Federal Court  Cour fédérale

Date: 20221011

Docket: T-1694-21

Citation: 2022 FC 1391

Ottawa, Ontario, October 11, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

DAVID LAVERGNE-POITRAS

Applicant

and

THE ATTORNEY GENERAL OF CANADA (MINISTER OF PUBLIC SERVICES AND PROCUREMENT) and PMG TECHNOLOGIES INC.

Respondents

ORDER AND REASONS

I. Overview

[1] The respondent, the Attorney General of Canada [AG], has filed a motion in writing under rule 369 of the *Federal Courts Rules*, SOR/98-106, seeking an order dismissing as moot the underlying application for judicial review [underlying application] challenging the Government of Canada's "COVID-19 vaccination requirement for supplier personnel" [supplier vaccination policy or policy]. The underlying application is scheduled to be heard on

December 6, 2022. For the reasons that follow, I agree with the AG, grant the present motion, and dismiss the underlying application.

II. Facts

[2] In *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232 [*Lavergne-Poitras 1*], Mr. Justice McHaffie outlined the background to the implementation of the supplier vaccination policy which took effect on November 15, 2021. In short, it required personnel of third-party suppliers to the federal government to be fully vaccinated against COVID-19 in order to access Government of Canada workplaces where government employees were present. It also required such third-party suppliers to certify that personnel who accessed federal government workplaces where they could have come into contact with federal government employees were fully vaccinated. The policy was suspended on June 20, 2022.

[3] The applicant, David Lavergne-Poitras, has been an employee of the respondent, PMG Technologies Inc. [PMG], a supplier to the federal government, since July 2019. He has chosen not to be vaccinated against COVID-19. He was suspended from his position with PMG when the policy was implemented and was unemployed until June 27, 2022, when he was called back to work at PMG following the suspension of the policy. Upon his return to work, he found that his former duties had been assigned to another individual hired during his absence.

[4] In the underlying application, Mr. Lavergne-Poitras seeks as interim relief, amongst other things, an order directing the Minister of Public Services and Procurement [Minister] to:

a. stay the implementation of the policy;

b. allow employees of federal government contractors to continue to have access to facilities of, or under the responsibility of, the federal government regardless of their vaccination status;

c. allow federal government contractors and suppliers to refrain from certifying the vaccination status of their employees; and

d. refrain from considering whether existing or potential federal government contractors or suppliers have policies of their own requiring their employees to be vaccinated in accordance with the supplier vaccination policy.

[5] Mr. Lavergne-Poitras also seeks, as final relief, amongst other things, an order precluding the Minister from implementing the policy as well as a declaration that the policy is invalid and of no effect, as it is:

a. *ultra vires* the Minister;

b. a violation of the applicant's and other individuals' right to security of the person under section 7 of the *Canadian Charter of Rights and Freedoms* [Charter]; and

c. a violation of the applicant's and other individuals' right to security of the person under paragraph 1(a) of the *Canadian Bill of Rights*.

[6] I should mention that Mr. Lavergne-Poitras does not refer to the *Canadian Bill of Rights* in his submissions on this motion. In addition, Mr. Lavergne-Poitras seeks no relief against the

respondent PMG and notes in his notice of application that PMG is named as a respondent only because its rights may be affected by the outcome of the underlying application.

[7] Shortly after commencing the underlying application, Mr. Lavergne-Poitras brought a motion for an interlocutory injunction to stay the implementation of the policy, which was set to come into effect on November 15, 2021. In a decision dated November 13, 2021, Mr. Justice McHaffie dismissed the motion, finding as follows:

- there was no serious issue with respect to the government's authority to issue the policy, and as a third party to the contract between the government and PMG, Mr. Lavergne-Poitras would have no standing to raise an argument about the government's authority to impose contractual terms;

- while Mr. Lavergne-Poitras had raised a serious issue regarding the possible deprivation of his liberty and security, he had not raised a serious issue, on the evidence filed in the injunction motion, that any such deprivation was contrary to the principles of fundamental justice, and as a result, had not raised a serious issue to be determined as to whether his section 7 Charter rights had been violated;

- Mr. Lavergne-Poitras had not established that he would suffer irreparable harm if the injunction were not granted; and

- the balance of convenience did not favour suspension of the policy.

