Federal Court  Cour fédérale

Date: 20220214

Docket: T-1644-21

Citation: 2022 FC 195

Ottawa, Ontario, February 14, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

IRA ZBARSKY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. OVERVIEW

[1] The plaintiff, Ira Zbarsky, who is self-represented, has commenced an action in which he alleges that the Government of Canada's COVID-19 vaccination requirements relating to international air travel infringe his rights under the *Canadian Charter of Rights and Freedoms*. By way of relief, he seeks, at least in part, an order from this Court that would exempt him from

those requirements so that he can continue to engage in development work in Guatemala and Mexico.

[2] The defendant has moved to strike out the statement of claim on several grounds under Rule 221(1) of the *Federal Courts Rules*, SOR/98-106: specifically, that the statement of claim discloses no reasonable cause of action (Rule 221(1)(a)), that it is scandalous, frivolous or vexatious (Rule 221(1)(c)), and that it is an abuse of the process of the Court (Rule 221(1)(f)).

[3] The defendant also seeks an Order for security for costs against Mr. Zbarsky under Rules 416(1)(f) and (g) in the event that the motion to strike is unsuccessful.

[4] For the reasons that follow, I am granting the motion to strike the statement of claim, without leave to amend, on the basis that it discloses no reasonable cause of action. As a result, the motion for security for costs will be dismissed as moot.

II. PRELIMINARY MATTER

[5] The plaintiff's surname is misspelled in the statement of claim as "Zbarky". The correct spelling is "Zbarsky". As part of the Court's order, the style of cause will be amended to correct this error, with immediate effect.

III. BACKGROUND

[6] The two-page statement of claim was issued on October 28, 2021. It is confusingly worded and at points difficult to understand. I would summarize Mr. Zbarsky's allegations as follows:

(a) he is a Canadian citizen who resides in Clinton, British Columbia when he is not travelling internationally;

(b) he works for the Society for the Promotion of Fair Trade and Ecological Development and is required to travel frequently between Canada, Mexico and Guatemala for his work;

(c) on October 6, 2021, the Government of Canada and the Ministry of Transport issued a mandate for non-essential travel requiring travellers to have received two doses of a COVID-19 vaccine ("vaccine mandate");

(d) the vaccine mandate exempts certain essential travel from this requirement; however, since the mandate does not define essential as opposed to non-essential travel, it is vague and over broad;

(e) for various health, religious, spiritual and moral reasons, Mr. Zbarsky refuses to receive any COVID-19 vaccine, as required by the vaccine mandate; and

(f) the vaccine mandate therefore infringes his rights under sections 2, 6, and 7 of the *Charter*, and cannot be saved under section 1.

[7] As he has expressed it, Mr. Zbarsky seeks the following relief:

(a) that by natural immunity, use of healing alternative therapies and by following protocol, he can guarantee his avoidance of any contagious spread of the so called pandemic corona virus;

(b) that he be granted exempt status from any such Order by the Government of Canada on behalf of Her Majesty the Queen mandating the obligatory use of the proposed untested and experimental vaccine therapies;

(c) that his use of air travel to carry out his work be recognized as an essential service; and

(d) that the mandatory vaccination proposed for air travel be interpreted as vague and overly broad, and in violation of sections 1, 2, 6 and 7 of the *Charter*.

[8] One day after filing the statement of claim, Mr. Zbarsky filed a motion seeking interlocutory relief under Rule 373 of the *Federal Courts Rules* suspending the vaccine mandate, declaring his work to constitute essential work for the purpose of the mandate, and granting him an exemption from all vaccine-related requirements for air travel. This motion was prompted by the fact that Mr. Zbarsky was planning to travel to Guatemala for work in the near future.

[9] On November 2, 2021, counsel for the defendant informed Mr. Zbarsky and the Court of their intention to bring a motion to strike out the statement of claim and a motion for security for costs. A Case Management Teleconference was held on November 3, 2021. On November 4, 2021, the Court issued a Direction holding the plaintiff's motion for interlocutory relief in abeyance pending the determination of the defendant's motions. The parties' motion records were filed shortly thereafter.

[10] At Mr. Zbarsky's request, the defendant's motions were dealt with by way of a hearing rather than simply in writing. This hearing eventually took place by teleconference on February 10, 2022.

