Federal Court  Cour fédérale

Date: 20250224

Docket: T-2490-22

Citation: 2025 FC 356

Toronto, Ontario, February 24, 2025

PRESENT: Associate Judge Trent Horne

PROPOSED CLASS ACTION

BETWEEN:

RICHARD MICHAEL PERRON,
VAN SUU TRANG AND
THE ESTATE OF NATALE BOZZO

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

I. Background

[1] In this proposed class proceeding, there are three representative plaintiffs: the Estate of Natalie Bozzo, who died from complications arising from COVID-19; Van Suu Trang, who was hospitalized and ventilated due to COVID-19; and Richard Michael Perron, who was hospitalized due to COVID-19.

[2] These three plaintiffs seek to represent a class consisting of all residents of Canada who were infected with COVID-19 from January 27, 2020 to November 17, 2021, and who (i) died, (ii) were hospitalized and ventilated in Canada and were released, with or without lingering symptoms, or (iii) were hospitalized without ventilation but were treated with oxygen and were released, with continuing oxygen treatment at home for more than 30 days, with or without lingering symptoms. The proposed class excludes people who travelled internationally after March 11, 2022. It also excludes residents of long-term care facilities.

[3] The fresh as amended statement of claim ("Claim") asserts that the defendant has a duty to protect the health of Canadians pursuant to the *Canada Health Act*, RSC 1985, c C-6, the *Department of Health Act*, SC 1996, c 8, the *Public Health Agency of Canada Act*, SC 2006, c 5, and the *Quarantine Act*, SC 2005, c 20. The Claim goes on to assert that the plaintiffs' rights under section 7 of the *Canadia 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"*) have been infringed as a consequence of what is described as a breaches of this health care legislation. All references to sections in these reasons are to sections of the *Charter*, unless otherwise indicated.

[4] More specifically, the defendant is alleged to have failed to discharge its statutory duty, and as a consequence of the following actions or inactions, increased the risk and caused the plaintiffs to contract COVID-19. This is defined in the Claim as the "Impugned Conduct:"

i. the defendant did not follow its own pandemic plan;

ii. the defendant failed to maintain and diminished Canada's supply of personal protective equipment;

iii. the defendant's advice with respect to masking, especially non-medical masks, ignored scientific facts;

iv. the defendant did not transition to mandatory submission of contact tracing and quarantine plans via the ArriveCAN phone app and website for all travelers entering Canada until November 17, 2020;

v. the defendant was not aware that, during the period of May 5, 2020 to June 30, 2020, 66% of incoming travelers to Canada who were required to quarantine were in fact doing so, and that contact information for 20% of incoming travelers was missing or incomplete; and

vi. the Global Public Health Intelligence Network failed to enable the defendant to correctly evaluate the level of risk to Canadians of COVID-19 infection and its consequences.

[5] The Claim is stated to be brought for two purposes: damages to vindicate the classes of persons who suffered during the COVID-19 pandemic as a result of this conduct, and to serve as a deterrent against future governments. The amount of the damages claim is $100,000,000.00.

[6] The defendant asserts that the Claim is doomed to fail and should be struck on a preliminary motion. I agree.

II. Law on Motions to Strike

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

[8] 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 ("*Atlantic Lottery*")).

[9] 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*")).

[10] 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).

III. Analysis

[11] I begin with the prayer for relief. After a request that the action be certified as a class proceeding, the Claim requests four orders declaring that the defendant breached certain statutory duties.

[12] The *Canada Health Act*, RSC 1985, c C-6 ("CHA") is federal legislation directed to publicly funded health care, which health care is provided by the provinces and territories. The CHA establishes criteria and conditions related to insured health services and extended health care services that the provinces and territories must fulfill to receive the full federal cash contribution under the Canada Health Transfer.

[13] The plaintiffs rely on section 3 of the CHA, which sets out the primary objective of Canadian health care policy:

Canadian Health Care Policy	Politique canadienne de la santé
Primary objective of Canadian health care policy	Objectif premier
3 It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.	3 La politique canadienne de la santé a pour premier objectif de protéger, de favoriser et d'améliorer le bien-être physique et mental des habitants du Canada et de faciliter un accès satisfaisant aux services de santé, sans obstacles d'ordre financier ou autre.

[14] This statement of objective does not create a duty between the government and members of the public, including the plaintiffs, to protect them from diseases including COVID-19. This section informs the objectives of legislation that sets out the architecture for federal funding to the provinces, and sets standards that the provinces must meet to receive transfer payments.

[15] Unlike allegations of fact, statements of law (such as the existence of a legal duty imposed by statute) are not deemed to be true on a motion to strike (*Dennis v Canada (Attorney General)*, 2013 FC 1197 at para 13). It is plain and obvious that the plaintiffs are not owed a statutory duty under the CHA. Without a duty, there can be no breach, and no consequent *Charter* remedy.

[16] Te *Public Health Agency of Canada Act*, SC 2006, c 5 ("PHAC") creates the Public Health Agency of Canada. The plaintiffs rely on subsection 7(1.1), which states:

Advice	Conseils
(1.1) The Chief Public Health Officer shall provide the Minister and the President with public health advice that is developed on a scientific basis.	(1.1) Il fournit au ministre et au président des conseils en matière de santé publique élaborés sur une base scientifique.

[17] This subsection creates a relationship between the Chief Public Health Officer and the Minister of Health. Neither this section, nor the PHAC as a whole, create a relationship between the federal government and the plaintiffs, or a duty of government to members of the public, including the plaintiffs, to protect them from diseases including COVID-19. It is plain and

obvious that the plaintiffs are not owed a statutory duty under the PHAC. Without a duty, there can be no breach, and no consequent *Charter* remedy.

[18] The plaintiffs also rely on the *Quarantine Act*, SC 2005, c 20. Section 4 of that Act describes its purpose - to protect public health by taking comprehensive measures to prevent the introduction and spread of communicable diseases. Section 7 of that Act permits the Minister to designate any place in Canada as a quarantine facility and amend, cancel or reinstate the designation, but there is no reference to duties or obligations. Section 58 of that Act sets out a discretionary power by Cabinet to 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 under certain conditions. There is, however, no positive obligation to do so. The *Quarantine Act* gives discretionary tools to government to protect members of the public, but does not create a positive duty to use them. It is plain and obvious that the plaintiffs are not owed a statutory duty under the *Quarantine Act*. Without a duty, there can be no breach, and no consequent *Charter* remedy.

[19] Of the four laws relied on by the plaintiff, only the *Department of Health Act*, SC 1996, c 8 ("DHA") speaks to the Minister's duties to the people of Canada. Section 4 states:

Powers, Duties and Functions of the Minister	Pouvoirs et fonctions du ministre
Powers, duties and functions	Attributions
4 (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has	4 (1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du

jurisdiction relating to the promotion and preservation of the health of the people of Canada not by law assigned to any other department, board or agency of the Government of Canada.

Parlement liés à la promotion et au maintien de la santé de la population ne ressortissant pas de droit à d'autres ministères ou organismes fédéraux.

Particulars

(2) Without restricting the generality of subsection (1), the Minister's powers, duties and functions relating to health include the following matters:

Attributions

(2) Les attributions du ministre en matière de santé comprennent notamment :

(a) the administration of such Acts of Parliament and of orders or regulations of the Government of Canada as are not by law assigned to any other department of the Government of Canada or any minister of that Government relating in any way to the health of the people of Canada;

a) l'exécution des lois et décrets ou règlements fédéraux ne ressortissant pas de droit à d'autres ministères fédéraux ou à l'un de leurs titulaires, et touchant de quelque manière que ce soit à la santé de la population;

(a.1) the promotion and preservation of the physical, mental and social well-being of the people of Canada;

a.1) la promotion et le maintien du bien-être physique, mental et social de la population;

(b) the protection of the people of Canada against risks to health and the spreading of diseases;

b) la protection de la population contre la propagation de la maladie et les risques pour la santé;

(c) investigation and research into public health, including the monitoring of diseases;

c) les enquêtes et les recherches sur la santé publique, y compris le contrôle suivi des maladies;

(d) the establishment and control of safety standards and safety information requirements for consumer products and of safety information requirements

d) l'établissement et le contrôle des normes de sécurité des produits de consommation ainsi que de l'information relative à la sécurité dont ceux-ci et les

for products intended for use in the workplace;

produits destinés à l’usage en milieu de travail doivent être accompagnés;

(e) the protection of public health on railways, ships, aircraft and all other methods of transportation, and their ancillary services;

e) la protection de la santé publique, tant à bord des trains, navires, aéronefs et autres moyens de transport que dans leurs services auxiliaires;

(f) the promotion and preservation of the health of the public servants and other employees of the Government of Canada;

f) la promotion et le maintien de la santé des fonctionnaires et autres agents de l’État;

(g) the enforcement of any rules or regulations made by the International Joint Commission, promulgated pursuant to the treaty between the United States of America and His Majesty, King Edward VII, relating to boundary waters and questions arising between the United States and Canada, in so far as they relate to public health;

g) l’application, dans la mesure où ils touchent la santé publique, des règles ou règlements pris par la Commission mixte internationale et promulgués aux termes du traité signé entre les États-Unis et Sa Majesté le roi Édouard VII au sujet des eaux limitrophes et des questions d’intérêt commun pour le Canada et les États-Unis;

(h) subject to the Statistics Act, the collection, analysis, interpretation, publication and distribution of information relating to public health; and

h) sous réserve de la Loi sur la statistique, la collecte, l’analyse, l’interprétation, la publication et la diffusion de l’information sur la santé publique;

(i) cooperation with provincial authorities with a view to the coordination of efforts made or proposed for preserving and improving public health.

i) la coopération avec les autorités provinciales en vue de coordonner les efforts visant à maintenir et à améliorer la santé publique.

[20] The nature of these duties was considered by the Supreme Court in *Imperial Tobacco*. Chief Justice McLaughlin found, at paragraph 50, that the statute only establishes general duties to the public, and not a private law duty of care to particular individuals.

[21] I acknowledge that this discussion in *Imperial Tobacco* was in the context of claims for negligent misrepresentation, and that the plaintiffs in this action have not framed their claim in negligence. This is not surprising. The law has not recognized an action for negligent breach of statutory duty. It is well established that breach of a statutory duty does not constitute negligence (*Holland v Saskatchewan*, 2008 SCC 42 at paras 8-9).

[22] The question then becomes whether a *Charter* remedy is available for breach of the duty described in the DHA. I conclude that no such remedy is available.

[23] The reasoning in *Imperial Tobacco* does not leave any apparent room for a *Charter* claim based on a breach of the Minister's duties set out in subsection 4(2). These are public law discretionary powers, exercised in the general public interest, not a private law duty owed to specific individuals.

[24] Stepping back and considering the issue at a higher level, it is not contested that section 7 does not provide a freestanding right to health care (*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 104).

[25] The defendant relies on authorities including: *Toussaint v Canada (Attorney General)*, 2011 FCA 213 where a person was in Canada contrary to immigration laws, and the Court concluded that her section 7 *Charter* rights were not infringed by a refusal to fund medical care; *Canadian Doctors For Refugee Care v Canada (Attorney General)*, 2014 FC 651 where the applicants' section 7 *Charter* claim was dismissed because what they sought was to impose a positive obligation on the Government of Canada to fund health care for refugee claimants; and *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 where a person challenging a deportation order unsuccessfully tried to ground a section 7 *Charter* claim on a need to access medical treatment in Canada.

[26] Section 7 does not impose a duty upon the government to enact policies to address discrete social problems, or to confer a benefit on individuals (*KO v British Columbia (Ministry of Health)*, 2023 BCCA 289 at para 69).

[27] The plaintiffs point out that the Claim does not assert an entitlement to health care generally, or any particular type or standard of health care. The Claim asserts that, because of the Impugned Conduct, the government's response to the COVID-19 pandemic was inadequate, and but for this conduct, the plaintiffs would not have suffered damages. Put another way, the plaintiffs assert that the defendant took certain positive steps, and then failed to deliver.

[28] The defendant argues that *Robertson v Ontario*, 2024 ONCA 86 ("*Robertson*") is a close analogy to this proceeding. *Robertson* involved a proposed class proceeding against the government of Ontario arising from its response to the risks posed by COVID-19 to residents of

long-term care homes. For the section 7 claims, the plaintiffs' core allegation was that the Crown failed to respond to the threat in a timely manner; the repeated complaint was that the measures adopted were delayed, vague and inadequate. In other words, as described by the motion judge, the plaintiffs' claim was that the government response was "too little, too late" (para 74). The Court in *Robertson*, citing *Leroux v Ontario*, 2023 ONCA 314 ("*Leroux*"), drew a distinction between instances where plaintiffs alleged that the government failed to provide certain services at all (which cannot ground a section 7 claim) against instances where claimants may be able to make out a section 7 deprivation that stems from delay in receiving essential benefits for which they are statutorily entitled (paras 77-78). There are close parallels to this case. "Too little, too late" could generally describe the plaintiffs' theory of their case. There is also no statutory entitlement to a certain level of health care, or a certain level or quality of response that is required in response to a public health emergency.

[29] I cannot agree with the plaintiffs that the circumstances here are closer to those in *Leroux*. There, the allegation of breach was not the result of government inaction, rather in the way Ontario administered Developmental Services waitlists. The administration of the program resulted in adults with developmental disabilities, who had been assessed and approved to receive certain types of supports and services, either not receiving them or experiencing substantial delays. A material difference is that the plaintiffs in this action were never promised certain types of supports or services in the DHA or otherwise.

[30] I am therefore not satisfied that a *Charter* remedy is available to the plaintiffs for alleged breach of the duty described in section 4 of the DHA. The Claim must therefore be struck.

IV. The Claim must be Struck Without Leave to Amend

[31] 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).

[32] I am not satisfied that the defects in the Claim can be remedied with better drafting.

[33] When reviewing a pleading, it must be read with a view to understanding its real essence, and gaining a realistic appreciation of the essential character of the proceeding. The Court of Appeal has warned that the Court must not fall for skilful pleaders who are "armed with sophisticated wordsmithing tools and cunning minds." Rather, pleadings must be read "holistically and practically without fastening onto matters of form" (*Canadian National Railway Company v Canada (Transportation Agency)*, 2023 FCA 245 at paras 14-16).

[34] As it currently stands, the Claim is essentially a negligence action, styled as a *Charter* claim. It alleges a duty of care imposed by statute, breach of that duty of care, and damages. Since a breach of a statutory duty cannot constitute negligence, this cannot be cured by amendment.

[35] Even if the claimed statutory duties were stripped out of the Claim, and the allegations relating to the Impugned Conduct remained, a section 7 claim could not be made out.

[36] There is a two-step test for applying section 7. The Court must first determine whether the impugned provisions deprive the claimant of life, liberty, or security of the person. If there is a deprivation, the Court must then determine whether it is contrary to the principles of fundamental justice (*R v Beare*, [1988] 2 SCR 387 at 401).

[37] These steps are sequential. As noted by the Supreme Court in *Blencoe v BC (Human Rights Commission)*, 2000 SCC 44 at para 47, "if no interest in the respondent's life, liberty or security of the person is implicated, the s. 7 analysis stops there."

[38] Even if I was to assume that the Impugned Conduct was a state action that deprived the plaintiffs of life, liberty, or security of the person, I am not satisfied that the plaintiffs can establish that the deprivation is contrary to the principles of fundamental justice.

[39] The Claim asserts that the Impugned Conduct was arbitrary in that it had the effect of failing to ensure that the stated purpose of the cited statutes, which include protecting the physical and mental well-being of Canadians and preventing the introduction and spread of communicable diseases, were achieved. Such an allegation is doomed to fail because it is completely foreclosed by existing jurisprudence.

[40] A law will only be found to be arbitrary "where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person" (*Carter v Canada (Attorney General)*, 2015 SCC 5 at para 83). The fact that a government practice is in some way unsound or that it fails to further the government objective as effectively as a different

course of action would is not sufficient to establish that the government practice is arbitrary (*Ewert v Canada*, 2018 SCC 30 at para 73).

[41] All that is required to demonstrate that the Impugned Conduct is not arbitrary is the existence of some link between that conduct and the objectives they were intended to achieve (*Spencer v Canada (Health)*, 2021 FC 621 at para 117 ("*Spencer*")). *Spencer* also involved a challenge to the government's COVID-19 response, particularly the requirement for certain individuals returning to Canada to stay at government approved accommodation or a designated quarantine facility while awaiting test results. Simply put, in *Spencer* the applicants said the government went too far in its pandemic response; here, the plaintiffs say the government did not go far enough. Either way, the outcome is the same; the fact that government action could have been better does not make a measure arbitrary.

[42] It is self-evident that there is a link between the actions that are collectively described as the Impugned Conduct and the objective of the pandemic response. The plaintiffs may have an argument that the federal government could have done things differently or better during the pandemic, but there is a clear link between what the government did and what it was hoping to achieve. It is plain and obvious that the Impugned Conduct cannot be "arbitrary" for the purposes of section 7.

[43] The Claim also asserts that the Impugned Conduct was overbroad and grossly disproportionate to the objective and purpose of the cited legislation. It is asserted that the Impugned Conduct breached the very purpose of the statutes and increased the risk to the class

members of death or serious outcomes, and is therefore inconsistent with the stated purpose - the protection of the health of the class members.

[44] A law is overbroad when it goes too far and interferes with some conduct that bears no connection to its objective (*R v Nur*, 2015 SCC 15 at para 107). Similarly, whether a law is grossly disproportionate considers whether it overshoots its purpose and infringes an individuals' rights, thereby going far beyond what is necessary to achieve its objective (*Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 at para 96). The rule against disproportionality is only applied in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure (*Spencer* at para 132).

[45] The Claim addresses overbreadth and proportionality in a single paragraph, and says that the Impugned Conduct overreached, and breached the very purpose of the cited statutes. It is not clear how there could be an overreach when the thrust of the Claim is that the government failed to take adequate action. Alleged breach of purpose of a statue does not, and cannot, constitute overbreadth or disproportionality.

[46] Both *Imperial Tobacco* (para 21) and *Atlantic Lottery* (para 19) instruct that the law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial. What the plaintiffs propose is not an incremental development, rather a quantum shift in the application of section 7. If their theory of liability was to be accepted, it would open the door to a section 7 claim for every instance where government response and

action relating to public health (and other issues) was not considered to be optimal or ideal. That is simply not the purpose of section 7, and inconsistent with the jurisprudence interpreting it.

[47] I am therefore satisfied that the Claim must be struck, without leave to amend.

V. The Claim is not Justiciable

[48] I would also strike the Claim without leave to amend on the basis that it is not justiciable.

[49] The defendant asserts that the Claim is not justiciable because it constitutes a scattershot attack on all aspects of Canada's early pandemic response, and that the plaintiffs are asking the Court to embark on an exercise akin to a public inquiry.

[50] Justiciability was recently considered in detail by the Federal Court of Appeal in *La Rose*. There, the statement of claim was struck on a preliminary motion, and that order was reversed on appeal.

[51] In *La Rose*, a number of children and youth initiated an action against Canada for its failure to address the problem of climate change. They sought remedies under sections 7 and 15, contending that the impacts of climate change interfered with their physical and psychological integrity and their ability to make fundamental life choices. They asserted that Canada's legislative response to climate change had a disproportionate effect on their generation and that they have suffered—and will continue to suffer—the consequences, given their vulnerability and age (para 2).

[52] Justiciability distinguishes claims suitable for judicial determination from those that are not. When assessing justiciability, the court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter. The question of institutional capacity asks what the court can do; the legitimacy question asks what the court should do. Courts decline to adjudicate issues that ask that they act beyond their institutional capacity or legitimacy. No firm criteria for assessing justiciability exist, and the boundaries between justiciable and non-justiciable matters are not always clear. The issue often distills to a single question as to whether the claim has a sufficient legal component upon which a court can adjudicate. Claims are not rendered non-justiciable simply because they raise complex or controversial issues (*La Rose* at paras 23-30).

[53] In *La Rose*, the target of the plaintiffs' claims was legislation—existing laws, regulatory instruments and Orders in Council. Even though some of the remedies sought were found to push the boundaries of the Court's competence (para 51), there were legally defined, objective standards against which the *Charter* claims could be assessed (para 38).

[54] I cannot conclude that the Claim articulates, or can be amended to articulate, a legally defined objective standard. I agree with the defendant that there is no judicially manageable standard for assessing whether the federal COVID-19 strategy struck the right balance between medical, economic and social priorities. The Claim refers to two reports of the Auditor General and a separate review of the Global Public Health Intelligence Network by the Minister of Health, however I am not satisfied that these reports establish legally defined, objective

standards against which the *Charter* claims could be assessed. I reach the same conclusion with respect to the general statements of purpose in the legislation relied on by the plaintiffs.

[55] Unlike *Spencer*, the Claim does not challenge a discrete part of the pandemic response, rather multiple actions and policy choices spanning decades. The Court does not have the institutional capacity to decide whether swaths of Canada's overall pandemic response strategy was the best strategy, nor is it a legitimate matter for the Court to decide.

JUDGEMENT in T-2490-22

THIS COURT'S JUDGMENT is that:

1. The fresh as amended statement of claim is struck, without leave to amend.

2. There is no order as to costs.

"Trent Horne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2490-22
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