Federal Court  Cour fédérale

Date: 20110428

Docket: T-696-11

Citation: 2011 FC 498

Ottawa, Ontario, April 28, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

KATHLEEN TROTTER

Applicant

and

AUDITOR GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The application that is before this Court addresses issues that are of the utmost importance to our democracy. In issue are the scope and breadth of Charter rights, as well as the Auditor General's interpretation of its statutory mandate.

[2] As it will be seen, this Order is not about the Court unduly refusing to "join the political fray" or taking an unjustifiably formalistic approach. It is about the responsible acquittal of judicial duties in interpreting the Constitution, something expediting the proceedings cannot accomplish. If

this application would have been served and filed in the week following April 11, 2011, the Court would have dealt with the matter.

[3] At this stage, the Court is asked to expedite the application and render judgment before the general election of May 2, 2011. This application seeks to make public the Auditor General's report on the Government's G8 Infrastructure Fund. This report was to be tabled before Parliament on April 5, 2011, had a general election not been called.

[4] The merits of seeking the publication of the Auditor General's report are not the questions that are incumbent upon the Court to resolve at this stage. Rather, the real question in a motion for an expedited hearing is illustrated by the criteria the jurisprudence has established as required to warrant an expedited hearing.

[5] Some of these factors have been set out in *Canada (Minister of Citizenship and Immigration) v Dragan*, 2003 FCA 139, as the following: (a) Harm will result if the hearing is not expedited; (b) A timetable can be agreed upon which is convenient to the Court and counsel for the parties for the hearing of the appeal; and (c) the appeal will not be heard to the detriment of others whose matters have already been scheduled for hearing. Courts have also recognized other factors: whether the Application becomes moot if not heard expeditiously; and whether the matter is urgent (*Canadian Wheat Board v Canada (Attorney General)*, 2007 FC 39).

[6] Furthermore, the public interest in proceeding, and the Respondent's prejudice have been stated anew recently as factors to be considered by the Court when assessing if an application should proceed on an expedited basis (*May v CBC/Radio Canada*, 2011 FCA 130).

[7] Inherent to all these factors is the nature of the application itself. In this respect, it should be noted that Charter applications must be given the full weighing they deserve. Surely, constitutional issues deserve complete and detailed materials for the Court, as guardian of the rule of law, to analyze the issues at hand and exercise its judicial duties. This is what is implied by the Supreme Court when it forewarns courts on proceeding on constitutional matters without adequate evidentiary records before them (*British Columbia (Attorney General) v Christie*, 2007 SCC 21, at para 28).

[8] Firstly, it can be said that the Attorney General should be named as a Respondent in the Application. Counsel for the Applicant indicated that the materials were served to the Attorney General as well as the current Respondent. Counsel for the Applicant also argued that, in the case at bar, the question was not one of whether the *Auditor General Act*, RSC 1985, c A-17 is unconstitutional in light of alleged Charter breaches. Rather, it is argued that the matter is whether the Auditor General incorrectly interpreted the statute, and whether Charter values contained in sections 2(b) and 3 should have been interpretative aids in the exercise of "her discretion" (if she has any) to arrive at a proper interpretation of her legislative mandate.

[9] With respect, framing the issue and deliberately confining it in the matter suggested by the Applicant is a matter to be determined by the determination of the application itself. The debate should not be unduly constrained in the motion for an expedited hearing.

[10] Also, the Attorney General may wish to meaningfully participate in the debates arising from the application. Very recently, Justice Marc Nadon of the Federal Court of Appeal has stated that justifying the constitutionality of laws remains the duty of the Attorney General (*May*, above, at para 18).

[11] Whether the application truly challenges the constitutionality of the law is not something that is clear at this stage, as the Applicant's written and oral representations made by counsel considerably differ in this respect. This also is not favourable to proceeding on an expedited basis, as the piecemeal submissions provided thus far differ as to whether remedies are sought under section 24(1) of the Charter or under other declaratory grounds.

[12] In the present matter, the timeframe in which the Applicant seeks to have the matter adjudicated is extremely brief. The Application itself was filed on the morning of Tuesday, April 26, 2011. The motion for the application to proceed expeditiously was filed in the late afternoon on the same day. The Court held the hearing on the motion on Wednesday, April 27, 2011. Thus, some steps remain unheeded: the Respondent must file a complete and detailed response to the application itself, the Attorney General may participate; the Applicant could file a reply memorandum, though likely would not; a hearing where all the parties are to be heard must be held; careful research and analysis must be conducted by the Court, etc. Also, the Respondent's position

may prove to be more nuanced and detailed than what counsel for the Applicant expects and it would be unfair, if not unbecoming, for the Court to proceed on this assumption.

[13] It should also be stated that the Respondent alleges that her office will suffer prejudice from an expedited proceeding.

[14] In any event, the Court cannot anticipate and constrain the questions arising from the Application and reduce them prematurely, as the Applicant would like to. Furthermore, even if the Court was to consider favourably all elements of the Application, it is questionable whether this could be done before Monday, May 2, 2011. This holds true without even considering the possible appeal and the likely motion for a stay of the execution of a favourable decision from this Court. Consequently, the relief sought may not even be granted should a favourable decision be made on an expedited basis.

[15] This situation would have been different had the Applicant not filed her application less than a week before the election. The Auditor General's refusal has been public and unequivocal since at least April 11, 2011.

[16] The inherent fairness of the proceedings is paramount. All parties involved should benefit from timely and professional advice from counsel. In the delays by which this complex application is suggested to proceed, it is questionable whether the Court would benefit from an evidentiary record that is of the level required for the proper assessment of the constitutional questions arising from the application. The materials filed must meaningfully address the issues at hand, something

that 24 to 48 hours may well prove insufficient for counsel to do so. This is notwithstanding the Court's own analysis that is to be as complete, considered and reasoned as judicial duties and the Constitution require.

[17] In citing the Supreme Court case of *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, Justice Nadon recognized in *May*, above, that the public interest in seeing the matter expedited should be considered.

[18] In this respect, counsel for the Applicant has argued that the public interest in the disclosure of the Auditor General's reports must prevail. Counsel has argued that the exercise of our democratic rights is contingent on adequate information, something the report would provide.

[19] While this could prove true in principle, in practice, the public interest is not well served in shortcutting the considered judicial process required for the weighing of constitutional matters. It is said that "haste makes waste". Surely, "waste" in constitutional matters is not a possibility that the Court can validly accept if it is to acquit itself of its judicial duties. The consequences of proceeding on an expedited basis could prove to be much broader than intended, again, for a remedy that may not even be ultimately available to the Applicant before Monday, May 2, 2011 in light of the appeals process and a possible stay of the execution of a favourable judgment.

[20] The alleged urgency of the matter should not blind the Court of the task at hand: deciding on the Auditor General's duty towards the public based on Charter values, as argued orally before the Court on April 27, 2011, or on the alleged breach of Charter rights, as opined in the written

representations of the Applicant. Whatever the question ultimately becomes, the extremely limited timeframe in which the Application is asked to proceed is not sufficient. Urgency should not trump the careful weighing of our Constitution, whether it is an "interpretative tool" or the source of the recourse itself. Even the Applicant's record is unclear in respect to what the grounds of the application are. Is it a *mandamus* application? Is it a judicial review of the Auditor General's decision? Is it a stand-alone action based on section 24(1) of the Charter? This wholly determines the remedies available and the Court's jurisdiction. Resolving this matter is essential and cannot proceed on the extremely short timeframe the Applicant is asking for.

[21] As for mootness, this Court believes that despite the general election of May 2, 2011, the underlying questions of law remain on the table, so to speak. However, that ultimately will be a question for the Court deciding the underlying application and whether, if the general election is the focal point of the application, the Court's residual discretion to hear the matter should be exercised.

[22] Thus, it can be said that there is an arguable public interest in having the Auditor General's report. It is a final report revised by her Office, apparently with ongoing consultations with members of the Executive currently seeking re-election. A fairness argument in this respect could be made. Furthermore, the party leaders of the four main parties have acknowledged publicly their wish to see the report made public. However, the public interest is not better served in the event that a favourable but rushed decision cannot be enforced before May 2, 2011. The public interest is not better served by having the Court decide on the drop of a dime an important constitutional question. Hence, the Court cannot grant the motion to hear the Application on an expedited basis for the reasons described above.

[23] At this stage, no costs have been sought therefore none will be allowed.

ORDER

THIS COURT ORDERS that the motion to expedite the hearing of the application is denied.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-696-11
STYLE OF CAUSE:	KATHLEEN TROTTER V AUDITOR GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 27, 2011
REASONS FOR ORDER AND ORDER:	NOËL S. J.
DATED:	April 28, 2011

APPEARANCES:

Frank Addario	FOR THE APPLICANT
Andrew McKenna, Andrew Hayes, Todd J. Burke	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sack Goldblatt Mitchell LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Gowling Lafleur Henderson LLP Barristers and Solicitors Ottawa, Ontario	FOR THE RESPONDENT