IV. ANALYSIS

A. *The Motion to Strike under Rule 221(1)(a)*

(1) The Test under Rule 221(1)(a)

[11] Rule 221(1)(a) of the *Federal Courts Rules* provides that, on motion, the Court may order that a pleading such as a statement of claim be struck out, with or without leave to amend, on the

ground that it discloses no reasonable cause of action. The test to be applied is well-known: assuming the facts pled to be true, is it plain and obvious that the statement of claim discloses no reasonable cause of action, that is to say, an action that has a reasonable prospect of success? See *R v Imperial Tobacco Ltd*, 2011 SCC 42 at para 17; see also *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 979-80. This is a stringent test for the moving party to meet. Only pleadings that plainly and obviously fall short of this relatively low threshold should be struck out on this basis.

[12] The same test applies whether the action in question seeks a private law remedy such as tort damages or, as in the present case, a public law remedy such as a remedy under the *Charter*. It also applies to actions and to applications for judicial review: see *Khodeir v Canada (Attorney General)*, 2022 FC 44 at paras 8-9.

[13] To establish a reasonable cause of action, a statement of claim must: (1) allege facts that are capable of giving rise to a cause of action; (2) indicate the nature of the action which is to be founded on those facts; and (3) indicate the relief sought, which must be of a type which the action could produce and the court has jurisdiction to grant: see *Bérubé v Canada*, 2009 FC 43 at para 24, aff'd 2010 FCA 276.

[14] In *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, the Federal Court of Appeal stated the following in upholding an order striking a statement of claim:

> [16] It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. As the judge noted "pleadings play an important role in providing notice and defining the issues to be tried and that the Court and opposing parties cannot be left to speculate as to how

> the facts might be variously arranged to support various causes of action."
>
> . . .
>
> [19] What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability.

[15] A statement of claim should be read "as generously as possible to accommodate any inadequacies in the form of the allegations that are merely the result of drafting deficiencies" (*Operation Dismantle Inc v The Queen*, [1985] 1 SCR 441 at 451). Nevertheless, a plaintiff must plead material facts capable of supporting the claim. This requirement is set out in Rule 174 of the *Federal Courts Rules*, which states that every pleading "shall contain a concise statement of the material facts on which the party relies." On the other hand, a plaintiff does not need to plead the particular legal label associated with a cause of action, nor will a claim be struck out just because the plaintiff chose the wrong label. Instead, on a motion to strike a claim under Rule 221(1)(a), the focus will be on whether the allegations of material facts in the statement of claim, construed generously, give rise to a cause of action: see *Paradis Honey Ltd v Canada*, 2015 FCA 89 at paras 113-14.

[16] Generally speaking, on a motion to strike out a statement of claim, only the statement of claim itself is considered. It stands or falls on its own. A motion to strike "tests the validity of the claim in the abstract, before any evidence is considered" (*Khodeir* at para 10). Thus, the general rule is that the facts alleged in the claim must be assumed to be true. The determinative issue is whether those facts, if true, would be capable of supporting an action with a reasonable

chance of success. If the statement of claim fails to include the material facts necessary to support the action, the claim must be struck out.

(2) The Test Applied

[17] Mr. Zbarsky alleges that an action by the Government of Canada unjustifiably infringes his rights under the *Charter* and that he is entitled to a remedy to prevent the continuation of this infringement. This motion turns on whether he has pled material facts capable of entitling him to the relief he seeks and, relatedly, whether he has pled the elements of the legal tests he seeks to invoke such that the defendant knows how to respond to the claim. Before explaining why I have concluded that he has not done either of these things, it is necessary to address two preliminary questions. First, what is the government action that Mr. Zbarsky alleges infringes his rights under the *Charter*? And second, what legal remedies is he seeking? Neither is altogether clear from the statement of claim. Clarifying these things will help show why his statement of claim, even construed generously, discloses no reasonable cause of action.

[18] As counsel for the defendant correctly points out, the statement of claim does not identify the specific government action – whether order, statute or regulation – that is the target of the action. While this would ordinarily be a serious and perhaps even fatal deficiency, I am not prepared to allow the motion on this ground alone. This is because there is no dispute that the Government of Canada has established vaccine mandates for international flights. Indeed, this is something of which the Court could take judicial notice: see *Canada Evidence Act*, RSC 1985, c C-5, section 17. The particular mandate in question in the statement of claim as drafted will be described further below.

