Federal Court  Cour fédérale

Date: 20230207

Docket: T-1765-21

Citation: 2023 FC 181

Ottawa, Ontario, February 7, 2023

PRESENT: Associate Judge Mireille Tabib

BETWEEN:

ADAM WOJDAN, ALANA MATHESON, ALEXANDER NEVIN HOBBS, ALEXANDRA BODE, ALEXANDRA JANE HARRISON, ALICIA DIAZ DE LA SERNA, ALLAN EMMETT NOLAN, AMANDA JOANNE WELLS, ANA LUCIC, ANA POTAKIS, ANASTASIA DALY, ANDREA B. MILLER, ANDREEA LIVIA MODREA, ANDRÉE-FRANCE PAGÉ, ANGELA NATHALIE GUENTERT, ANIK MARIE-LOU ARAND, ANNA DOROTA YAARY, ANNA MAGDALENA RATAJCZAK, ASHLEY GAIL BRUNET, AUDREY GENEVIEVE LACASSE, AUTUMN MARIE CARDY, BARBARA ANN BERGSMA, BELINDA KATO, BIANCA BOUCHER, BRANDON BRUCE LEO SMITH, BRANDON JAY MERRILL, BRENT R EPPS, CALVIN BEDROS, CALVIN JOHN KOTOWICH, CARL THIESSEN, CARLY VIOLA LARSEN, CAROL-ANN MARY DODD, CAROLEE ANNE STEWART, CATALINA MIHAI OBREJA, CATALIN CAZAN-MACISANU, CATALINE SOLOMAN, CHAD MICHAEL GAGNON, CHARLES-PHILIPPE SAJOUS, CHRISTIAN FESTEJO, CHRISTIAN JOSEPH ANDRÉ GAGNÉ, CHRISTINE SERBAN, CHRISTINE SUSAN GRAY HUTCHINS, CHRISTINE SYLVIA DANIS, CHRISTOPH PHILIPPE DAUDIN, CHYLOW NADINE HALL, CINDY MILDRED DERAICHE, CLAIRE BRETON-PACHLA, COREY GERALD JOSEPH GAUTHIER, COREY JOHN CHARLES CRABTREE, CORY LALONDE, CRAIG STUART MCGUIGAN, DAISY-IVY BODE, DANA TOMA, DANIEL EMANUEL ANINOIU , DANIEL GEORGE GERALD KRAUTER, DANIEL LIONEL GASTON GIROUX, DANIEL NATHAN BUDD, DANIEL WILLIAM ADSHADE, DANNY ALLEN EDWARD HONE, DAVID JOHN DEMPSTER, DAVID MCNICOLL, DEAN ALLAN LEROY DAVIS, DEANNA GETZ, DEBBIE LYNN PREVOST, DENIS LECOMPTE, DENISE GABRIELLA NICOLE RAMSANKAR, DERRICK ANTHONY BELL, DÉSIRÉE-LYNN ROCHON, DHEEPA MURTHY, DIANNE EVERLYNE MARIE FLYNN, DONEEN COXE, DONNA JUNE STAINFIELD, EDMUND MCLAUGHLIN, ELAINE J. HEYINK, ELENA PALMIERI, ELIZABETH

