Federal Court  Cour fédérale

Date: 20220301

Docket: T-306-22

Citation: 2022 FC 284

Ottawa, Ontario, March 1, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

CANADIAN FRONTLINE NURSES and KRISTEN NAGLE

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] This is an order and reasons respecting a motion for an interlocutory injunction, or stay, of the *Public Order Emergency Proclamation* and related orders issued by the Governor in Council on February 14 and 15, 2022, pending the hearing of the Applicants' application for judicial review of the proclamation and orders.

[2] Before the motion could be heard, the proclamation of a state of emergency was revoked, as were all orders and regulations made pursuant to the proclamation. As a result, the motion is moot and must be dismissed. The question of whether the underlying application for judicial review may proceed to a determination on its merits, notwithstanding revocation of the proclamation and orders, will be decided at a later date on the basis of a fuller evidentiary record and submissions by the parties. This motion order does not address that question. Nothing in these reasons should be construed as a finding in relation to the merits of the underlying application and whether it may still be heard and determined.

[3] The Applicant, Canadian Frontline Nurses, is a registered not-for-profit corporation. The Applicant, Kristen Nagle, is a Registered Nurse and a director and member of Canadian Frontline Nurses. The Attorney General of Canada is the representative Respondent on behalf of the Governor in Council.

II. **Legal Context**

[4] On February 14, 2022, Order in Council P.C. 2022-106, the *Public Order Emergency Proclamation*, was issued pursuant to s 17(1) of the *Emergencies Act*, RSC 1985, c 22 (4th Supp) (the *Emergencies Act* or the *Act*). The following day, Order in Council P.C. 2022-107, the *Emergency Measures Regulations*, and Order in Council P.C. 2022-108, the *Emergency Economic Measures Order*, were issued pursuant to the *Public Order Emergency Proclamation*.

[5] On Friday, February 18, 2022 the Applicants filed an application for judicial review seeking declaratory and other relief in respect of the *Public Order Emergency Proclamation*, the

Emergency Measures Regulations, the *Emergency Economic Measures Order* and any other regulations, orders or measures issued or implemented pursuant to the *Proclamation*.

[6] Also on February 18, 2022, the Applicants filed a Notice of Motion seeking a temporary interlocutory order staying Order in Council P.C. 2022–106 until their judicial review application is heard and determined. Furthermore, they sought the issuance of other procedural orders and costs of the motion on a substantial or full indemnity basis. In support of the motion, the Applicants filed a Motion Record that included the affidavit of Kristen Nagle and the affidavit of the Applicants' lawyer attaching copies of the legislative instruments as exhibits.

[7] In her affidavit sworn on February 18, 2022, Ms. Nagle deposed that she had participated in the protests in Ottawa, that Canadian Frontline Nurses required access to funds stored at financial institutions to support its mission, that she had bank accounts and credit cards and needed access to funds to secure necessities of life for herself and her family. Ms. Nagle deposed that she wished to continue to express her opinions in the protests but could not conceive of how she would be able to do so if she was prevented from receiving, directly or indirectly, funds necessary to maintain life. She did not depose that her bank accounts, credit cards or other funds had been seized or restrained.

[8] With the Notice of Motion and Motion Record, the Applicants also submitted an informal request by letter pursuant to Rule 35 (2) of the *Federal Courts Rules*, SOR/98-106 seeking the appointment of a special time and place for the motion to be heard, other than at the General Sittings of the Court, and for the convening of an urgent case conference. In response to the

request for an expedited hearing, Chief Justice Crampton ordered that the matter continue as a specially managed proceeding and appointed the undersigned and Prothonotary Milczynski as Case Management Judges. The Court then issued a direction convening a case management conference with counsel for the parties for Tuesday, February 22, 2022.

[9] At the case management conference on February 22, 2022, the motion was set down for hearing on Friday February 25, 2022 with an abridged time-table for the filing of the Respondent's Motion Record.

[10] On February 23, 2022 the Governor in Council issued the *Proclamation Revoking the Declaration of a Public Order Emergency*, SOR/2022-26, [*Revoking Proclamation*] which revoked the declaration of a state of emergency under the *Emergencies Act*. Pursuant to s 26(2) of the *Emergencies Act*, all orders and regulations made pursuant to the declaration were revoked effective on the revocation of the declaration.