[19] As for the remedies Mr. Zbarsky seeks, they are set out in paragraph 7, above. Whatever is meant by the first form of relief Mr. Zbarsky seeks, it is manifestly not a legal remedy. It would have to be struck out in any event. The third form of relief – that Mr. Zbarsky's work be recognized as essential – appears to be an administrative remedy under the vaccine mandate as opposed to a strictly legal remedy. It appears to be the sort of remedy that, ordinarily, a litigant would have to seek first from an administrative decision maker before coming to this Court on judicial review of an adverse decision: see *Strickland v Canada (Attorney General)*, 2015 SCC 37, at paras 40-45. However, it is not necessary to resolve this issue here because I am satisfied that, generously interpreted, the second and fourth forms of relief sought are recognizable legal remedies – namely, that under some combination of subsection 24(1) of the *Charter* and subsection 52(1) of the *Constitution Act, 1982*, Mr. Zbarsky should be exempted from the application of the vaccine mandate, additional conditions fitting Mr. Zbarsky's circumstances should be read into the vaccine mandate so that he is relieved of the requirement to be vaccinated, or the vaccine mandate should be declared of no force and effect. Thus, in these two respects at least, the statement of claim does indicate the relief sought with sufficient precision and it is relief of a type that the court has jurisdiction to grant.

[20] The determinative issue is whether the statement of claim discloses a reasonable cause of action entitling Mr. Zbarsky to the relief he seeks. As I will now explain, it does not.

[21] The crux of Mr. Zbarsky's claim is set out as follows in the statement of claim (*sic* throughout):

> On October 6th, 2021, The Government of Canada and Ministry of Transport, on behalf of Her Majesty the Queen, issued a vaccine

> mandate for non essential travel, specifying as essential; ferry services on the islands and air travel to and from remote rural communities, without specific definitions of essential versus non essential travel services. The work of the Plaintiff is claimed to be an essential service to the international community. The Order by which the Government of Canada sets a deadline of October 30th, 2021, for air travellers deemed non essential, to receive double doses of a number of untested unproven vaccines (Exhibits available), for which the Plaintiff, in protection of his personal security, mobility rights and religious rights, cannot comply with. The Plaintiff claims to be providing essential service to humanity, which has not been specifically identified with this Government Order and therefore is not exempt. What constitutes essential versus non essential service? This has not been defined under the Order and therefore claimed by the Plaintiff to be vague and overly broad.

[22] The serious and potentially fatal flaw in the statement of claim is that while the Government of Canada did issue a vaccine mandate governing international air travel at about the time the statement of claim was issued, that mandate plainly and obviously does not state what Mr. Zbarsky asserts or implies in the statement of claim.

[23] While the general rule is that on a motion to strike the Court must assume the facts pled to be true, an exception will be made when the facts pled are "manifestly incapable of being proven" (*Imperial Tobacco Ltd* at para 22). In *Operation Dismantle*, the Supreme Court of Canada explained this exception to the general rule as follows:

> The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true.

[24] In the present case, Mr. Zbarsky's assertions about the vaccine mandate referred to in the statement of claim ought not to be presumed to be true because they are manifestly incapable of being proven. The statement of claim is premised on a plain and obvious misunderstanding of the vaccine mandate to which it must be referring. Although arriving at this conclusion requires looking outside the four corners of the statement of claim, in the particular circumstances of this case, it is necessary to do so to achieve a just disposition of this motion and to ensure that public resources are not squandered on a fundamentally ill-conceived piece of litigation.

[25] As drafted, the only vaccine mandate to which the statement of claim can be referring is the one set out in *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43* ("*Interim Order No. 43*"). This Order was made by the Minister of Transport on October 29, 2021. Contrary to what is asserted in the statement of claim, the mandate was not issued on October 6, 2021. Rather, on that date the Prime Minister's Office issued a press release notifying the public that a vaccine mandate for air travellers would be put into effect in the near future.

[26] As set out above, Mr. Zbarsky's claim presumes that, under the federal vaccine mandate, as of October 30, 2021, all air travellers deemed non-essential must be fully vaccinated if they wish to enter or leave Canada. That is plainly and obviously not the case.

[27] Briefly stated, the mandate set out in *Interim Order No. 43* provides that every person who is 12 years of age plus 4 months, or older, must be fully vaccinated *or* produce a valid COVID-19 molecular test result to board a flight departing from an airport in Canada, including

international flights: see paragraphs 17.1 to 17.4 of *Interim Order No. 43*. The source of the confusion may well be the October 6, 2021, press release, which stated that effective October 30, 2021, "travellers departing from Canadian airports [. . .] will be required to be fully vaccinated, with very limited exceptions." Of course, a government press release is not a vaccine mandate, nor is it susceptible to a legal challenge like the one Mr. Zbarsky has attempted to bring.