JOSEPHINE DROCHOLL, EMILIE GABRIELLE CYR, FARRAH ESPERA, FILIPPAS LAVIDAS, FRANCE RENÉE PARADIS, FRANCIS EMOND, FRANCK ARMEL DIEDRO, FRANK MOURA RODRIGUES, GAËL BRASSARD, GIUSEPPE SALERA, GIUSEPPINA TRAPANI, GORDON WILLIAM HILL, GREGORY J D DALE, HAMID NAGHDIAN-VISHTEH, HANNA "JOHN" GEBARA, HEIDI SCHENKEWITZ, HOLLY ANN JEFFERD, IKECHUKWU PRECIOUS ARUNGWA, JACOB ALLEN ELLIOTT, JACQUELYN ANN STEVENSON, JADE BERGERON, JAMES EDISON JOHN SNIVELY, JASBIR SINGH KAILA, JAY CHRISTOPHER SINHA, JEFFERY LADOUCEUR, JENNIFER ANN THIESSEN, JENNIFER LYNN MCKEOWN, JENNIFER LYNNE STANNARD, JENNIFER MARIE JUST, JÉRÉMY BENOIT, JESSICA LEIGH WADDELL, JILI LI, JOHANNE LAROCHE, JOHN DONALD MARSHALL JR., JONATHAN CHARLES SERGIUS MANKOW, JONATHAN DAVID GIROUX, JONATHAN TASKER, JOSÉE SIVRE, JOSEPH BREFNI WARREN MACDONALD, JOSHUA NATHANIEL TORTORICI, JULIE BLOUIN, JULIE DIANE SOOK HARN MA, JULIE DONNA MOUNCE COMBER, KALIN KOSTADINOV STOYANOV, KARINE MARIE ELIZABETH GÉLINAS, KATHLEEN BRIDGET MULHOLLAND, KELLY ANNE GRENIER, KELSEY WARNOCK, KERSTIN SYKES, KEVIN LYSIUS CÔTÉ, KHRISTEN VASSEUR, KIMBERLEY ANN GIROUX, KIMBERLY NATASHA JOY LANE, KIMBERLY ANNE LISSEL, KIRSTEN PATRICIA HALL, KRISTEN ALEXANDRA SOO, KRISTINE GRAVELLE, KYLE ROYCE STUPPLE, LANCE AARON STUART DIXON, LAURA PALMA HECIMOVIC, LAURA SUZANNE YKEMA, LILLIAM SCHULZ BECHARA, LINDA BENKAIOUCHE, LINDSAY VIRGINIA DAGENAIS, LISA JANE LAWR, LLOYD WILLIAM SWANSON, LOU ANN F. GOVEAS, LUC LAFLEUR, LUCAS BRETT REID, LUKE BEDROS-ZAVODNI, LYANE Y. GIROUX, LYNE JOSEE SURETTE, MANON TREMBLAY, MARC HENRY DOMINIQUE, MARIE BETHIE THIMOT, MARIE CLAIRE SONIA CARIGNAN, MARIE GENEVIEVE PIERRETTE BERGERON, MARIE NICOLE DOROTHÉE LISE HOUDE, MARIE-CLAUDE PAGÉ, MARIE-FRANCE LADOUCEUR, MARILYN DUFRESNE, MARK LAVAL JAEKL, MARTINE JOSEPH, MARVIN ROLANDO CASTILLO, MARY DEANNA THOMPSON, MARY ELLEN RENAUT, MARY NATALIE DAWN VELLENDA, MARY-ANN HUE, MATHIEU LEMAY, MATTHEW BRADEN CAPELL, MÉLISSA HÉLENE GAUTIER, MELISSA SHARON COOPER, MELISSA SUZANNE MARTIN, MERIEM MOKAIRITA-LAMSSAHHAL MELISSA RICCIARDELLI, MICHAEL ALBERT FALCONE, MICHAEL DOUGLAS ANDERSON, MICHAEL ERIC LLOYD, MICHAEL STEVEN GENDRON, MICHAEL THEODORE SHOSTAK, MICHAL WALCZAK, MICHELLE LALANDE, MONA ABRAHAM KIAME, MONIQUE BRUYERE, MORGAN ANDREW WATTS, NADINE KASPICK, NANCY ANN DUNPHY, NATASHA MARIE BUDY, NATHALIE LACROIX, NICHOLAS GUENETTE, NICQUES MWILAMBWE YUMBA, OLIVIA LOUISE

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Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] The Respondent, the Attorney General of Canada ("Canada"), brings this motion to strike the present application on the basis that it is moot or, alternatively, that it is premature.

[2] As stated in the Notice of Application, the Applicants are all federal public servants who are affected by the Treasury Board's Policy, issued October 6, 2021, pursuant to the *Financial Administration Act* RSC 1985 c F-11, requiring all federal public servants to be vaccinated against Covid-19. The Application for judicial review seeks the following substantive relief:

> (a) a declaration that the Policy on Covid-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police ("Policy") […] be declared inoperative and unconstitutional, and in violation of the Applicants' rights and freedoms pursuant to sections 7 and 15 of the Canadian Charter of Rights and Freedoms […] (the "Charter").
>
> (b) In the alternative, a declaration that the sanctions provided for at paragraph 7.1, 7.2 and 7.3 are inoperative and unconstitutional, in violation of sections 2, 7 and 15 of the Charter.
>
> (c) […]
>
> (d) The issuance of a permanent injunction against the continued implementation of the Policy.

