Federal Court  Cour fédérale

Date: 20150714

Docket: T-2506-14

Citation: 2015 FC 859

Ottawa, Ontario, July 14, 2015

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ANIZ ALANI

Applicant

and

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

Respondents

ORDER AND REASONS

[1] This motion arises in the context of an application brought by Mr. Aniz Alani before this Court for judicial review of the Prime Minister's decision, as communicated publicly on December 4, 2014, not to advise the Governor General to summon fit and qualified persons to fill existing vacancies in the Senate. As general elections are expected to be held on October 19, 2015, Mr. Alani is asking the Court to abridge the timeline fixed by the Order dated June 9, 2015

of the Case management Judge Roger Lafrenière in relation to the remaining steps in the proceeding, and asks to immediately set a pre-election hearing date.

[2] He is further seeking an order granting leave to the Respondents to cross-examine him – or any other deponent - on his affidavit, before the Respondents have served their own affidavits and, as a corollary, to file their affidavits after having cross-examined him – or any other deponent - on his or their affidavit.

[3] The main question is therefore whether the Court ought to depart from the timelines prescribed in Part 5 of the *Federal Courts Rules*, SOR/98-106 [Rules] more particularly Rules 307, 308, 309, 310 and 314.

I. Background

[4] After having heard the declaration publicly made by the Prime Minister that he did not intend to fill the 16 vacancies then existing in the Senate, the Applicant filed a notice of application for judicial review seeking, *inter alia*, a declaration that the Prime Minister must advise the Governor General to summon a qualified person to the Senate, within a reasonable time after the vacancy happens.

[5] Within a month from the filing of his application for judicial review, the Applicant sought to avail himself of the Court's procedure for requesting a hearing date before the perfection of the application. He wrote to counsel for the Respondents and proposed a timetable that would have caused the file to have been perfected by April 27, 2015.

[6] Instead, the Respondents served a motion to strike the application for judicial review which was heard by my colleague Harrington J. on April 23, 2015. The Respondents essentially argued that Mr. Alani had no standing in the claim before the Court, that there was no real decision to be judicially reviewed and that in any event, there was a constitutional convention by which the timing of Senate appointments is left to the Prime Minister's discretion, and that a breach of that constitutional convention is not justiciable but rather left to the political arena.

[7] On May, 21, 2015, Harrington J. observed that on most issues raised before him, there were insufficient facts established to permit him to undertake a thorough analysis. He therefore found that it was not plain and obvious that Mr. Alani's application had no chance of success and he dismissed the Respondents' motion to strike. Harrington J. also allowed most of the proposed amendments to Mr. Alani's Notice of Application and stated that the normal procedure of the Rules, including the delays set out in Rule 304 and following of the Rules should be followed thereafter.

[8] From May 21, 2015 to June 1, 2015, the Applicant attempted, without success, to have the Respondents' consent on abridging the timetable that would cause the file to be perfected on or around August 4, 2015. During a case management conference held on June 1st, counsel for the Respondents advised the Court they anticipated commissioning an expert to provide affidavit evidence speaking to the issues relating to constitutional conventions. As a result, they further advised they might need additional time to do so. A week after, the Respondents advised they would be able to serve their responding affidavits by July 31, 2015 and that they were hoping the Applicant would consent to this extension of time without the need to file a formal Rule 8

motion. The Applicant consented to the Respondents' informal request but reiterated that he was hoping for the Respondents to consent to the proposed timetable for the remaining steps in the proceedings.

[9] On June 11, 2015, as these discussions were ongoing, the Applicant raised the potential for his application to become moot after the general election anticipated for October 19, 2015.

[10] On June 15, 2015, counsel for the Respondents advised the Applicant that:

> "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, 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."

[11] The Respondents also declined to provide a time estimate for the hearing and to reveal their availability until after the production of their Application Record. In any event, counsel for the Respondents then advised the Applicant that they were unavailable from September 28 to October 16, having previously scheduled other hearings or professional commitments.

[12] As a result, the Applicant served and filed his present Rule 8 motion on June 17, 2015. As things stand, the file is case managed by Prothonotary Lafrenière and it is expected to be

perfected by September 9, 2015, at which time the Applicant is expected to file his Requisition for hearing in accordance with Rule 314.

II. Analysis

[13] The only issue raised by this motion is whether the Court should exercise its discretion to expedite this application in order to accommodate a hearing date before the federal election which will be held on October 19, 2015.

[14] Rule 8 authorizes the Court to "extend or abridge a period provided by these Rules or fixed by an order". It does not set out the test this Court should apply while exercising its discretion but both parties rely on the factors that emanate from this Court's few decisions where abridgment was considered in order to expedite the proceeding so it could be heard prior to a particular event (*May v CBC/Radio Canada*, 2011 FCA 130 at paras 12 and 13; *Canada (Minister of Citizenship and Immigration) v Dragan*, 2003 FCA 139 at para 7; *Trotter v Canada (Auditor General)*, 2011 FC 498 at paras 5-7; *Conacher v Canada (Prime Minister)*, 2008 FC 1119 at para 16; *Canadian Wheat Board v Canada (Attorney General)*, 2007 FC 39 at para 13 and *Gordon v Canada (Minister of National Defence)*, 2004 FC 1642 at para 11) . They can be summarized as follows:

i. Whether the proceeding is really urgent or does the moving party simply prefer that the matter be expedited (Respondents rather formulate this first branch of the test as being: whether prejudice will ensue to the moving party if the matter is not expedited);

ii. Whether prejudice will ensue to the responding party if the matter is expedited;

iii. Whether the matter will become moot if it is not expedited; and

iv. Whether expediting the matter will prejudice other litigants by "queue jumping".

[15] The consideration of these factors is not mandatory but should be used by the Court as guidance, bearing in mind that the scheduling deadlines presumptively imposed by Part 5 of the Rules are designed as a "compromise" between the need to have applications for judicial review heard summarily and the need to ensure the parties have sufficient time to adequately prepare their cases. The burden to show the need to depart from these Rules lies on the party seeking the abridgement.

[16] In the case at bar, I am of the view, mainly mindful of the factors set-out in i) and iii) above, that the Applicant failed to meet his burden and that this case should continue to proceed in accordance with the Rules, with the assistance of the Case Management Judge.

[17] The Applicant's main complaint concerns the soon to be 22 vacancies of the Senate and the fact that those vacancies would deny the Canadian population the guaranteed level of regional representation set out in the *Constitution Act, 1867*, ss. 21–22. He seeks a declaratory relief interpreting and giving effect to section 32 of the *Constitution Act, 1867* and, in particular, in determining whether, in the circumstances "when a vacancy happens", the requirement to summon qualified persons to the Senate imposes an obligation to cause appointments to be made within a reasonable time.

[18] As can be read from the judgment of Harrington J. on the Respondents' motion to strike, the Applicant's application for judicial review raises complex and novel constitutional issues and, as such, it will require a complete evidentiary record placed before the Court. Amongst other things, that will include expert evidence on the existence, validity and content of a constitutional convention on Senate appointments. Neither the parties nor the Court should be rushed, without compelling reasons, into an early hearing or a decision on the merits.

[19] The Applicant argues that the urgency to proceed with his application and to obtain a ruling from the Court emanates from one of the defence arguments advanced by the Respondents. The Respondents argue that the matter raised by this application is non-justiciable and that any remedy related to the Prime Minister's inaction must be found in the political realm. If the Court ought to agree with the Respondents on that specific issue and if the decision is not rendered before the October 19, 2015 election, the individual voters will be deprived of a singular opportunity to effect an obviously available political remedy. In other words, says the applicant, we are dealing here with a "ballot box" issue.