[11] As a result of the issuance of the *Revoking Proclamation*, the Court requested the Registry to contact counsel for the parties on February 24, 2022 to ascertain their views on whether the motion was now moot and the hearing could be cancelled. Counsel for the Respondent advised that the matter was moot and there was no need for a hearing. Counsel for the Applicants disagreed and asked that the hearing proceed. When asked again for a substantive explanation of their position, counsel submitted a brief statement by email noting that costs remained a live issue between the parties and submitted that "…to the extent that the request for an interim stay…is rendered moot by the [Revoking Proclamation] … the Court has jurisdiction

to hear the motion in spite of mootness…" citing the decision of the Supreme Court of Canada in *Borowski v Canada (Attorney General)***,** [1989] 1 SCR 342 [*Borowski*].

[12] A further direction was then issued that the Court would hear the parties on the issue of costs and on the question of whether the principles expressed in *Borowski* had any application in the context of a motion for a stay that is moot.

III. **Issues**

[13] At the outset of the hearing, the Applicants took the position that the motion was not moot because they considered that they were still at risk of prosecutions or of having their accounts and credit cards restrained for their actions during the period between the issuance of the *Public Order Emergency Proclamation* and the issuance of the *Revoking Proclamation* on February 23, 2022. Counsel for the Applicants acknowledged that this had not in fact happened and, as the hearing progressed, conceded that if there was no longer any risk of his clients being prosecuted or of having their funds restrained there were no grounds for a stay.

[14] The Applicants continued to maintain that the costs of the motion remained a live controversy between the parties and that costs should be awarded in their favour to be paid forthwith on a full or substantial indemnity basis. This was based largely on the assertion that they had succeeded as a result of the issuance of the *Revoking Proclamation* following the filing of their Notice of Motion.

[15] For the sake of clarity, it is appropriate to lay out the Court's views on several questions to explain why this motion is being dismissed and to avoid any confusion going forward. Those questions are as follows:

1) Why is the motion being dismissed for mootness?

2) Are the Applicants entitled to costs on the motion notwithstanding that it is being dismissed for mootness?

IV. **Analysis**

A. *Why is the motion being dismissed for mootness?*

[16] In *Borowski*, the Supreme Court of Canada set out general principles for dealing with the concept of mootness. The Court noted, at paragraph 15, that the doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question.

[17] The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.

[18] The question of mootness can arise at any time before a decision is rendered. If, as in this context, events occur such that no present live controversy exists which affects the rights of the parties, the case is said to be moot and will not be decided. This general policy or practice is

followed in most cases unless the Court exercises its discretion to depart from it, applying criteria such as the concern for judicial economy, whether the adversarial relationship between the parties will continue and whether the case raises an issue of public importance of which a resolution is in the public interest.

[19] In the present matter, determination of the stay motion would have no practical effect because the legislative instruments made pursuant to the *Emergencies Act* including the *Public Order Emergency Proclamation* have already been revoked. To the extent that there remains an adversarial relationship between the parties, it is reflected in the Application for Judicial Review of the issuance of the *Proclamation.* The question of whether that application raises an issue of public importance of which a resolution is in the public interest can be determined at a later date based on a more complete evidentiary record and full argument between the parties.

[20] In their Supplemental Book of Authorities, the Applicants rely on *British Columbia Civil Liberties Association v Canada (Royal Mounted Police)*, 2021 FC 1475 [*BCCLA*], in which Associate Chief Justice Gagné exercised the Court's discretion in accordance with the *Borowski* principles to dispose of a matter that was moot. However, it should be noted that in that case, the Court's discretion was exercised only in regard to declaratory relief going to the merits of the application for judicial review, while the writ of mandamus initially sought by the Applicants was not disposed of, as even the Applicants conceded it was "without object" on account of its mootness: *BCCLA* at paras 6, 52.

B. *Are the Applicants entitled to costs on the motion notwithstanding that it is being dismissed for mootness?*

[21] There is no evidence before the Court that would support the claim made by counsel in argument that the Applicants had achieved success on the motion deserving of an award of costs, let alone costs on a full or substantial indemnity basis. There is no evidence upon which a reasonable inference could be drawn that the decision to issue the *Revoking Proclamation* was in any way related to the filing of the stay motion by the Applicants.

[22] Moreover, it should be noted that the Applicants' prospects of success on the motion were remote, based on the record before the Court, even if the *Proclamation* and related Orders in Council had remained in effect. This is relevant because implicit in the Applicants' contention that they should be awarded costs on the motion is the assumption that they would have succeeded should it not have been determined to be moot.

[23] An interlocutory order like a stay is an extraordinary and equitable form of relief. A decision to grant or refuse such relief is a discretionary one that must be made having regard to all of the relevant circumstances. The test for the issuance of an interim injunction, or stay of proceedings, is that set out by the Supreme Court of Canada in *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334 [*RJR McDonald*].