[3] Sections 7.1, 7.2 and 7.3 of the Policy, referred to in (b) above, are the provisions whereby employees who remain unvaccinated or refuse to disclose their vaccination status are placed on administrative leave without pay.

[4] It is worth noting that the Applicants have also filed an action seeking the same declarations and injunction, as well as damages for Charter violations and punitive and exemplary damages. While that action remains pending, Canada has also brought a motion to strike it. That motion was heard concurrently with the present motion and is the subject of a separate order.

[5] On June 14, 2022, the Government of Canada announced the suspension of the vaccination mandate for the Core Public Administration and the RCMP, as set out in the Policy. Further, as of June 20, 2022, federal public servants who were subject to administrative leave without pay as a result of the Policy were able to resume regular work. Canada therefore submits that this Application has become moot, there being no live controversy remaining between the parties. For that reason, it submits that the Application should be struck.

[6] The Applicants acknowledge that, as a matter of fact, the Policy has indeed been suspended and is no longer applied. However, they emphasize that the Policy is merely suspended, not revoked, and that it could be reinstated at any moment. They accordingly submit that there remains a live controversy between the parties and that the matter is not moot. Even if it is, they submit that the Court should exercise its discretion to allow the matter to be determined notwithstanding mootness.

[7] Should the Court find that the Application is not moot or that the Court should exercise its discretion to hear it, Canada submits that the Application is premature and should be dismissed because the Applicants had an adequate alternative remedy that they failed to pursue.

[8] Motions to strike that raise issues of mootness and prematurity differ from motions to strike on the basis that the proceeding fails to disclose a reasonable cause of action in that it is permissible for the moving party to adduce evidence to establish the facts upon which the finding of mootness, prematurity or lack of jurisdiction may be based. Canada has accordingly filed evidence to establish that all of the Applicants, as members of the Core Public Administration, are subject to the *Federal Public Sector Labour Relations Act* SC 2003 c 22 ("FPSLRA") and have access to the grievance process provided by s 208 of the FPSLRA. That section establishes the right of any employee to grieve in respect of "the interpretation or application of any direction of the employer that deals with terms and conditions of employment". This includes regular members of the RCMP, unless they are officers or managers, as expressly excluded by the terms of s 206 FPSLRA. While some of the Applicants are said to be members of the RCMP, the evidence is to the effect that those members are regular members and thus, entitled to the same grievance process as all of the Applicants. The Applicants have not challenged this evidence or denied that the individual grievance process of s 208 is open to them. What they argue is that this process is not "adequate" for the determination of the issues raised in this Application.

[9] The parties do not disagree as to the test that must be met by Canada in order to succeed in respect of either aspect of this motion. Canada must show that the Application is "so clearly improper as to be bereft of any possibility of success." (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.* 2013 FCA 250 at paras 47-48).

The issues for determination on this motion are therefore the following:

(a) Is the Application moot, and if so, should this Court exercise its discretion to hear it notwithstanding its mootness?

(b) Should the Application be dismissed because the Applicants have failed to avail themselves of an adequate alternative remedy?

I. Mootness

[10] The two-step analysis on a mootness argument is well known. It is spelled out in *Borowski v Canada (Attorney General)* [1989] 1 SCR 342. This test has, moreover, been applied numerous times by this Court in respect of proceedings taken against Covid-19 measures following the suspension or revocation of those measures: *Wojdan et al v Canada (Attorney General)* 2022 FCA 120; *Lavergne-Poitras v Canada (Attorney General) 2022 FC 1391; Ben Naoum et al. v Canada (Attorney General)* 2022 FC 1463; *Kakuev v Canada* 2022 FC 1465. These cases are determinative of the issue raised on the mootness aspect of this motion.

[11] In all those cases, the Court found that the suspension or revocation of the measures that the applicants were seeking to judicially review had the effect of extinguishing any live controversy between the parties. The Court found that the matter was indeed moot and that it should not exercise its discretion to hear it.

[12] I acknowledged that *Wojdan* concerned only the interlocutory injunction aspect of this application and that *Ben Naoum* and *Kakuev* related to policies that had been revoked or had expired rather than policies that were merely suspended, as is the case here. *Lavergne-Poitras,* however, is on all fours with this case. It concerned the Canadian Government's "Covid-19

vaccination requirement for supplier personnel" which had been suspended rather than revoked.

The Court found as follows, at paras 14 to 17:

> 14 As far as I am concerned, there is no longer a tangible and concrete dispute between the parties. The policy is suspended and as a result, Mr. Lavergne-Poitras has obtained the interim relief sought in the underlying application. With regard to the declarations that he seeks as final relief, any such declaration will have no impact on Mr. Lavergne-Poitras's rights because the policy is no longer in effect (Cheecham v Fort McMurray #468 First Nation, 2020 FC 471 at paras 26, 29 [).
>
> 15 With regard to Mr. Lavergne-Poitras's concerns regarding the potential reinstatement of the policy, I agree with the AG that such concerns are speculative (N.O. at para 4); given that there is no longer a bar on Mr. Lavergne-Poitras's employment at PMG, the substratum of the underlying application is no longer present (Borowski at 357). With respect to his intent to seek financial compensation by way of action, potential future litigation is insufficient to raise a live controversy (Cheecham at para 27).
>
> 16 While Mr. Lavergne-Poitras argues that this litigation is not about the appropriateness of the policy when it was implemented, but rather about the legality of the government's actions overall, to decide such questions abstracted from their factual context when their determination would serve no useful purpose beyond precedent-setting would be an entirely academic exercise (Rebel News Network Ltd v Canada (Leaders' Debates Commission), 2020 FC 1181 at para 64 [).
>
> 17 As there is no live controversy, the underlying application is moot. The remaining question to be determined is whether the Court should nevertheless exercise its discretion to hear this matter.

[13] This reasoning equally applies to the facts of this matter.

[14] The Applicants argue that there remains a tangible dispute between the parties, given the outstanding action for damages, and that the decision to be rendered in this matter will impact the outcome of that action. That argument is indistinguishable from the argument made in

Lavergne-Poitras and summarily dismissed at para 15, cited above, and in *Ben Naoum*. The Court's determination in *Ben Naoum* is found in the following paragraphs:

> 28 Generally speaking, the Applicants seek declarations of invalidity, on various grounds, in respect of the repealed air and rail passenger vaccine mandates. Yet, it is well known that Courts should refrain from expressing opinions on questions of law in a vacuum or where it is unnecessary to dispose of a case. Any legal or constitutional pronouncement could prejudice future cases and should be avoided (Phillips v Nova Scotia Commissioner of Inquiry into the Westray Mine Tragedy, [1995] 2 SCR 97, at para 12).
>
> 32 Finally, I agree with the Respondent that requests for declaratory relief cannot sustain a moot case in and of itself and that the declaratory remedies the Applicants seek fail to provide live issues for judicial resolution. Mootness "cannot be avoided" on the basis that declaratory relief is sought (Rebel News Network Ltd v Canada (Leaders' Debates Commission), 2020 FC 1181, at para 42). Courts will grant declaratory reliefs only when they have the potential of providing practical utility, that is, if when they settle a "live controversy" between the parties. The Court sees no practical utility in the declaratory reliefs sought by the Applicants.
>
> 41 As stated above, these proceedings will have no practical effect on the rights of the Applicants. They have obtained the full relief available to them and a decision of the remaining declaratory relief would provide them no practical utility. <u>If they suffered damages as a result of these IOs/MO being in force, they would have to bring an action against the Crown and have their respective rights assessed in light of all the relevant facts.</u>
>
> (emphasis added)

[15] The existence of a pending action in this case is of no more moment than the firmly held and demonstrated intention to commence a similar action was in *Lavergne-Poitras* and *Ben Naoum.*

[16] The only case brought to my attention in which a Canadian court exercised its discretion to determine an application relating to Covid-19 measures despite its mootness was *Syndicat des*

Metallos, Section locale 2008 c Procureur Général du Canada 2022 QCCS 2455 (CanLii). Like the Court in *Lavergne-Poitras* and *Ben Naoum*, I find that case clearly distinguishable. The revocation of the vaccination policies for passengers and employees of the federally regulated transportation sector in that case had occurred after the matter had been fully heard, and while the Court was deliberating. Both parties were desirous of having a decision on the issues raised. That is a far cry from the matter at hand, where the Application is at its very beginning and the Attorney General actively seeks its dismissal.

[17] Applying the cases of *Lavergne-Poitras* and *Ben Naoum*, I find that this matter is moot, in that there remains no live controversy between the parties, and no practical utility or purpose in the declaratory relief sought by the Applicants. I also find that, despite the clear existence of a continuing adversarial context, judicial economy does not militate in favour of allowing this matter to proceed. The issues raised in this Application are not evasive of judicial review, as found by the Court in *Ben Naoum* at paragraph 42. Finally, in the absence of a live controversy, the Court would be exceeding its mandate by making pronouncements without practical consequences.

