Court File No. T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA,
THE GOVERNOR GENERAL OF CANADA and
THE QUEEN'S PRIVY COUNCIL FOR CANADA

Respondents

NOTICE OF MOTION

(Motion for Abridgement of Time and Expedited Hearing)

TAKE NOTICE THAT the Applicant will make a motion to the Case Management Court on Tuesday, June 30, 2015 at 09:30 in the forenoon, or as soon thereafter as the motion can be heard or on such other date as may be fixed by the Case Management Judge pursuant to paragraph 385(1)(b) of the *Federal Courts Rules*, at 701 West Georgia Street, 3rd Floor, Vancouver, British Columbia.

THE MOTION IS FOR:

1. an order abridging the time fixed by the Order of the Court (Lafrenière P.) issued June 9, 2015 for the remaining steps in the proceeding so as to accommodate a hearing of the application on its merits on or before October 19, 2015;

2. an order pursuant to Rule 84(1) of the *Federal Courts Rules* granting leave to the Respondents to cross-examine the deponent of an affidavit filed in the application on behalf of the Applicant before the Respondents have served every affidavit on which the Respondents intend to rely in the application;

3. an order pursuant to Rule 84(2) of the *Federal Courts Rules* granting leave to the Respondents to file affidavits in the application after having cross-examined the deponent of an affidavit filed in the application on behalf of the Applicant;

4. an order fixing the date for the hearing of the application on its merits on or before October 19, 2015;

5. costs of this motion payable by the Respondents to the Applicant; and

6. such further and other relief as the Court deems just.

THE GROUNDS FOR THE MOTION ARE:

Background

1. The Applicant has sought judicial review in respect of the decision of the Prime Minister, as communicated publicly on December 4, 2014, not to advise the Governor General to summon fit and qualified Person to fill existing Vacancies in the Senate.

2. In the context of this judicial review, the Applicant seeks declaratory relief pursuant to section 18 and 18.1 of the *Federal Courts Act* to the effect that the Prime Minister of Canada must advise the Governor General to summon a fit and qualified Person to the Senate within a reasonable time after a Vacancy happens in the Senate.

3. Section 18.4(1) of the *Federal Courts Act* requires that "Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way."

4. Rule 3 of the *Federal Courts Rules* provides that "These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

Discretion to abridge time

5. Rule 8(1) of the *Federal Courts Rules* provides:

> **8. (1) Extension or abridgement** – On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.

6. The abridgement of time periods to the extent necessary to accommodate a hearing of the application on or before October 19, 2015 is justified having regard to the following non-exhaustive factors:

    a. The absence of delay in the Applicant's conduct of the litigation and the seeking of an abridgement of time, particulars of which conduct are set out in paragraphs 7 to 37 below;

    b. The urgency of the proceeding in light of:

        i. the ongoing alleged unconstitutionality of the matters complained of in the application;

        ii. the public interest in having the issues in the proceeding

heard before the general federal election to take place on October 19, 2015 in accordance with the *Canada Elections Act*, including in light of the Respondents' position that the Prime Minister's actions impugned in the application can only carry political consequences; and

iii. the Applicant's personal family circumstances being such that his availability to prepare for and attend in Court will be reduced and uncertain as of mid-November 2015.

c. The abridgment will not unfairly prejudice the Respondents in their ability to defend their legal position given:

i. the notice the Respondents have had of the issues to be determined,

ii. the ample time the Respondents have had to prepare their case, and

iii. the Respondents' conduct of this proceeding including the misuse of time and expense occasioned by the Respondents' unmeritorious motion to strike;

d. The reasonable possibility that the proceeding will be rendered moot if not decided before the federal election on October 19, 2015; and

e. It is not apparent that expediting the proceeding would result in the cancellation of other hearings.

Conduct of the Proceeding

7. The notice of application was filed on December 8, 2014.

8. By letter dated December 27, 2014, the Applicant served all provincial and territorial attorneys general with a copy of the notice of application and notice under Rule 110(a) of the *Federal Courts Rules* of a potential question of general importance raised therein.

9. On January 5, 2015, the Applicant wrote to counsel for the Respondents seeking agreement as to calculation of the periods provided by the *Federal Courts Rules*, up to and including the service and filing of the Respondents' Record on or before April 27, 2015, so as to facilitate a request that hearing dates be set before the perfection of the application as contemplated in the Court's Notice to the Parties and to the Profession dated November 18, 2010 entitled "Early Hearing Dates for Applications in the Federal Court".

10. On January 15, 2015, the Respondents brought a motion seeking, *inter alia*, an order striking out the Applicant's notice of application and an order dismissing the Applicant's application on the basis that "the Applicant's application for judicial review is so clearly improper as to be bereft of any possibility of success, and therefore deserves to be struck out and dismissed summarily by means of a preliminary motion".

11. The Respondents took the position that the remaining procedural steps in the proceeding should be deferred pending resolution of the Respondents' motion to strike.

12. On January 15, 2015, the Applicant wrote to counsel for the Respondents, stating, in part:

> "Regarding the delivery of tribunal materials, may I respectfully propose that if the respondents are prepared to stipulate that the only objection to producing materials requested under Rule 317 is that the application for judicial review is fundamently flawed for the reasons set out in the respondents' Notice of Motion and that the materials will otherwise be available to be transmitted in their entirety without further objection in the event the respondents' motion is not granted, immediately upon the determination of the motion, I would agree that there is no practical utility in requiring that a separate document be provided under Rule 318(2). This approach would in my view further the objective of the Rules in providing an expeditious process for judicial review applications.
>
> If the respondents are not prepared to stipulate accordingly, I would respectfully request that an exhaustive statement of the respondents' grounds of objection be provided for the record as contemplated under Rule 318(2).
>
> As to timing, while your offer to not insist on strict compliance with the time limits is appreciated, I have made arrangements to have my affidavit materials served and filed in accordance with the Rules and, aside from being unable to append as an exhibit to an affidavit any of [the] materials requested under Rule 317 before I receive them, the respondents' motion to strike does not affect my ability to comply with the time limits or detract from my interest in having this matter proceed as expeditiously as reasonably possible. …"

13. On January 19, 2015, counsel for the Respondents responded, in part:

> "The respondents' position remains as set out in the notice of motion to strike filed January 15th and we have nothing to add to what has already been stated in our previous correspondence. We now await the direction of the Court with regard to the scheduling of the motion to strike and will govern ourselves accordingly."

14. On January 18, 2015, the Applicant served an affidavit and filed proof of service in accordance with Rule 306 of the *Federal Courts Rules*.

15. By letter to the Court dated January 22, 2015, counsel for the Respondents stated, in part:

> "Second, with respect to the timelines for the remaining procedural steps in this application, the Respondents respectfully propose that they be addressed, if necessary, following adjudication of the Respondents' motion. We have already communicated to Mr. Alani that the Respondents will not insist on strict compliance with procedural deadlines while their motion to strike is pending.
>
> Similarly, we have indicated to him that, in the event the Respondents' motion to strike is dismissed, the parties can discuss proposing to the Court a reasonable schedule for the completion of the remaining procedural steps at that time. In our view, such an approach is consistent with the parties' mutual interest in conducting this litigation is a manner that is most likely to secure the just, most expeditious and least expensive determination of this proceeding."

16. By Direction of the Chief Justice dated January 29, 2015, the Court directed that the Respondents' motion to strike would be made returnable before the Court on April 23, 2015 at a special sitting of four hours in duration.

17. By letter to the Court dated February 5, 2015, the Applicant informally requested a case management conference be held to consider, *inter alia*, an adjournment of the hearing of the Respondents' motion to strike such that it be heard at the outset of the hearing of the application of the merits, as was ordered by Prothonotary Milczynski in her capacity as case management judge in Court File No. T-1476-14 in respect of a similar motion to strike an application on grounds of justiciability and jurisdiction without the need for a separate hearing.

18. The Applicant also requested, in the alternative, that the Court consider reserving hearing dates, on an anticipatory basis, for the underlying application in order to minimize any delay in securing an expeditious determination of the application on its merits in the event that the Respondents' motion to strike be dismissed.

19. By Order issued February 16, 2015, the Court (Lafrenière P.) dismissed the Applicant's informal request that the hearing of the Respondents' motion to strike be adjourned and heard at the outset of the hearing of the application.

20. On May 21, 2015, the Court (Harrington J.) dismissed the Respondents' motion to strike.

21. On May 21, 2015, the Applicant again wrote to counsel for the Respondents to propose a timetable for the remaining steps in the application as follows:

May 25, 2015 – Applicant to serve and file amended notice of application

June 15, 2015 – Rule 318 material to be transmitted

June 22, 2015 – Applicant to serve any further supporting affidavits

June 29, 2015 – Respondents to serve any affidavits

July 6, 2015 – Cross-examination on affidavits to be completed

July 20, 2015 – Applicant to serve and file application record

August 4, 2015 – Respondents to serve and file Respondents' record

22. By reply dated May 22, 2015, counsel for the Respondents advised of their understanding that the timetable for the remaining steps was prescribed by the Court's Order of May 21, 2015 and position that they did "not see any justification for abridging them in the manner" proposed.

23. By letter to the Court dated May 22, 2015, the Applicant requested a case management conference to canvass the possibility of fixing dates for the remaining steps in the proceeding, including the potential fixing of a hearing date prior to the perfection of the application as contemplated by the Notice to the Parties and to the Profession dated November 18, 2010.

24. On May 25, 2015, the Applicant served and filed an Amended Notice of Application pursuant to the Order of the Court (Harrington J.) issued May 21, 2015.

25. On May 29, 2015, the Respondents filed a Notice of Appeal of the Court's order dismissing the Respondents' motion to strike.

26. Following a case management conference held on June 1, 2015, the Court (Lafrenière P.) by Order issued June 2, 2015 ordered that:

    a. the Respondents submit a letter on or before June 8, 2015 indicating when they expect to be able to serve their responding affidavit evidence and file proof of service;

    b. the timeline for transmission of any material under Rule 318 is extended to June 15, 2015;

    c. the timeline for the Applicant to serve any further affidavit material and file proof of service is extended to June 24, 2015;

d. subsequent steps shall be taken within the timelines provided in Part 5 of the *Federal Courts Rules* or as otherwise ordered by the Case Management Judge.

27. By letter to the Court dated June 8, 2015, counsel for the Respondents advised that they expect to be able to serve their responding affidavit evidence and file proof of service by July 31, 2015. Counsel for the Respondents stated that "[t]his brief extension is necessary because of the complex nature of the affidavit evidence the Respondents intend to tender, namely, evidence in relation to the existence and scope of an alleged constitutional convention (as referenced by the Court (Harrington J.) in paragraphs 23 and 24 of its May 21, 2015 order dismissing the Respondents' motion to strike)." The Respondents indicated: "While it is our hope that this reasonable request will meet with the consent of the Applicant and can be adjudicated informally by the Court, the Respondents are prepared to file a formal Rule 8 motion if necessary."

28. By letter to the Court dated June 8, 2015, the Applicant consented to the Respondents' informal request for an extension of time (i.e., of 7 days).

29. On June 8, 2015, the Applicant wrote to counsel for the Respondents to request confirmation of the timetable for the remaining steps in the proceeding.

30. On June 9, 2015, counsel for the Respondents wrote to the Applicant to clarify the timeline for completion of cross-examination on affidavits (i.e., by August 20, 2015). Counsel also indicated, in part:

> "…[W]e think it preferable to await the completion of the parties' affidavit material before committing to a position on whether extensions or abridgements would be appropriate for the remaining procedural steps in this application."

31. On June 11, 2015, the Applicant wrote to counsel for the Respondents, stating in part:

> "As indicated in my correspondence to the Court of May 29th, I have concerns that if the hearing of the application does not take place in advance of the scheduled federal election of October 19th the issues raised in the application may become moot. It may be the case that a hearing date can be accommodated before October 19th without any further modifications to the timetable, depending on the parties' and Court's availability and whether an early hearing date is requested as contemplated in the Practice Direction already referenced.
>
> Before taking steps to determine whether this is the case, including, if necessary, by way of a formal Rule 8 motion to abridge time limits as necessary to accommodate a hearing date before October 19th, I note

> that you referred at the June 1st case management conference to being prepared to make submissions regarding why the issues in the application may not become moot after October 19. Those submissions were not heard.
>
> If I have understood correctly that the respondents take the position that the issues would not necessarily be moot after the election, I would respectfully request that you provide me with the basis for that position. If we can agree that mootness will not be an issue, it may not be necessary in my view to take any further steps to fix a hearing date at this time."

32. On June 15, 2015, the Respondents wrote to the Court to advise:

> "…[T]here was no "decision not to advise the Governor General to fill the currently existing [Senate] Vacancies" as alleged by Mr. Alani. Accordingly, Rule 317 is not applicable (as per *Alberta Wilderness Association v. Canada*, 2013 FCA 190) and no material will be transmitted to either the Registry or the Applicant pursuant to Rule 318.

33. By letter dated June 15, 2015, counsel for the Respondents stated, in part:

> "In the absence of a formal motion to expedite or any evidence in support of your assertions, we see no utility in engaging in an academic debate on the merits of your apparent position at this time. Suffice it to say that, in our respectful submission, we find neither of the grounds you have raised to be persuasive. They certainly do not provide a justification for denying either party the opportunity to properly prepare their respective cases. In sum, it is our position that the timing of the next federal election is not a factor that ought to govern the determination of either the procedural deadlines or the hearing date of this application."

34. On June 15, 2015, the Applicant wrote to counsel for the Respondents reiterating his intention to request through case management a direction as to whether the Court can accommodate a hearing date between the current time limit for service and filing of the Respondents' Record (i.e., September 29, 2015) and October 19, 2015. Referring to the Notice to the Parties and the Profession dated November 18, 2010, the Applicant inquired as to counsel's time estimate for the hearing of the application and counsel's availability for a hearing after September 29, 2015.

35. By reply dated June 16, 2015, counsel for the Respondents stated, in part:

> "In our view, the appropriate time to discuss the anticipated duration and the parties' availability for the hearing is following the production of the respondents' Rule 310 record as this triggers the applicant's

obligation to prepare a Rule 314 requisition for hearing which contains such information. Furthermore, the parties will be better placed to estimate the time needed for the hearing once they both have had the opportunity to produce their full written arguments."

36. By reply dated June 16, 2015, the Applicant confirmed his intention to:

> "… submit [his] inquiry as to whether the Court can accommodate a hearing date between September 29, 2015 and October 19, 2015, which, if so, would obviate the need for a Rule 8 motion to abridge time limits."

37. By further reply dated June 16, 2015, counsel for the Respondents advised:

> "That said, in light of your stated intention to inquire whether the Court can accommodate a hearing between September 29 and October 19, 2015, please be advised that Mr. Pulleyblank and I are not available from September 28 to October 16 inclusive as a result of previously scheduled court hearings and out-of-town business travel commitments."

Statutory provisions and Rules relied upon

38. *Federal Courts Act*, especially s. 18.4(1).

39. *Federal Courts Rules*, especially Rules 3, 8(1), 84(1), 84(2), 385 and 401.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) Affidavit of Aniz Alani

Date: June 17, 2015

Aniz Alani, Applicant

[redacted]

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TO:

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Solicitor for the Respondents