a stand-alone cause of action.

[43] To the extent the plaintiffs intend to argue that their dignity was compromised because their non-vaccinated status prevented them from travelling by air, dignity is not a constitutional right. It is a fundamental value that serves as a guide for the interpretation of all *Charter* rights (*R v Bissonnette*, 2022 SCC 23 at para 59). It is open to Mr Harrison to plead a loss of dignity in association with claims brought under subsection 6(1).

[44] The amended statement of claim is therefore struck, with leave to amend to advance a claim by Mr Harrison based on subsection 6(1) for international air travel only. Mr Harrison may plead and rely on Article 12 of the ICCPR in association with his claims based on subsection 6(1), provided that any such reliance is properly particularized. It is plain and obvious that Mr Rickard may not rely on subsection 6(1), and leave to amend in this respect is refused. It is also plain and obvious that there is no stand-alone cause of action based on the ICCPR alone, so the plaintiffs may not plead and rely on Article 12 of the ICCPR as a separate cause of action.

[45] The Crown's motion requests an order that any amended statement of claim name His Majesty the King in Right of Canada as the only defendant. The plaintiffs oppose this request. The difficulty I have is that this issue is not addressed in the defendants' notice of motion (other than asking for the relief) or written representations. The burden is always on the party asserting a proposition or fact that is not self-evident (*Voltage Holdings, LLC v Doe #1*, 2023 FCA 194 at para 40). I am not satisfied that it is self-evident that His Majesty the King in Right of Canada is the only proper defendant, particularly since the respondent in T-1991-21 was the Attorney General of Canada, and it does not appear that this was amended or corrected in 2022 FC 1463. The defendants' motion in this respect is dismissed, without prejudice to a subsequent motion or informal request for the same relief.

C. *Section 7*

[46] Section 7 is directed to life, liberty and security of person, and states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[47] The plaintiffs argue that they were forced to make a "constitutional trade-off," where they were forced to decide between protecting their bodily integrity and autonomy in refusing vaccination (described as a section 7 liberty interest), and exercising their section 6 mobility rights.

[48] The interplay between sections 6 and 7 as it relates to travel was expressly considered in *Khadr v Canada (Attorney General)*, 2006 FC 727 ("*Khadr*"), an application for judicial review challenging a decision to deny issuance of a passport:

> [74] However, *Godbout*, above, makes clear that the section 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.
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> [75] The ability to travel where and when one wants outside Canada does not strike at that basic value of individual dignity and independence. I say this because the matter of choice to leave Canada is enshrined in section 6 of the Charter. If one provision of the Charter covers a specific freedom, other sections of the Charter should not be presumed to cover the same freedom. There is a presumption against redundancies in legislation. The denial of a passport, while limiting the right to leave Canada, is not tantamount to making one a prisoner in one's own country. As such, I would not consider that the right to leave Canada constitutes a section 7 right to liberty.

[49] There are factual differences between *Kadhr* and this case. In *Kadhr*, the applicant was not faced with a choice, the outcome of which would have made him eligible for a passport. But that difference does not impact the fundamental reasoning in *Kadhr* regarding the presumption against redundancies in legislation.

[50] The plaintiffs in this action were not deprived of the ability, the liberty, to make a choice to accept the COVID vaccine or refuse it. They were not coerced or forced to be vaccinated, or to

refrain from taking the vaccination. There were consequences to their decision not to be vaccinated, including an inability to leave the country by air. That squarely engages, for Mr Harrison, the mobility right in subsection 6(1). I agree with the Crown that the fact that the plaintiffs may have faced consequences in terms of their ability to travel by air does not amount to coercion, and is insufficient to trigger the section 7 right to liberty.

[51] *Taylor*, which involved travel restrictions arising from the COVID-19 pandemic and is relied on by the plaintiffs, expressly rejected a claim under section 7.

> [378] The Respondents make the argument, convincingly in my view, that s. 7 is not an amalgam of expressed rights under the *Charter*, and where an expressed right exists the Court should reject s. 7 claims as creating parallel rights with different tests and standards.
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> [379] In this case the expressed right is the right to mobility. Section 6(1) rights, apply to citizens of Canada and s. 6(2) rights to citizens of Canada and permanent residents. Section 7 on the other hand applies to "everyone", interpreted as "every human being who is physically present in Canada and by virtue of such presence amenable to Canadian Law" (*Singh v. Canada (Minister of Employment and Immigration)*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at p. 202).
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> [380] Furthermore, s. 6 mobility rights are subject to the application of s. 1 of the *Charter* and may be infringed where the infringement can be demonstrably justified in a free and democratic society. Section 7 is subject to the principles of fundamental justice. These principles demand that the law not be arbitrary, overbroad or grossly disproportionate to its object. The inclusion of mobility rights in s. 7 under the guise of a "liberty" right would thus give rise to a new constitutional standard for mobility.
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> [381] In *R. v. Lloyd*, 2016 SCC 13 the Supreme Court of Canada struck down the one year mandatory minimum jail sentence for certain drug offences as being "grossly disproportionate" and thus in violation of the prohibition against cruel and unusual punishment in s. 12 of the *Charter*.

> [382] In response to Lloyd's argument that his *Charter* right to liberty under s. 7 of the Charter was also violated, Chief Justice McLachlin observed that the "principles of fundamental justice in s. 7 must be defined in a way that promotes coherence within the Charter and conformity to the respective roles of Parliament and the courts" (*Lloyd*, at para. 40).
>
> [383] The present circumstance is not unlike that in *Lloyd*, where the Chief Justice concluded that to invoke the s. 7 right to liberty would give rise to a new constitutional standard lower than s. 12, leading to incoherence in the *Charter*.

[52] I see no principled basis for reaching a different outcome here. I also note that the leave application to the Supreme Court of Canada filed by the Canadian Civil Liberties Association and Kimberley Taylor, and their factum on the pending appeal (SCC docket 40952), do not raise arguments based on section 7.

[53] It is plain and obvious that subsection 7(b) cannot be expanded to include mobility rights when such rights are already specifically addressed in section 6. I am satisfied that the Claim does not disclose a cause of action under section 7 and must be struck in this respect. I am also satisfied that the deficiencies as they relate to section 7 cannot be cured with better drafting, therefore the Claim as it relates to section 7 is struck without leave to amend.

D. *Section 15*

[54] Section 15 provides equality rights. Subsection 15(1) states that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[55] Vaccination status is not an enumerated ground in section 15, nor has it been recognized as an analogous ground. Analogous grounds are those similar to the enumerated grounds that would often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity (*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13).

[56] No material facts are specifically pleaded in respect of the section 15 claim. The plaintiffs broadly allege that the vaccine mandates, implemented through the IMOs, violate section 15.

[57] *Charter* actions do not trigger special rules on motions to strike; the requirement of pleading material facts still applies. The Supreme Court of Canada has defined in the case law the substantive content of each *Charter* right, and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is no mere technicality, "rather, it is essential to the proper presentation of Charter issues" (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 21).

[58] Litigants have attempted to have vaccination status identified as an analogous ground under section 15. It appears that all have been unsuccessful (*Lewis v Alberta Health Services*, 2022 ABCA 359 at paras 62-70 ("*Lewis*"); *Costa, Love, Badowich and Mandekic v Seneca College of Applied Arts and Technology*, 2022 ONSC 5111 at paras 91-95 ("*Costa*"); *R v Lauterpacht*, 2023 ONCJ 51 at paras 85-89).

[59] The plaintiffs distinguish *Lewis* on the facts, particularly that vaccination status was not found to be an immutable personal characteristic, nor was it one that was changeable only at unacceptable cost to the personal identity of the plaintiff in that case (para 68). *Costa* is distinguished on the factual findings that the applicants in that proceeding fell well short of showing that they could not be safely vaccinated, or that the act of doing so would tear asunder immutable or even deeply held beliefs (para 94).

[60] In the Proposed Claim, the plaintiffs intend to allege that receiving the vaccine would have significantly undermined their sincerely held sense of dignity, worth and personal autonomy, while also requiring the plaintiffs to disregard their genuine concerns about the vaccine's safety and efficacy.

[61] While the chances of having vaccination status recognized as an analogous ground for the purposes of section 15 may be remote in light of the current jurisprudence, I am not satisfied that such an argument is bound to fail if the plaintiffs allege that vaccination would constitute an unacceptable cost to their personal identity, or would tear asunder immutable or even deeply held beliefs. *Lewis* and *Costa* do not foreclose this possibility, or stand for the proposition that vaccination status is incapable of constituting an analogous ground. While it may be dim, there is a "glimmer of hope" (*La Rose* at para 122) that vaccination status could be recognized as an analogous ground. Leave to amend to add a cause of action under section 15 is granted for both plaintiffs, however any such amendment must be fully and completely particularized.

E. *Section 12*

[62] Section 12 provides that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment." This section was raised for the first time in the Proposed Claim. Claims based on section 12 were not raised in the application for judicial review, or the earlier versions of the statement of claim.

[63] The Proposed Claim does not disclose a cause of action under section 12. Section 12 is only mentioned in a single paragraph, and is little more than a statement that the denial of access to federally-regulated transportation amounts to cruel and unusual punishment. The plaintiffs' written submissions assert that the IMOs constitute cruel and unusual treatment; it was clarified at the hearing that the plaintiffs intended to assert cruel and unusual treatment.

[64] A leading case on the interpretation of section 12 is *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 611-612 ("*Rodriguez*"). There, the appellant suffered from amyotrophic lateral sclerosis. She applied for an order declaring subsection 241(b) of the *Criminal Code*, RSC 1985 c C-46 ("*Criminal Code*"), which prohibited the giving of assistance to commit suicide, invalid (pages 608-612). The majority concluded that section 12 was not engaged. More specifically, the Court concluded that "a mere prohibition by the state on certain action, without more, cannot constitute "treatment" under s. 12" (page 610). Ms Rodriguez was "simply subject to the edicts of the *Criminal Code*, as are all other individuals in society. The fact that, because of the personal situation in which she finds herself, a particular prohibition impacts upon her in a manner which causes her suffering does not subject her to "treatment" at the hands of the state" (page 611).

[65] If the actions of the state that denied Ms Rodriguez the ability to elect medically-assisted suicide do not engage section 12, I fail to see how the IMOs, which prevented the plaintiffs from travelling by air without being vaccinated for a certain period, could engage section 12. There was no state control over the plaintiffs that compelled them to be vaccinated or unvaccinated. The plaintiffs were not engaged in the state administrative or justice system, rather were subject to IMOs that applied to everyone.

[66] The plaintiffs argue that *Rodriguez* was overturned by *Carter v Canada (Attorney General)*, 2015 SCC 5 ("*Carter*"). I disagree. *Carter* did revisit subsection 241(b) of the *Criminal Code*, however that decision involved no analysis of section 12. The plaintiffs also seek to distinguish *Rodriguez* on the basis that the plaintiffs previously had the ability to travel without a vaccination, lost that ability when the IMOs were enacted, and that constituted active state process and operation. Again, I disagree. All legislation, including the *Criminal Code*, can be characterized as an action of the state. At a high level, every amendment to the *Criminal Code* affects the legality of certain conduct. If the plaintiffs' position is correct, every legislative or administrative act of government that adds a form of restriction could be subject to section 12. This finds no support in *Rodriguez* or other jurisprudence. Again, the IMOs applied to everyone, and did not compel the plaintiffs to be vaccinated.

[67] The fact that the plaintiffs may view the prohibitions imposed by the IMOs as "degrading and dehumanizing" does not assist them. As stated earlier, it is open to Mr Harrison to plead a loss of dignity in association with his claims brought under subsection 6(1), and for both plaintiffs under section 15.

[68] The plaintiffs' section 12 claim has no jurisprudential root, and is conceptually outside the scope of section 12, at least as it has been understood to date (*La Rose* at para 123). Leave to amend to add a cause of action under section 12 is refused.

V. Costs

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

[70] The plaintiffs were unsuccessful on their motion. The defendants were substantially successful on their motion. The unexpected service of the plaintiffs' motion and evolving nature of the statement of claim are also factors that weigh in the defendants' favour.

[71] Costs will be fixed in accordance with Column III of Tariff B. The defendants are awarded five units for preparation of their own motion, and five units for responding to the plaintiffs' motion. Five units are awarded for appearance on the motions (2.5 hours x 2 units per hour). At $180 per unit, costs are fixed at $2,700.00, payable in any event of the cause.

ORDER in T-2536-23

THIS COURT ORDERS that:

1. The plaintiffs' motion is dismissed.

2. The defendants' motion is granted in part. The amended statement of claim is hereby struck, with leave to amend in accordance with these reasons.

3. Any fresh as amended statement of claim shall be served and filed within 30 days of the date of this order.

4. Costs of the motion are fixed at $2,700.00, payable by the plaintiffs to the defendants in any event of the cause.

"Trent Horne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2536-23
STYLE OF CAUSE:	SHAUN RICKARD ET AL v HIS MAJESTY THE KING ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 18, 2024
ORDER AND REASONS:	HORNE A.J.
DATED:	NOVEMBER 28, 2024

APPEARANCES:

Sam Presvelos	FOR THE PLAINTIFFS
James Schneider Zachary Lanys	FOR THE DEFENDANTS

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