[28] Further, Mr. Zbarsky claims that the vaccine mandate prevents him from returning to Canada because he refuses to get vaccinated. However, *Interim Order No. 43* does not require Canadian citizens who are returning to Canada by air to be vaccinated.

[29] In short, the statement of claim presumes something that is simply not the case – that the vaccine mandate for international air travel that prompted Mr. Zbarsky to bring the action in the first place required him to get vaccinated. That would ordinarily be sufficient to strike out the statement of claim on this ground alone. However, in the unusual circumstances of this case, this is not necessarily the end of the matter.

[30] To meet effectively the challenges of a public health crisis like the COVID-19 pandemic, government measures like vaccine mandates may need to evolve to take into account changing conditions, improvements in scientific knowledge, and improvements in the understanding and availability of safe and effective public health measures, among other things. As a result, a measure like a vaccine mandate will almost inevitably prove to be something of a moving target for someone who might wish to challenge its constitutionality. While I have found the statement

of claim to be fundamentally defective in the way I have just described, I must also consider whether this defect could be cured by an amendment: see *Simon v Canada*, 2011 FCA 6 at paras 8 and 14. An otherwise sufficient statement of claim should not be struck out simply because it has been overtaken by events if a genuine legal question remains to be decided.

[31] Shortly after Mr. Zbarsky commenced this action, *Interim Order No. 43* was repealed and replaced by *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 44*. The measure currently in force is *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 54* ("*Interim Order No. 54*"), which came into effect on February 10, 2022. As it happens, it does include requirements that are much closer to what Mr. Zbarsky (mistakenly) presumed to be the case when he drafted his statement of claim. See in particular, paragraph 17.3(1) of *Interim Order No. 54*, which states:

> 17.3 (1) A person is prohibited from boarding an aircraft for a flight or entering a restricted area unless they are a fully vaccinated person.

[32] It appears that this requirement was first introduced in *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 47*, which came into effect on November 30, 2021.

[33] In my view, even if the statement of claim were amended to refer to the more stringent vaccine mandate that is currently in effect under *Interim Order No. 54*, it would still be fatally deficient.

[34] The current mandate does impose a general requirement to be vaccinated to board an aircraft but it also includes several exemptions from this requirement, including travel for essential medical services and treatment, emergency and urgent travel, medical inability to be vaccinated, and sincere religious belief opposing vaccination: see paragraph 17.3(2) of *Interim Order No. 54*. In such cases, a passenger who is recognized as being entitled to an exemption will have to present a valid COVID-19 molecular test in order to be permitted to board an aircraft.

[35] Given this, it is not the case that the more stringent vaccine mandate currently in place prevents Mr. Zbarsky from boarding an international flight leaving Canada simply because he refuses to get vaccinated. At most it imposes a conditional obligation on him: *if* he wishes to board an international flight departing Canada *and* he does not qualify for an exemption, *only then* must he be fully vaccinated. And in any event, no such restrictions are placed on him returning to Canada: see paragraphs 11 to 17 of *Interim Order No. 54*. Mr. Zbarsky has failed to plead any material facts capable of establishing that his *Charter* rights are even engaged in these circumstances.

[36] Furthermore, even if his *Charter* rights were engaged, Mr. Zbarsky has failed to plead any material facts capable of establishing that the vaccine mandate infringes those rights. Again assuming for the sake of argument that the statement of claim could be amended to refer to the vaccine mandate that is currently in force, Mr. Zbarsky has not pled any material facts capable of establishing that he would not be entitled to an exemption, that having to seek an exemption on specified grounds infringes his *Charter* rights, or that the existing exemptions are

unconstitutionally vague or narrow. The alleged *Charter* breaches Mr. Zbarsky asserts are entirely hypothetical. In any event, Mr. Zbarsky has failed to plead the constituent elements of the legal tests for determining whether his rights under any of sections 2, 6(1) or 7 of the *Charter* have been infringed and, if so, the legal remedy to which he is entitled. In short, he has failed to plead, even in summary form, the constituent elements of the legal grounds he raises. All these deficiencies leave the defendant unable to know how to answer the claim.

[37] Material facts must be pled to support *Charter* claims no less than any other type of claim on which an action rests: see *Mancuso* at paras 22-24. Bald, conclusory statements are insufficient: see *Amos v Canada*, 2017 FCA 213 at paras 33-36. Allowing *Charter* litigation to proceed when a pleading lacks the requisite material facts risks trivializing the *Charter*: *c.f. Mackay v Manitoba*, [1989] 2 SCR 357 at 361-62.