[24] An applicant seeking a stay must demonstrate three things: (1) that the underlying application for judicial review raises a "serious question to be tried;" (2) that the applicant will

suffer irreparable harm if the stay is refused; and (3) that the balance of convenience (i.e. the assessment of which party would suffer greater harm from the granting or refusal of the injunction pending a decision on the merits of the judicial review application) favours granting the stay. The three branches or arms of the test are conjunctive. They must all be established.

[25] As counsel for the Applicants acknowledged during the hearing, the serious issue to be tried standard is elevated in the present matter because the stay, if granted, would effectively provide the remedy sought in the underlying application: *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81. The Applicants would have had to demonstrate a likelihood of success on the underlying application. When the object of the motion is to stay the operation of what are on their face duly enacted laws, the threshold is very high. It is only in the clearest of cases that injunctions will issue to enjoin the operation of legislation: *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9 [*Harper*].

[26] The second branch of the stay test would also have been a formidable obstacle for the Applicants. To establish irreparable harm, an applicant must show that there is "real, definite, unavoidable harm – not hypothetical and speculative harm": *Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 24. There must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless the stay is granted: *Glooscap Heritage Society v Minister of National Revenue*, 2012 FCA 255 at para 31.

[27] Ms. Nagle's evidence was, at best, speculative about the possible economic harms that might befall the organization and herself. There is no evidence that she qualified as a "designated

person" who might have been targeted for application of the financial measures. Some unidentified people at the protests in Ottawa had told her that their bank accounts were frozen after the *Emergencies Act* was invoked. Aside from the inadmissible hearsay aspect of this statement, it falls short of establishing clear and non-speculative irreparable harm.

[28] On the balance of convenience, the public interest must be taken into account, which includes the presumption that validly enacted measures are made for the public good and serve a legitimate purpose: *RJR McDonald* at p 343, 346, 348-49; *Harper* at para 9. The validity of those measures may be called into question, as it has in the underlying application for judicial review, but such a determination would not be made on an inadequate record in a motion for a stay. There will be opportunities to consider and determine whether the invocation of the *Act* was justified. This is not one of them. The Applicants are not entitled to costs for having filed a motion for a stay that was doomed to failure from the outset.

[29] In their oral argument, the Applicants relied on *R v Dadzie*, 2018 ONSC 1332 at para 10 [*Dadzie*], *Broomer v Ontario (Attorney General)* (2004), 121 CRR (2d) 163 (ON SCDC) at para 11 [*Broomer*], and on *Josef v Ontario Minister of Health*, 2013 ONSC 6091 at para 18 [*Josef*] to argue that costs against the Respondents should be awarded to the Applicants, as the Respondents' act obviated the necessity for the continuation of the motion. The Applicants contend that the circumstances of the present motion are such that the criteria set out in those three cases for an award of costs in favour of the Applicants are met: a) the applicants are public interest litigants and the application raises issues of general public interest; b) the government

causes the application to become moot; c) as a result of the government's actions, the applicant has effectively achieved what it wanted on the application: *Dadzie* at para 10.

[30] However, all three of these cases may be distinguished from the present motion. In *Broomer*, the applicants had been specifically targeted by regulations and been issued lifetime bans on social assistance as a result. The repeal of those regulations had the effect of restoring the applicants' entitlements. Conversely, in the present motion, there is no evidence on record indicating that the Applicants ever were in fact targeted by specific emergency measures; thus, the repeal of those measures did not have the effect of restoring any rights or entitlements of the Applicants that may have been lost. In *Josef*, the change in public policy deprived the applicant of her day in court as the application was adjourned on consent and had not been argued on the merits, while in the present matter, the Applicants' motion for a stay was given a full hearing on February 25, 2022. Finally, *Dadzie* does not support the position of the Applicants, as in that decision, the Ontario Superior Court of Justice held that the three criteria enumerated above were not met: *Dadzie* at para 11.

[31] The Respondent has proposed that the question of costs be left to be determined in the cause, that is to say in the outcome of the underlying application for judicial review. That is, in the Court's view, a reasonable position.

ORDER IN T-306-22

THIS COURT ORDERS that the motion for an interim injunction is dismissed. Costs to be in the cause.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-306-22
STYLE OF CAUSE:	CANADIAN FRONTLINE NURSES and KRISTEN NAGLE V THE ATTORNEY GENERAL OF CANADA
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APPEARANCES:

Alexander Boissonneau-Lehner Simon Sigler David G. Cowling	FOR THE APPLICANTS
John Provart Ayesha Laldin Shain Widdifield	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Johnstone & Cowling LLP Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT