Federal Court Cour fédérale

Date: 20220628

Docket: T-145-22

Ottawa, Ontario, June 28, 2022

PRESENT: Associate Judge Mireille Tabib

BETWEEN:

NABIL BEN NAOUM

demandeur

et

LE PROCUREUR GÉNÉRAL DU CANADA

défendeur

Docket: T-247-22

AND BETWEEN

L'HONORABLE MAXIME BERNIER

demandeur

et

LE PROCUREUR GÉNÉRAL DU CANADA

défendeur

Docket: T-168-22

AND BETWEEN:

THE HONOURABLE A. BRIAN PECKFORD, LEESHA NIKKANEN, KEN BAIGENT, DREW BELOBABA, NATALIE GRCIC, AND AEDAN MACDONALD

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1991-21

AND BETWEEN:

SHAUN RICKARD AND KARL HARRISON

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER

UPON the motion of the Respondent, the Attorney General of Canada, for an order extending the time within which to serve and file its responding application record and, by necessity, adjourning the hearing of this matter;

CONSIDERING the motion materials, constituted in accordance with the Order dated June 21, 2022, the additional information contained in the Attorney General's letter dated June 23, 2022, and the parties' oral submissions at a hearing held by telephone conference on June 24, 2022;

The Attorney General's responding motion record is currently due to be filed by September 2, 2022. The hearing is scheduled to begin on September 19, 2022, and to last five days. The Attorney General seeks an extension of time to October 7, 2022, to serve and file its responding record. By necessity, if that extension of time is granted, the hearing will need to be adjourned. All of the Applicants vigorously oppose the Attorney General's motion.

At issue in these applications is the constitutional validity of the air and rail passenger vaccination mandates imposed pursuant to various iterations of the *Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to Covid-19* under the *Aeronautics Act* and Ministerial Orders made pursuant to the *Railway Safety Act.* The Attorney General's motion was brought as those mandates came to an end as of June 20, 2022, but in a context where the Government of Canada signalled that it would not hesitate to reinstate such mandates as the need arose.

The purpose on this motion is not to determine whether the applications have now become moot. That will be the subject matter of a motion to be brought by the Attorney General. The termination of the vaccination mandates and the potential for them to be reinstated in the short term are nevertheless factors that must be taken into consideration in determining whether it is in the interest of justice that the Attorney General's motion be granted.

I. The parties' positions

The Attorney General cited the following factors as justifying the relief sought:

a) *Lack of urgency.* Given the lifting of the impugned measures, the Attorney General argues that there is no longer urgency in meeting the hearing dates.

b) *Translation.* The Attorney General verified the time needed to translate its memorandum of fact and law, and to then ensure that it accurately reflects the Attorney General's arguments, and was advised that the two weeks it had initially estimated were insufficient. Four weeks (being 20 business days) would be needed at a minimum. (As will be seen below, this factor is no longer at play).

c) *Lead counsel's medical leave.* The lead counsel for the Attorney General will take medical leave beginning on August 2, 2022, for an extended period of time, requiring the assignment of a new senior lead counsel on these matters. Counsel only learned of the timing of that necessary leave on June 9, 2022.

d) *Other practice motions.* The need to brief and hear several practice motions, including the motion to dismiss for mootness, increases the pressure on an already strained schedule.

The Applicants' position in respect of those factors is as follows:

a) *Lack of Urgency.* The Applicants argue that the Governments' messaging around the lifting of the mandates has emphasized that they were merely "suspended" and that the Government would "not hesitate" in reinstating the mandates. They argue that the fall typically coincides with a resurgence of COVID-19 cases, and that there thus remains urgency in hearing the matter so as not to risk Canadians being subject to

new mandates pending its determination. Some Applicants have seen in the Attorney General's request a disguised attempt to argue the mootness motion. Others argue that giving in to the Attorney General's request would create a precedent for indefinitely delaying the determination of similar measures by lifting, then reinstating mandates. Some Applicants point out that a form of vaccine mandate remains in effect through the requirement that returning unvaccinated Canadian undergo testing and a fourteen-day quarantine.

b) *Translation.* The Applicants submit that the Attorney General was remiss in not verifying the time required for translation earlier, and express skepticism as to the timing of this verification. As mentioned, and for the reasons set out below, this is no longer a live issue.

c) *Lead counsel's medical leave.* While unanimous in wishing their colleague a prompt recovery, all counsel for the Applicants pointed to the fact that numerous lawyers, including several senior lawyers, are already involved in the litigation that the Department of Justice must surely have deep resources and that there is more than enough time between now and August 2, 2022, to transition the lead to a new senior counsel.

d) *Other practice motions.* In an effort to alleviate the procedural burden and in the application of the principles of proportionality, the Rickard and Harrison Applicants advised that they no longer intended to pursue their motion to compel answers to questions refused. As to the motion for mootness, all Applicants argue that it ought not to be heard and determined in advance of the hearing on the merits, but at the

hearing itself. They thus argue that delaying the hearing to permit the determination of that motion is unjustified.

The following additional arguments were also raised by some Applicants:

e) *Prejudice.* The Applicants argue that time and resources have already been expended to move this matter on an expedited basis, and that to delay this matter in any way at this time would cause great prejudice to the parties who expended these resources and efforts to date. They also highlight the Court's practice directions and jurisprudence to the effect that adjourning set hearing dates requires the most exceptional circumstances, as adjournments cause serious inconvenience to the Court and other litigants.

f) *The Attorney General's conduct.* It has been suggested that the inconvenience and prejudice resulting from the strain of meeting the litigation deadlines in the circumstances should be visited on the Attorney General, as it is the Attorney General that chose to call 16 of the 35 the witnesses, to bring an interlocutory motion to strike evidence, to bring the mootness motion and an anticipated motion to file additional evidence. Arguments were made to the effect that the Attorney General could and should make the most of the time available by beginning to draft its memorandum of fact and law even before receiving the Applicants'.

II. Discussion

Lack of urgency. The schedule to which the parties agreed is, given the number of witnesses and expert witnesses and the importance and complexity of the issues, extraordinarily condensed. Even the time contemplated for the Court to prepare and review such a voluminous

and complex record – a mere two weeks – speaks to the urgency with which the parties and the Court have viewed the determination of this matter. The lifting of the mandates does significantly reduce the urgency. I accept that there is a possibility that some mandates may be re-imposed in the fall. However, whether, when and in what form new travel mandates might be reinstated is entirely speculative. Continuing to impose on the parties – and the Court – a schedule that speaks to urgency rather than expeditiousness is simply not justified in the circumstances. The Applicants' submissions seem to take for granted that an adjournment, if granted, would delay the hearing indefinitely. As set out below, that is not the case. Finally, I am not persuaded by the Applicants' suggestion that the matter is still urgent because of the remaining constraints imposed on returning unvaccinated Canadians. These constraints are imposed pursuant to the *Quarantine Act*, and not pursuant to the now lifted orders, and are not the subject of the present applications.

Translation. The Attorney General indicated, as soon as the applications were joined, that it would deliver its pleadings in both French and English. It did so in a spontaneous demonstration of its commitment to bilingualism and to the equal treatment of both official languages. That most commendable impulse was, however, perhaps too hasty, as it failed to fully foresee the logistical challenges and the time it would require to honour that commitment. That undertaking also, as the Attorney General later ascertained, goes beyond the obligations imposed on it by the *Official Languages Act*. The *OLA* requires the Attorney General to plead in the language of the other parties, but it does not require it to plead bilingually. In a case such as the present, where parties use both languages, the Attorney General must plead in the language the other parties agree to use or, failing agreement, in the language that is, in the circumstances, reasonable. Having been apprised of these provisions of the *OLA*, all parties at the June 24, 2022,

hearing expressly agreed that the Attorney General should plead in English. This agreement relieves the Attorney General of its undertaking. (To its credit, the Attorney General still intends to provide a French translation of its pleadings for the benefit of the parties and the public, but they will not stand as official pleadings and will be delivered after the official English-language pleadings.)

The agreement also removes the constraint of translation as a basis for an extension of time. That said, I should note that I do not find that the Attorney General has used the translation issue as a pretext to justify an adjournment, as some of the Applicants have suggested. On the contrary, it was the Attorney General who brought to the Court and the other parties' attention that its undertaking to translate went beyond its strict obligations, paving the way for the parties' agreement to relieve it of its undertaking.

Lead counsel's medical leave. I am satisfied that the Attorney General and its counsel cannot be faulted for the unfortunate timing of the required medical leave. The Department of Justice may well be "the largest law firm in the country", but I have no doubt that it is commensurably busy. The challenges of reallocating workload to replace the senior counsel on a matter of this importance and complexity should not be underestimated. The challenge is not, however, insurmountable, given the nearly two-month period available for the transition to occur. Had the matter still had the same urgency as when it was initially scheduled, I would not have considered this factor, on its own, as a sufficient justification for delay. In the circumstances, however, given my finding of reduced urgency, it is a factor that militates in favour of granting a short extension of time. Matters of this weightiness and importance benefit

from thoughtful, considered arguments. They ought not to be cobbled together in a rush if that can reasonably be avoided.

Other practice motions. The Rickard and Harrison Applicants have decided to forego their motion to compel, and the Attorney General is content for its motion to adduce additional evidence to be determined in writing. As a result, the only motion that has the potential to significantly impact the schedule is the Attorney General's motion to dismiss for mootness. The Applicants argue that it is unnecessary, and indeed, not in the interest of justice, that this motion be heard and determined prior to the hearing on the merits. Rather, they submit that it should be heard and determined by the judge seized of the merits, having the benefit of the complete record. That may well be, but the Applicants' arguments gloss over the time required to constitute a proper record for the determination of this important motion, and the time needed to hear it, that would have to be taken out of the five-day hearing time currently scheduled. A motion to dismiss for mootness is not capricious or brought in an effort to delay or obfuscate. There is a strong case to be made that the matter is indeed moot, and an equally strong case to be made that the *Borowski* analysis would favour its determination in any event. The determination is one only the Court can make; the parties cannot resolve it by agreement. A proper consideration and determination of that motion will require full and thoughtful arguments, supported by a sufficient evidentiary record. This cannot simply be shoehorned in an already punishing schedule. Further, even if this motion could be heard by the application judge in the time set aside for the hearing on the merits, I note that the current schedule only allows two weeks between the filing of the Attorney General's application record and the hearing. In the absence of grave urgency, it is not reasonable to tack on to the Judge's short preparation time the review of the parties' materials and submissions on the mootness argument.

Prejudice. The Applicants' sunken investment in meeting an expedited schedule, if it can be considered a prejudice at all, is susceptible of being compensated by an award of costs and does not, in my view, outweigh the other factors considered above. There is, as raised by the Applicants, a public interest in ensuring that dates set aside are not lost absent extraordinary circumstances. The request for an adjournment in this case is made sufficiently in advance of the hearing that the dates can be used for other matters. As mentioned above, and as the Applicants have repeatedly highlighted, these applications raise issues of great public interest. The volume of evidence and the number of issues, including the mootness issue, have grown since the schedule and hearing dates were first fixed. It would be prejudicial to the interest of justice to keep driving to a fixed hearing date without taking into account changing circumstances, and to leave the parties and the Court with insufficient time to prepare for such a hearing.

Conduct of the Attorney General. The suggestion by some of the Applicants that the Attorney General should have adduced less evidence than it thought necessary to respond to a constitutional challenge is untenable, as is their suggestion that raising the potential mootness of the application is somehow dispensable. The Attorney General's past motion to strike portions of the evidence has not, in my view, played any role in the circumstances that now make holding fast to the schedule so challenging. I have already commented, as part of my analysis of other factors, on other complaints the Applicants have raised in relation with the Attorney General's conduct of this litigation, and found them to be without merit.

III. Conclusion

None of the factors raised by the Attorney General would, by themselves, justify the relief sought. However, taken together, they constitute the kind of extraordinary circumstances

that justify adjourning a hearing. I am satisfied that it is in the interest of justice that the time for the Attorney General to serve and file its record be extended and that a short adjournment of the hearing be granted.

Fortuitously, the Court has been able to find dates to re-schedule the hearing to begin on October 31, 2022, a mere six weeks later than the scheduled hearing, and a week during which all counsel have indicated that they can make themselves available. As an additional benefit, the application judge is also available during the originally scheduled week of September 19 to hear the Attorney General' motion to dismiss for mootness. This will allow the judge to either determine the mootness issue as a preliminary matter or to defer his or her decision to after the full hearing, as he or she may deem most appropriate.

While I have come to the conclusion that the time for the delivery of the Attorney General's record should be extended, the precise length of that extension remains to be determined. As mentioned, the issues raised in these applications are complex and important. They deserve thorough and well thought out records. The Applicants have insisted, for the sake of an early hearing, on keeping to the 20-day period for serving and filing their records. Given the delayed hearing, the motion for mootness for which a briefing schedule has yet to be set, and the fact that translation issues no longer affect the schedule, the manner in which the additional time before the hearings is to be apportioned to achieve justice between the parties and allow the Court adequate preparation time merits further thought and submissions. I will hear the parties' submissions on that issue at the case management telephone conference scheduled to take place on June 30, 2022.

THIS COURT ORDERS that:

1. The hearing of these applications, initially scheduled to begin on September 19, 2022, is adjourned to begin on October 31, 2022, for a duration of 5 days.

2. The Attorney General's motion to dismiss for mootness will be heard on a date to be determined during the week of September 19, 2022.

3. The time within which the Attorney General is to serve and file its record is extended to a date to be fixed.

"Mireille Tabib"
Associate Judge