[20] Although this is a possible outcome, it is not the only one. However, the Applicant does not argue that urgency would exist in any other scenario - for example, in the instance where the Court finds in his favour or rather finds that it lacks jurisdiction over the matter.

[21] Not only is the applicant's sense of urgency rather speculative but he has not presented evidence that the Canadian electorate, or himself for that matter, requires the benefit of a ruling from this Court on Senate vacancies in order to make an informed decision at the next election.

[22] Vacancies at the Senate exist and they are known to the public. In fact, many issues regarding the Senate and Senators have received extensive media coverage during the last few years. As things stand, the issues raised by this application for judicial review are exposed in Harrington J.'s public decision of May 21, 2015 and they will be further enunciated in the parties' public written submissions which will be filed in the Court record prior to October 19, 2015.

[23] Even if the Court could accommodate the parties and hold a hearing between September 10 and September 28 (again, both counsel for the Respondents are unavailable from September 28 and October 16), it is not to say that the Court would issue its Judgment and Reasons before October 19, 2015. Considering the importance of the issues raised, it is not excluded either that this Court's judgment will be appealed before the Federal Court of Appeal. Therefore, even if I see the next general election as a relevant factor favouring an abridgment of the delays and scheduling of a hearing before the file is perfected, which is not the case, it is unlikely that the individual voters would benefit from a final decision of this Court or the Federal Court of Appeal before October 19, 2015.

[24] Similar comments can be made as regards the Applicant's mootness argument. The Applicant acknowledges that the result of the October 19 election cannot be predicted, nor can its impact on his application for judicial review. The Applicant says that his application could become moot: i) if the Prime Minister "resiles from his stated intention not to appoint senators"; or ii) if the Prime Minister does not remain in office following the election. My answer to that argument is also twofold: If the applicant's objective is to have the Senate vacancies filled, he

should be satisfied if his first hypothesis becomes reality. However, if his real intention is to have a declaration from the Court dealing with a Prime Minister's duties and obligations with respect to Senate appointments, this application for judicial review might not be moot if the vacancies are filled before a final judgment is rendered. In any case, the Applicant's argument is hypothetical and highly speculative.

[25] Finally, in his written submissions, the Applicant states that he would also wish to have his application for judicial review heard before the third week of November as his wife is expected to give birth to his child. The Applicant did not raise that issue during the hearing but I agree with the Respondents that the Court should be able to accommodate the parties and set a hearing date between mid-October and mid-November. A note should be added to that effect in the Applicant's request for hearing.

III. Conclusion

[26] For these reasons, and keeping in mind that this file is case managed by Case Management Judge Lafrenière, I do not think that the Court's intervention is warranted and that a hearing should be scheduled before the file is perfected and before counsel for the parties can provide the Court with an estimate of the time they require to present their case.

[27] However, in the same way that I do not think this file's timetable should be influenced by the general election expected on October 19, the general election equally should not be used by the Respondents in an attempt to delay the hearing and avoid the media attention it may attract. I

have no evidence that these concerns have been the case so far, and I am confident that the Case Management Judge will ensure that it does not become the case in the near future.

[28] Considering the special circumstances of this case and the fact that the Applicant has brought and conducted the proceedings in a timely manner, no costs will be granted.

ORDER

THIS COURT ORDERS that:

1. The Applicant’s motion be dismissed;

2. No costs be granted.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2506-14
STYLE OF CAUSE:	ANIZ ALANI v THE PRIME MINISTER OF CANADA, THE GOVERNOR GENERAL OF CANADA AND THE QUEEN'S PRIVY COUNCIL FOR CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 30, 2015
ORDER AND REASONS:	GAGNÉ J.
DATED:	JULY 14, 2015

APPEARANCES:

Mr. Aniz Alani	FOR THE APPLICANT (ON HIS OWN BEHALF)
Me Jan Brongers Me Oliver Pulleyblank	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Mr. Aniz Alani Vancouver, British Columbia	FOR THE APPLICANT (ON HIS OWN BEHALF)
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENTS