



Date: 20211116

Docket: T-1704-21

Citation: 2021 FC 1244

Ottawa, Ontario, November 16, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ADAM WOJDAN, ALANA MATHESON, ALEXANDER N HOBBS, ALEXANDRA BODE, ALEXANDRA JANE HARRISON, ALICIA DIAZ DE LA SERNA, ANA POTAKIS, ANASTASIA DALY, ANDREA B MILLER, ANDREE FRANCE PAGE, ANDREEA LIVIA MODREA, ANIK MARIE-LOU ARAND, ANNA BROWN, ANNA DOROTA YAARY, ASHLEY BRUNET, AUDREY GENEVIEVE LACASSE, AUTUM CARDY, BIANCA BOUCHER, BRANDON BRUCE LEO SMITH, BRANDON JAY MERRILL, CARL THIESSEN, CARLY LARSEN, CAROL-ANN DODD, CATALINA CAZAN-MACISANU, CATALINE SOLOMAN, CHAD MICHAEL GAGNON, CHAR-LEIGH POTVIN, CHARLES PHILIPPE SAJOUS, CHRISTIAN FESTEJO, CHRISTIAN GAGNE, CHRISTINE DANIS, CHRISTINE SERBAN, CHRISTINE SUSAN GRAY HUTCHINS, CHRISTOPH PHILIPPE DAUDIN, CHYLOW HALL, CINDY MILDRED DERAICHE, COREY CRABTREE, COREY GAUTHIER, CRAIG MCGUIGAN, DAISY IVY-BODE, DANA TOMA, DANIEL EMANUEL ANINOIU , DANIEL LIONEL GASTON GIROUX, DANIEL NATHAN BUDD, DANIEL WILLIAM ADSHADE, DANNY ALLEN EDWARD HONE, DAVID JOHN DEMPSTER, DAVID MCNICOLL, DEAN A L DAVIS, DEANNA GETZ, DEANNA THOMPSON, DENIS LECOMPTE, DENISE GABRIELLA NICOLE RAMSANKAR, DERRICK ANTHONY BELL, DESIREE LYNN ROCHON, DIANNE FLYNN, DONNA STAINFIELD, DR. JULIE DONNA MOUNCE COMBER, EDMUND MCLAUGHLIN, ELENA PALMIERI, ELIZABETH DROCHOLL, EMILIE GABRIELLE CYR, FARRAH ESPERA, FILIPPAS LAVIDAS, FRANCE RENÉE PARADIS, FRANCIS EMOND, FRANCK ARMEL DIEDRO, FRANK MOURA RODRIGUES, GAEL BRASSARD, GENEVIEVE BERGERON, GIUSEPPE SALERA, GIUSEPPINA TRAPANI, GORDON WILLIAM HILL, GREGORY DALE, HAMID NAGHDIAN-VISHTEH, HANNA GEBARA, HEIDI SCHENKEWITZ, HOLLY ANN JEFFERD, JACOB ALLEN ELLIOTT, JADE BERGERON, JAMES EDISON JOHN SNIVELY, JASBIR SINGH

**KAILA, JAY CHRISTOPHER SINHA, JEFFERY LADOUCEUR,
JENNIFER ANN THIESSEN, JENNIFER LYNNE STANNARD,
JENNIFER MARIE JUST, JENNIFER MCKEOWN, JESSICA LEIGH
WADDELL, JILI LI, JOANNE ELISABETH COUSINEAU, JOHANNE
LAROCHE, JOHN DONALD MARSHALL JR., JONATHAN CHARLES
SERGIUS MANKOW, JONATHAN DAVID GIROUX, JONATHAN
RAYMOND CHOW, JONATHAN TASKER, JOSÉE SIVRE, JOSEPH
BREFNI W MACDONALD, JULIE BLOUIN, JULIE DIANE S H MA,
KALIN KOSTADINOV STOYANOV, KARINE GELINAS, KATHY
MULHOLLAND, KELLY ANNE GRENIER, KELSEY WARNOCK,
KERSTIN SYKES, KEVIN LYSIUS COTE, KHRISTEN, KIMBERLEY
ANN GIROUX, KIMBERLY LISSEL, KRISTEN ALEXANDRA SOO,
KYLE ROYCE STUPPLE, LANCE AARON STUART DIXON, LAURA
PALMA HECIMOVIC, LAURA SUZANNE YKEMA, LILLIAM SCHULZ
BECHAR, LINDA BENKAIUCHE, LINDSAY VIRGINIA DAGENAIS,
LISE HOUDE, LLOYD WILLIAM SWANSON, LUC LAFLEUR, LUCAS
BRETT REID, LUKE BEDROS ZAVODNI, LYANE GIROUX, MANON
TREMBLAY, MARC DOMINIQUE, MARIE BETHIE THIMOT, MARIE
CLAIRE SONIA CARIGNAN, MARIE-CLAUDE PAGÉ, MARIE-FRANCE
LADOUCEUR, MARIE-FRANCE LADOUCEUR, MARILYN
DUFRESNE, MARK LAVAL JAEKL, MARTINE JOSEPH, MARVIN
CASTILLO, MARY-ANN HUE, MATHIEU LEMAY, MELISSA MARTIN,
MELISSA RICCIARDELLI, MERIEM MOKAIRITA-LAMSSAHHAL,
MICHAEL ALBERT FALCONE, MICHAEL DOUGLAS ANDERSON,
MICHAEL LLOYD, MICHAEL SHOSTAK, MICHAEL STEVEN
GENDRON, MICHAL WALCZAK, MICHELLE LALANDE, MIKE
NOLAN, MR WE SEONG LIM, NADINE KASPICK, NANCY DUNPHY,
NATASHA MARIE BUDY, NATHALIE DREW, OLIVIA JENKINSON,
PABLO ROMAN DICONCA, PANAGIOTA STAPPAS, PASCAL
MUSACCHIO, PATRICK HILBORN, PAWEL SZOPA, PEREZ HONG,
PIERRE-MARC COTE, RAELEEN KERELIUK, REID HOWARD
MILLER, RENEE FLEURY, RENÉE JOELLE THÉORÊT, RIANN
BROOKE BABINEAU, RICK KENNETH GABBAY, ROBERT BRUCE
COSMAN, ROBERT JOHANNES DUECK, ROBERT MANDIC, ROBERT
WEIR ROBSON, ROBYN ELAINE MCKELVIE DUNN, ROLAND
MICHAEL CHARBONNEAU, ROSEDORE GOTTFRIEDE KANITZ,
ROSEMARY RAIMONDI, ROXANNE LANTHIER, ROXANNE
ROBERTSON, ROXANNE ROBERTSON, SABRINA NICOLE
FONTANA, SABRINE BARAKAT, SABRINE BARAKAT, SALINNA
BRANDY LACHANCE, SANDRA ANNE HALEY, SASA DANICIC,
SCOTT FAST, SEAN RUSENSTROM, SEBASTIEN PROST, SETHA
RABIDEAU, SÉVERINE HUGUETTE PARNAUDEAU, SHELLEY
HARVEY, SHELLY ANN ENMAN THERIAULT, SHERIE DAWN
CRAIK, SONIA PARISIEN, SONIA PARISIEN, STEPHANE LEBLANC,
STEPHANE ROBY JOSEPH DUBE, STEPHEN HOWARD KELLY,
STEVEN BOLDUC, STEVEN RACINE, SUZAN CHERIE MOTTL,**

**SYLVIA VERISSIMO, SZABOLCS PALL, TAMMY LYNN MYER,
TANIA MICHAUD, TANJA DANICIC, THERESA GELDART,
TIMOTHY JOHN HIEBERT, TRISTAN GRAVEL, TYLER MARK
ALEXANDER BORG, VÉRONIQUE SANTOS, AND ZACHARY
WILLIAM ANTHONY LINNICK**

Plaintiffs

and

**HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA, THE
TREASURY BOARD OF CANADA, CANADA BORDER SERVICES
AGENCY, CORRECTIONAL SERVICE OF CANADA, ROYAL CANADIAN
MOUNTED POLICE, AND DEPARTMENT OF EMPLOYMENT AND
SOCIAL DEVELOPMENT**

Defendants

ORDER

UPON the motion of the Plaintiffs for interim injunctive relief, not exceeding a period of 10 days, staying the operation of the “Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police” [Vaccination Policy], issued by the Treasury Board of Canada on October 6, 2021, pending determination of the Plaintiffs’ motion for an interlocutory injunction;

AND UPON hearing counsel for the parties on November 15, 2021, and reading the materials filed;

AND CONSIDERING the following:

The Plaintiffs are employees of the Defendants and members of the core public administration. They refuse to be vaccinated against COVID-19 for reasons that vary. They say their rights at common law and pursuant to the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter] are infringed by the Vaccination Policy in a manner that cannot be justified under s 1. They seek declarations to this effect, coupled with monetary damages.

The Vaccination Policy requires the Plaintiffs to be fully vaccinated against COVID-19 and to disclose their vaccination status to their employers. The Plaintiffs say they will be placed on administrative leave without pay pursuant to s 7.1.2.2. of the Vaccination Policy if they have not submitted their attestations by November 15, 2021.

The Plaintiffs acknowledge that s 4.1.8.2 of the Vaccination Policy permits mandatory COVID-19 testing as an alternative to vaccination for those who are “unable to be fully vaccinated based on a certified medical contraindication, religion, or another prohibited ground of discrimination as defined under the *Canadian Human Rights Act*, which could also include employees who are partially vaccinated”. However, the Vaccination Policy does not permit mandatory testing as an alternative for those who simply do not wish to be vaccinated, or who do not consent to disclosing their vaccination status to their employers.

The Statement of Claim names more than two hundred Plaintiffs. Only 10 of them have sworn affidavits in support of the present motion for interim injunctive relief. The Plaintiffs seek to stay the operation of the Vaccination Policy for all members of the core public administration

pending determination of the Plaintiffs' motion for an interlocutory injunction, which is currently scheduled to be heard on Monday, November 22, 2021.

An interim injunction is an extraordinary form of equitable relief. An applicant must establish that: (i) there is a serious issue to be tried, (ii) the applicant will suffer irreparable harm if the stay is not granted, and (iii) the balance of convenience favours the applicant (*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at page 334). An applicant must satisfy each branch of the test.

The test for establishing a serious issue to be tried is generally low. The issue must be neither frivolous nor vexatious. However, where granting the interim relief is tantamount to granting the relief sought in the underlying proceeding, the test is more onerous. The Court must closely examine the merits of the underlying proceeding, and conclude that the applicant has put forward "quite a strong case" (*Kellapatha v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 739 at para 13; see also *Spencer v Canada (Attorney General)*, 2021 FC 361 at paras 58-59).

A party seeking interim injunctive relief must demonstrate a situation of urgency (*Arysta Lifescience North America, LLC v Agracity Crop & Nutrition Ltd*, 2019 FC 530 at para 17).

Here, most of the Plaintiffs who filed affidavits acknowledge they have been aware of the Vaccination Policy since it came into effect on October 6, 2021. They nevertheless waited until November 11, 2021 to commence the action and seek interim injunctive relief. I agree with the Defendants that the Plaintiffs' delay in bringing this matter before the Court is a sufficient basis to refuse the request for discretionary, equitable relief.

Furthermore, I am not satisfied the Plaintiffs have demonstrated that this Court has jurisdiction to grant interim injunctive relief against the Defendants. The Plaintiffs have sought to challenge the Vaccination Policy by way of action, not judicial review. While the Federal Court has exclusive original jurisdiction to issue an injunction or grant declaratory relief against any federal board, commission or other tribunal (*Federal Courts Act*, RSC 1985, c F-7, s 18(1)), this relief may be obtained only by application for judicial review, not action (*Federal Courts Act*, s 18(3)).

The definition of a “federal board, commission or other tribunal” in s 2 of the *Federal Courts Act* is “sweeping”, and “goes well beyond what are usually thought of as ‘boards and commissions’” (*Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*TeleZone*] at paras 3, 50). There is no serious question that it encompasses the Treasury Board of Canada.

A litigant who seeks to impugn a federal agency’s decision is not free to choose between judicial review and an action in damages. He or she must proceed by judicial review in order to have the decision invalidated (*Canada v Tremblay*, 2004 FCA 172 at para 18). As the Federal Court of Appeal (*per Stratas JA*) explained in *Brake v Canada (Attorney General)*, 2019 FCA 274 [*Brake*] at paragraphs 26 and 27:

In the Federal Courts system, section 18 of the *Federal Courts Act* and associated jurisprudence set out the substantive and remedial distinctions:

- Damages for an administrative decision cannot be sought on a judicial review. The remedies on judicial review are restricted to the administrative law remedies set out in subsection 18(1) of the *Federal Courts Act* such as injunction, *certiorari*, prohibition, *mandamus*, *quo warranto* and declaration. See, e.g., *Al-Mhamad v. Canada (Radio-Television and Telecommunications Commission)*,

2003 FCA 45; *Bouchard v. Canada (Min. of National Defence)* (1998), 158 F.T.R. 232, 18 Admin. L.R. (3d) 7, aff'd (1999), 187 D.L.R. (4th) 314, 180 F.T.R. 9 (C.A.).

- Administrative law remedies such as *certiorari* and *mandamus* can only be obtained on an application for judicial review: *Federal Courts Act*, subsection 18(3).
- If administrative law remedies are not being sought, damages caused by an administrative decision can be sought in an action. In such circumstances, it is not always necessary to bring a separate application for judicial review. See *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585.

In the Federal Court, as in most if not all other courts in Canada, to seek both administrative law remedies and damages simultaneously, one must launch two separate proceedings: an application for judicial review started by a notice of application and an action for damages started by a statement of claim.

The potential for unnecessary expenditure of judicial resources and conflicting results is real, but may be addressed to some extent by the *Federal Courts Rules*, SOR/98-106. For example, Rule 105 permits multiple proceedings to be consolidated and progress as if they were one proceeding governed by one set of procedures (*Brake* at paras 28-29).

Where a claimant seeks to set aside the decision of a federal decision maker, it must proceed by judicial review (*Brake* at para 26; *TeleZone* at para 19). It is only where the claimant is content to let the decision stand, and instead seeks compensation for an alleged loss, that the claimant should not be forced to take the extra step of an application for judicial review. However, in this case it is clear that the Plaintiffs are seeking not only to recover damages, but also to set aside the Vaccination Policy for the entire core public administration.

A further jurisdictional concern arises from the fact that the Plaintiffs are persons employed within the core public administration. The Defendants take the position that their claims respecting the Vaccination Policy are barred by s 236 of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [FPSLRA]. The FPSLRA sets out an exclusive and comprehensive scheme for resolving employment-related disputes. Section 236 states that the grievance procedure is the exclusive means for the determination of grievable claims. This provision has been recognized as an “explicit ouster” of the courts’ jurisdiction (*Bron v Canada (Attorney General)*, 2010 ONCA 71 [*Bron*] at para 4).

The term “employee” generally means a person employed in the public service, with some exceptions such as casual employees or students. The right to grieve is “very broad”, and “[a]lmost all employment-related disputes can be grieved under s 208 of the FPSLRA” (*Bron* at paras 14-15).

The Defendants also take issue with the Plaintiffs’ assertions respecting infringement of their Charter rights, the likelihood they will suffer irreparable harm if the interim injunction is not granted, and the balance of convenience (citing the recent decisions of Justice Nicholas McHaffie of this Court in *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232 and Justice Michel Yergeau of the Quebec Superior Court in *Lachance et al v Quebec (Attorney General)*, November 15, 2021, Court No 500-17-118565-210). In light of my findings respecting the Plaintiffs’ delay in seeking interim injunctive relief and the Court’s lack of jurisdiction to entertain the current motion, I will leave these matters to be addressed by the parties at greater length during the hearing of the motion for an interlocutory injunction on Monday, November 22, 2021.

If the Plaintiffs wish to continue their efforts to invalidate the Vaccination Policy through litigation in this Court, they have the option of filing and serving the requisite application for judicial review this week. This is without prejudice to the Defendants' right to argue that the application should be dismissed because it is untimely, beyond the Court's jurisdiction, or for any other reason.

The Defendants do not seek their costs of this motion.

THIS COURT ORDERS that the Plaintiffs' motion for interim injunctive relief is dismissed, without costs.

"Simon Fothergill"
Judge