II. Prematurity

[18] Even if I were wrong in respect of the mootness issue, I am satisfied that the individual grievance process open to the Applicants constitutes an adequate alternative relief. The Application is accordingly premature and doomed to fail, as the Applicants were bound to exhaust this avenue of redress before seeking judicial review.

[19] The circumstances of this case are indistinguishable from those in *Murphy v Canada (Attorney General)* 2022 FC, upheld at 2023 FC 57. In that case, federal employees who had access to the individual grievance process provided by s 208 of PSLRA sought to judicial review the very same Covid-19 Policy as is at stake in this Application. The Court found that this individual grievance process constituted an adequate alternative remedy, of which the Applicants were required to avail themselves before turning to the courts.

[20] The Applicants appear to submit, relying on the case of *Northern Regional Health Authority v Horrocks* 2021 SCC 42 at para 38, that only disputes that arise from collective agreements must obligatory proceed through the internal administrative process, to the exclusion of the courts. The Applicants clearly misread and misapply *Horrocks.* That case concerned the limits of the exclusive jurisdiction of labour arbitrators in respect of disputes arising from a collective agreement. As the Applicants themselves point out, the Policy is not included in a collective agreement. Further, *Horrocks* does not concern the effect of alternative administrative remedies on the availability of recourse to the court system. It merely applies to the determination of whether recourse to arbitration in respect of disputes arising from a collective agreement excludes recourses to other administrative tribunals of overlapping jurisdiction, such as human rights tribunals.

[21] The cases cited in *Murphy*, (*Canada (Border Services Agency) v CB Powell Limited* 2010 FCA 61, *Bron v Canada (Attorney General)* 2010 ONCA 71 and *McCarthy v Canada (Attorney General)* 2020 FC 930) remain applicable and binding. These cases establish the principle that the existence and availability of a labour grievance process precludes judicial review.

[22] The Applicants argue that the only recourse available to them under the FPSLRA to "properly" challenge the Policy "in terms of its general application" is the policy grievance process contemplated by s 220 FPSLRA. They say that this recourse is not, however, open to them because the Policy is not incorporated in the collective agreement and cannot therefore be the subject of a group or policy grievance. This argument is without merit. It is not material to the determination of this motion that the issues may not be amenable to determination through another and possibly better administrative process. The only relevant question is whether there is at least one adequate alternative remedy available to the Applicants. As per the determination of the Court in *Murphy,* the individual grievance process is such an adequate remedy. The Applicants have not made any cogent argument as to why the issues raised in this Application as to the alleged invalidity of the Policy cannot be raised and adequately determined in an individual grievance.

[23] The Applicants do argue that the FPSLRA precludes grievances, whether individual, group or policy, relating to "any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada" (see s 220 (4) and s 208 (6) of the FPSLRA). This argument is fully answered by the decision in *Murphy*. It was held, at para 77, that:

> 77 To conclude on the first issue, the fact that the limitations contained in subsections 208(2) through (6) may result in an individual grievance being inadmissible does not render the grievance process inadequate or ineffective such that it permits an applicant to bring a judicial review prior to completing the statutory grievance process.

[24] In conclusion, it is plain and obvious that the Applicants, under the FPSLRA, had access to the individual grievance process of s 208, in the context of which they could contest the validity of the Policy on all grounds raised in the Notice of Application. Some of the Applicants indeed availed themselves of this process. Whether an individual Applicant filed a grievance or chose not to do so is not relevant to the outcome of this motion. What matters is that this recourse was available and capable of providing an adequate remedy to the Applicants' issues. They had an obligation to exhaust this recourse and their attempt to short-circuit the process to address this Court directly on judicial review is premature and constitutes an abuse of process.

[25] Following the hearing, at the request of the Court, the parties advised that costs on this motion should to be awarded to the successful party, in the amount of $2250.

THIS COURT ORDERS that:

1. This application struck.

2. Cost, in the amount of $2250, are awarded in favour of the Respondent.

"Mireille Tabib"

Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 31, 2022
REASONS FOR ORDER AND ORDER:	TABIB P.
DATED:	FEBRUARY 7, 2023

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