(*Lavergne-Poitras 1* at paras 5 to 8).

III. Legal Framework

[8] Courts will generally not decide issues that have become moot. A matter is moot where there is no longer any "live controversy" or "tangible and concrete dispute" between the parties, rendering the issues academic (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353 [*Borowski*]). Where a matter is moot, the Court must determine whether it should nevertheless exercise its discretion to hear the case, based on three considerations: (1) whether an adversarial context continues to exist between the parties; (2) concern for judicial economy; and (3) whether the Court would be intruding on the legislature's role by rendering a decision (*Borowski* at 358-362). I will deal with each issue individually.

A. *Is there a live controversy between the parties?*

[9] The AG submits that the underlying application is moot as the policy was suspended on June 20, 2022, and it no longer applies to Mr. Lavergne-Poitras. As such the relief sought by Mr. Lavergne-Poitras would serve no useful purpose (*Wojdan v Canada (Attorney General)*, 2022 FCA 120 [*Wojdan*]). As was the case in *Wojdan*, argues the AG, here, Mr. Lavergne-Poitras has already obtained the practical outcome he seeks in the underlying application: the policy is no longer in effect and is not a barrier to his continued employment at PMG. The AG argues that the issues raised by Mr. Lavergne-Poitras are now academic as there is no longer a tangible and concrete dispute, and that such a conclusion cannot be avoided on the basis that Mr. Lavergne-Poitras also seeks declaratory relief, particularly given that that relief would have no practical effect and will settle no live controversy between the parties on account of the supplier vaccination policy's suspension (*Fogal v Canada*, 1999 CanLII 7932 (FC), 167 FTR 266 (TD) at paras 24-27; *Income Security Advocacy Centre v Mette*, 2016 FCA 167 at para 6,

citing *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11; *Solosky v The Queen*, [1980] 1 SCR 821; *Public Service Alliance of Canada v Canada (Attorney General)*, 2021 FCA 90 at para 8).

[10] In addition, the AG submits that Mr. Lavergne-Poitras's concerns regarding the potential reinstatement of the policy are speculative and do not justify hearing a matter that has become moot (*N.O. v Canada (Citizenship and Immigration)*, 2016 FCA 214 at para 4 [*N.O.*], citing *Velasquez Guzman v Canada (Citizenship and Immigration)*, 2007 FCA 358 at para 4).

[11] For his part, Mr. Lavergne-Poitras refers to excerpts from the federal government's announcement of the policy's suspension which indicates that the policy has not been revoked but merely suspended; according to Mr. Lavergne-Poitras, the policy is susceptible of revival at any time, in particular as the federal government specifically reserved the right to reinstate the policy in the future in alignment with public health guidelines and any vaccination requirements for the public service. In addition, Mr. Lavergne-Poitras disputes the AG's assertion that the policy was suspended based on a review of the current public health situation in Canada, and argues that the policy was a "by-product" of the public service policy, which itself was implemented to fulfill an election campaign promise by the current government. Therefore, the supplier vaccination policy is liable to be reinstated, in which case the questions at issue in this case will again be raised.

[12] Further, Mr. Lavergne-Poitras seeks not just to challenge the reasonableness or appropriateness of the policy with respect to the public health circumstances that existed when it

was first enacted, but also challenges the legality of the government's actions. Specifically, Mr. Lavergne-Poitras seeks answers to the following questions:

> a. Did the Government of Canada have the power to force employees of a third party to opt between receiving an unwanted medical treatment and [loosing] their job for the foreseeable future;
>
> b. Is that forced choice, in view of the attached consequences, a violation of the Applicant's right to security of the person;
>
> c. To what extent is the Impugned Policy (as a by-product of the *Policy on COVID-19 Vaccination for the Core Public Administration including the Royal Canadian Mounted Police*) motivated by political, as opposed [to] *bona fide* public health considerations? In the latter case, we remind the Court that the Prime Minister has publicly questioned "whether those who oppose vaccination should be tolerated", after calling them racist and mysoginistic [*sic*]. Thus, it appears that the Prime Minister's personal views and feelings towards those who, like the Applicant, do not want to be vaccinated, has [*sic*] played an important role in the enactment of the Impugned Policy.

[13] Mr. Lavergne-Poitras submits that the first and third questions raise issues related to the rule of law, "which are reminiscent of the *Roncarelli* matter" (citing *Roncarelli v Duplessis*, [1959] SCR 121), and argues that *Wojdan* is distinguishable as in that case, the only relief sought was a stay of the public service policy and not a declaration regarding its merits. I should also point out that Mr. Lavergne-Poitras has made clear his intention to seek financial compensation should the Court find the policy *ultra vires* the Minister. Therefore, a declaration regarding the policy's legality would, according to Mr. Lavergne-Poitras, be useful regardless of whether it is ever reinstated, even if he chooses not to seek damages down the road.

[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 [*Cheecham*]).

[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 [*Rebel News*]).

[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.

B. *Is there an adversarial context?*

[18] In *Borowski*, the Supreme Court explained the importance of an adversarial context as follows (at 358-359):

> The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context. …

[19] The AG acknowledges that there is an adversarial context only insofar as the parties take opposing positions (*Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 10 [Air Canada]).

[20] Mr. Lavergne-Poitras reiterates that he intends to seek financial compensation, however has not yet done so because damages are not available on judicial review. He argues that a finding that the policy was *ultra vires* the government would act as a "springboard to an action for damages", and that the debate would not take place in an abstract as there is a genuine factual substratum to the dispute. Further, the ruling may have collateral consequences on the rights of third parties, namely, other similarly situated individuals adversely affected by the supplier vaccination policy (*Borowski* at 358-359; *Woronkiewicz v Mission Institution (Warden)*, 2021 BCSC 1087 at paras 39-41).

[21] Having considered the matter, I agree that there remains an adversarial context; there are two sides, represented by counsel, taking opposing positions (*Air Canada* at para 10).

C. *Would hearing the underlying application be an appropriate use of scarce judicial resources?*

[22] The Supreme Court in *Borowski* explained this factor as follows, at pages 360 and 361):

> … The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.
>
> The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. …
>
> Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. … The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

[23] The AG submits that the hearing of this matter will entail the use of scarce judicial resources without any practical utility. The AG distinguishes the present case from *Syndicat des métallos, section locale 2008 c Procureur général du Canada*, 2022 QCCS 2455 [*Métallos*], in which the Superior Court of Québec found that the appeal at issue was moot as the interim and emergency orders at issue were repealed, but nevertheless exercised its discretion to decide the

matter given the significant resources invested by the parties, the existence of related litigation involving the parties, and the parties' clear desire for a judgment. The AG notes that unlike the situation in *Métallos*, the hearing in this case is not yet under way; there remains a motion scheduled to hear objections made on cross-examinations, which themselves have not been completed; the parties' application records have yet to be filed; and the hearing is scheduled to take place over a day and a half, starting December 6, 2022. Significant resources will need to be invested by the parties and the Court.

[24] In addition, the AG argues that this is not a case where the need to settle uncertain jurisprudence is of sufficiently great practical importance to justify hearing the matter (*Amgen Canada Inc v Apotex Inc*, 2016 FCA 196 at para 16). Moreover, the implementation of both the public service policy and the supplier vaccination policy was tied to prevailing considerations at the time, and any assessment of the *vires* of the supplier vaccination policy, or of its Charter compliance, depends on the factual matrix of the pandemic and the impact of vaccination at the time that the mandate was in place. Charter decisions should not be made in a factual vacuum (*Mackay v Manitoba*, [1989] 2 SCR 357 at 361-362 [*Mackay*]).

[25] The AG argues that the constitutionality of vaccine mandates generally is not evasive of review, as demonstrated by ongoing litigation seeking Charter damages for orders implementing vaccine mandates in other contexts. To suggest, as does Mr. Lavergne-Poitras, that a future vaccine policy will be evasive of review is speculative. In *Kozarov v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 185, the Federal Court of Appeal declined to exercise its discretion to hear a moot appeal involving a Charter challenge to legislation, noting that there

were similar cases before the Federal Court (at paras 5-6). There have also been constitutional challenges to quarantine measures imposed in 2021, demonstrating that public health orders are capable of judicial review (*Canadian Constitution Foundation v Attorney General of Canada*, 2021 ONSC 2117; *Spencer v Canada (Attorney General)*, 2021 FC 361).

[26] The AG submits that a decision on the underlying application will have limited or no precedential value as the policy was enacted and suspended in response to circumstances at particular points in time (*Baber v Ontario (Attorney General)*, 2022 ONCA 345 at paras 8-9; *Nova Scotia (Attorney General) v Freedom Nova Scotia*, 2021 NSSC 217 at para 37). In addition, the underlying application does not raise an issue of public or national importance of which a resolution is in the public interest. The only real issue is the application of existing Charter jurisprudence to a specific factual matrix that includes a particular epidemiological point in the pandemic unlikely to be repeated. Even if there are issues of national importance raised, this factor is insufficient on its own to justify the Court's exercise of discretion (*Borowski* at 361).

[27] Finally, the AG submits that Mr. Lavergne-Poitras' stated intent to use the underlying application as a "springboard" for an action for damages does not warrant the use of scarce judicial resources. To obtain damages, Mr. Lavergne-Poitras must proceed by way of action, for which continuation of the underlying application is unnecessary (*Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at para 27).

[28] For his part, Mr. Lavergne-Poitras submits the following:

> Dismissing the matter for mootness after eight and a half months of litigation and forcing the Applicant to start from scratch by way of an action for damages would be contrary to the good administration of justice. Not only would it be financially detrimental to the Applicant, but it would force every other similarly situated aggrieved party to separately litigate the legality of the Impugned Policy, in order to seek financial compensation. The resulting burden upon the Court's resources would be much greater than allowing the Applicant to continue with this Application.

[29] He argues that the underlying questions in this matter have not been decided in that the safety of COVID-19 vaccines was not at issue in *Métallos* and the "affected parties were employed in a field of federal jurisdiction"; by contrast, in the present case, Mr. Lavergne-Poitras argues that the federal government "has acted without regulatory power, through a policy affecting a third party, and outside of its inherent field of jurisdiction."

[30] Mr. Lavergne-Poitras submits that to refuse to address the underlying application would amount to recognizing that most temporary government policies are immune from judicial review because a hearing cannot take place before they are phased out. This, he argues, would be contrary to the rule of law (*Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59).

[31] He also argues that the underlying application raises an issue of national importance. Since the pandemic is ongoing and the AG has acknowledged that it may be reinstated, it is in the public interest to decide the underlying issues regardless of whether circumstances in the future may differ to some extent. Mr. Lavergne-Poitras cites *Interlake Reserves Tribal Council*

Inc et al v Manitoba, 2022 MBQB 131 [*Interlake Reserves*], in which the Court of King's Bench of Manitoba considered whether to hear a moot matter regarding the determination of a question about the triggering, content, and satisfaction of the Crown's duty to consult under section 35 of the *Constitution Act, 1982*. The Court found as follows (at para 154):

> … a determination of the above question while technically moot, would serve the expressive function of addressing what may be the conflicting positions of the parties in relation to some similar aspects of any future disputes (on the Project) concerning the scope and necessity of consultation. In that sense, while recognizing the fact specific nature of these issues, the Permit question represents one that is real (and not theoretical) and in which the parties raising the issue have a genuine interest in the potential clarity and guidance that can come from its determination and resolution.

[32] In my view, the circumstances of this case do not justify the deployment of the Court's scarce resources as a decision would not have any practical utility. As discussed earlier, a decision in this matter will have no practical impact on the parties' rights. With regard to Mr. Lavergne-Poitras's arguments concerning the value of a determination as to the policy's Charter compliance, the assessment of this question would necessarily be tied to the factual circumstances at the time that the supplier vaccination policy was implemented. Any potential future litigation would similarly require a consideration of the factual matrix relevant to that litigation, as Charter decisions must not be made in a factual vacuum (*Mackay* at 361-363; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at para 45).

[33] While Mr. Lavergne-Poitras argues that a decision in this matter will be useful to a future action for Charter damages, I fail to see how duplicative proceedings are an efficient use of the Court's resources. Any action for Charter damages brought by Mr. Lavergne-Poitras or a

similarly situated person would require a determination of that individual's rights in relation to the whatever similar vaccination policy may be put in place and the factual circumstances in which it was implemented. A determination of Mr. Lavergne-Poitras's Charter rights should be done in the context of his action for Charter damages to avoid unnecessarily duplicative proceedings, which drain the Court's resources.

[34] I am also not persuaded by Mr. Lavergne-Poitras' arguments regarding the rights of third parties, whether they be similarly situated individuals or PMG. Any similarly situated individuals seeking damages for issues related to the policy would also need to proceed by way of action, and the determination of their rights would again need to be in reference to their specific factual matrix. As for PMG, I note that despite being a party to this proceeding, it has made no submissions on this motion. I agree with Justice McHaffie's findings in *Lavergne-Poitras 1* that "to the extent there is any argument about whether Canada can require PMG to provide a certification with respect to its current agreement, this is a matter of contract between PMG and Canada" (*Lavergne-Poitras 1* at para 45).

[35] I also disagree with Mr. Lavergne-Poitras that rendering a determination with no practical impact for the sake of giving him a "springboard" for future litigation is analogous to a decision regarding the scope and necessity of anticipated consultation required under section 35 of the *Constitution Act, 1982* with regard to the creation of a specific flood control management system and its related permit approval process (*Interlake Reserves* at paras 1-5); I see no parallels.

[36] Moreover, I disagree that declining to hear this matter amounts to recognizing that the policy, or any other "temporary" policy, is immune from judicial review. The policy was suspended in response to changes in the public health situation in Canada, and it is that change in factual circumstances, rather than any inherent quality of "temporary government policies", that has rendered the underlying application moot. Litigation for litigation's sake is not the answer.

D. *Would determining the underlying application exceed the Court's proper role?*

[37] The Supreme Court in *Borowski* addressed this factor as follows (at 362):

> The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability.

[38] The AG submits that the determination of the underlying application would amount to law-making in the abstract and thus an intrusion on the role of the legislative branch (*Yahaan v Canada*, 2018 FCA 41 at para 32). Courts should avoid expressing opinions on questions of law where it is not necessary to do so to dispose of a case, particularly when the question is constitutional in nature (*Rebel News* at para 64, citing *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at paras 9-12).

[39] Mr. Lavergne-Poitras argues that there is no risk of venturing into legislative ground in the absence of a dispute affecting the parties as the policy is still on the books and that he still

intends to seek financial compensation. In his submissions, Mr. Lavergne-Poitras claims that the Court "would be in the same position as if it were seized of an Action for damages, and it had to decide upon the legality of the Impugned Policy as part of the determination of the merits of such an action."

[40] For my part, as I have determined that Mr. Lavergne-Poitras's contemplated action for Charter damages does not warrant the Court's deployment of scarce resources, I do not find that that concern justifies pronouncing judgments in the absence of a dispute affecting the parties' rights (*Borowski* at 362).

IV. Conclusion

[41] Having considered and weighed the various factors, I decline to exercise my discretion allowing for the hearing of the underlying application despite its mootness. Accordingly, the present motion will be granted and the underlying application dismissed. Although the AG seeks costs, given the reasons for the dismissal of the underlying application have little to do with Mr. Lavergne-Poitras, I do not believe that costs against him should be granted under the circumstances. Finally, the scheduling order setting down the hearing of this matter for December 6, 2022, will be vacated, and the hearing date released.

ORDER in T-1694-21

THIS COURT ORDERS that:

1. The motion is granted and the underlying application for judicial review is dismissed.

2. The scheduling order in this matter dated June 27, 2022, is hereby vacated.

3. There shall be no costs awarded.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1694-21
STYLE OF CAUSE:	LAVERGNE-POITRAS v THE ATTORNEY GENERAL OF CANADA (MINISTER OF PUBLIC SERVICES AND PROCUREMENT) ET AL

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	PAMEL J
DATED:	OCTOBER 11, 2022

WRITTEN SUBMISSIONS BY:

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