[38] In oral submissions on this motion, Mr. Zbarsky (who is currently outside Canada) appeared to acknowledge that he would not be prevented from returning to Canada by the vaccine mandate currently in force. His concern is that if he returns, he will not be able to leave again. However, as stated above, he has failed to plead material facts to establish that the requirements of the vaccine mandate for departing air travellers infringe his *Charter* rights.

[39] Finally, even if the statement of claim could be amended to refer to the vaccine mandate for air travellers that is currently in force, it remains fatally deficient in other ways that could not be cured by further amendments. Having given careful consideration to Mr. Zbarsky's written and oral submissions, including potential amendments he has suggested, I am satisfied that the

defects in the claim identified above are so fundamental that no amendment to the statement of claim could bring it to the point of disclosing a reasonable cause of action: see *Gagné v Canada*, 2013 FC 331 at para 22. Consequently, the statement of claim should be struck out, without leave to amend.

B. *The Motion to Strike under Rule 221(1)(c) and (f)*

[40] Since the determination that the statement of claim discloses no reasonable cause of action is a sufficient basis to strike out the statement of claim and dismiss the action, strictly speaking it is not necessary to find that it should also be struck out as frivolous or vexatious or as an abuse of the court's process. That being said, Mr. Zbarsky should not take any comfort from this. The law is clear that a statement of claim that does not sufficiently reveal the facts or legal principles on which it is based, leaving the defendant unable to know how to answer and the Court unable to regulate the proceeding, is a vexatious action: see *Ksikawpimootewin v Canada*, 2004 FC 1426 at paras 8-9.

[41] The present case joins a list of cases Mr. Zbarsky has brought recently that have met the same fate:

- In *Zbarsky v BC Ministry of the Attorney General* (Court File No. T-410-19), Prothonotary Ring struck out the statement of claim on the basis that the Federal Court lacked jurisdiction to entertain the action and, in any event, the claim disclosed no reasonable cause of action and was vexatious.

- In *Zbarsky v Elections Canada* (Court File No. T-1693-19), Prothonotary Ring struck out the statement of claim on the basis that it disclosed no reasonable cause of action and was vexatious.

- In *Zbarsky v Her Majesty the Queen* (Court File No. T-1800-19), Prothonotary Ring struck out the statement of claim on the basis that it disclosed no reasonable cause of action and was frivolous and vexatious. That decision was upheld by Justice St. Louis on appeal.

- In *Zbarsky v Her Majesty the Queen* (Court File No. T-1485-21), Prothonotary Coughlan struck out the statement of claim on the basis that it disclosed no reasonable cause of action.

[42] I do not doubt the sincerity of the beliefs that led Mr. Zbarsky to launch the present action. He would, however, have been well-advised to try to learn from his past experiences as a litigant before launching yet another legal action that was doomed to fail.

C. *Other relief sought*

[43] Since the statement of claim is struck out without leave to amend, the action must be dismissed. As a result, the defendant's motion for security for costs has become moot. So too has Mr. Zbarsky's motion for interlocutory relief.

V. CONCLUSION

[44] For these reasons, the defendant's motion is granted, the statement of claim is struck out without leave to amend, and the action is dismissed.

[45] The defendant seeks costs in the all-inclusive, lump sum amount of $450. In the circumstances, this is an entirely reasonable request.

JUDGMENT IN T-1644-21

THIS COURT'S JUDGMENT IS THAT

1. The style of cause is amended to reflect the correct spelling of the plaintiff's surname.
2. The defendant's motion is granted.
3. The statement of claim is struck out, without leave to amend.
4. The action is dismissed.
5. The defendant's motion for security for costs is dismissed as moot.
6. The plaintiff's motion for interlocutory relief is dismissed as moot.
7. Costs are awarded to the defendant in the fixed amount of $450.00, inclusive of taxes and disbursements.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1644-21
STYLE OF CAUSE:	IRA ZBARSKY v HER MAJESTY THE QUEEN
PLACE OF HEARING:	HELD BY TELECONFERENCE
DATE OF HEARING:	FEBRUARY 10, 2022
JUDGMENT AND REASONS:	NORRIS J.
DATED:	FEBRUARY 14, 2022

APPEARANCES:

Ira Zbarsky	ON HIS OWN BEHALF
Olivia French	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT