Federal Court  Cour fédérale

Date: 20220725

Docket: T-1030-21

Citation: 2022 FC 1090

Ottawa, Ontario, July 25, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application by the Association of Justice Counsel [AJC] for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of Guidelines issued by the Courts Administration Service [CAS], a federal body established under the *Courts Administration Service Act*, SC 2002, c 8.

Background

[2] The AJC is the bargaining agent for lawyers employed by the federal Department of Justice and the Public Prosecution Service of Canada. Many of the Applicant's members, in the course of their employment, regularly appear before Canada's federal courts: the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada, and the Tax Court of Canada. Hereinafter, "a federal court" refers to any one of these courts while "the Federal Court" refers to this Court specifically.

[3] Administrative services for these four federal courts are provided by CAS. CAS is led by a Chief Administrator, appointed by the Governor in Council. This Chief Administrator works with the Chief Justices of each of the federal courts to manage their administrative functions. While CAS supports the judiciary, it remains a part of the Government of Canada and is a part of the executive branch of government.

[4] As with almost every aspect of Canadian society, the COVID-19 pandemic has had a significant impact on the operation of the federal courts. On March 16, 2020, in response to increasing cases of COVID-19, each of the federal courts ceased conducting in-person hearings. In the months and now years following this, each court has charted its own course in adapting to our new reality.

[5] In this application, the AJC is challenging CAS's guidelines regarding protections from COVID-19 in Canada's federal courts, particularly in the Tax Court of Canada. The Applicant seeks the following relief in its Notice of Application:

1. A declaration that the health and safety of participants in judicial proceedings, including counsel, is protected by section 7 of the *Canadian Charter of Rights and Freedoms*;

2. A declaration that CAS has inadequately protected participants in judicial proceedings from the adverse health risks of the COVID-19 pandemic in the Tax Court of Canada by:

    a. Failing to require all participants for in-person hearings to wear appropriate masks at all times;

    b. Failing to require other persons present in courthouse facilities to wear appropriate masks at all times;

    c. Failing to provide adequate resources and infrastructure to permit proceedings to take place remotely by tele-conference, video-conference, or otherwise rather than in-person; and

    d. Failing to demonstrate that it has provided the necessary heating, ventilation, and air conditioning ("HVAC") for participants in judicial proceedings;

3. A declaration that rules for participants to wear masks for all in-person hearings falls within the responsibility of the Chief Administrator of the CAS under s. 7(2) of the *Courts Administration Service Act*, SC 2002, c 8, and falls outside the judicial function reserved for the Tax Court of Canada in s. 8(1) of that Act;

4. An order of *mandamus* that the CAS issue a direction requiring all participants in in-person proceedings to wear appropriate masks at all times in the courts subject to its jurisdiction;

5. An order of *mandamus* that the CAS provide sufficient resources that would permit judicial officers in all courts to conduct proceedings by way of video-conference;

6. In the alternative, a declaration that in exercising its judicial function, a Court under the responsibility of the CAS has an obligation to ensure that courts are safe for all participants in the context of a pandemic;

7. Such further and other relief as this Honourable Court deems just.

[6] The Applicant notes that the Tax Court of Canada never transitioned to virtual hearings (i.e. hearings held by either videoconference or teleconference). Instead, it has resumed hearing matters solely in person, with hearings being suspended on a number of occasions in response to COVID-19. This is why the Applicant has specifically singled out the Tax Court of Canada in this application.

The CAS Guidelines

[7] In response to COVID-19, the federal courts issued practice directions to suspend regular operations temporarily, postpone in-person hearings, and, where possible, conduct hearings via teleconference and videoconference.

[8] CAS adopted what the Respondent describes in its submissions as "a layered risk mitigation approach with a combination of preventative measures used concurrently."

[9] In July 2020, CAS published "COVID-19: Recommended Preventative Measures, Resuming In-Person Court Operations" [the CAS Guidelines]. The CAS Guidelines were updated in March 2021 and September 2021.

[10] The July 2020 CAS Guidelines require court attendees to use a non-medical mask or cloth face covering in circumstances where physical distancing cannot be maintained. Both the March 2021 and September 2021 versions of the CAS Guidelines require that court attendees

wear a blue disposable procedural mask "at all times." The March 2021 and September 2021 CAS Guidelines also note that a Court Security Officer or other individual designated by CAS will ensure compliance.

[11] Under the heading "In the Courtroom", both the March 2021 and September 2021 CAS Guidelines state that blue disposable procedural masks will be provided at appropriate locations in the courtroom to ensure they are available for use as required. The July 2020 CAS Guidelines, under the same heading, state:

> Even though all measures are taken to ensure that the physical layout or use of dividers maintains the physical distancing, there may be circumstances during the hearing where this cannot be achieved. In these circumstances, court attendees must use a non-medical mask or cloth face covering.

[12] Following the hearing of this application, the CAS Guidelines were once again updated in June 2022. The June 2022 CAS Guidelines also require the wearing of blue procedural masks at all times and indicate that masks are provided in courtrooms.

Court Guidelines

[13] In addition to the CAS Guidelines, each of the federal courts has issued its own guidelines on in-person hearings. The Applicant has filed versions of these guidelines as part of its Application Record. The Tax Court of Canada's guidelines state that participates "must wear the appropriate PPE (masks and/or gloves) inside the court facilities where two-metre physical distancing is not possible. This includes courtrooms and other common areas." The Tax Court of Canada's guidelines also note that "preventative measures and directives could differ in some

cities or provinces in light of local and provincial guidelines and legislation in effect at the time of your hearing."

[14] As noted above, the Tax Court of Canada's policy has been to not hold virtual hearings.

[15] The Federal Court's guidelines state that "participants at a court appearance, including counsel, parties, witnesses, and members of the public, are required to wear masks or face coverings that cover their nose, mouth, and chin in the courtroom, except when giving testimony or making submissions." The Federal Court's guidelines further state that "[t]he presiding Judge or Prothonotary will wear a mask when entering and exiting the courtroom, but otherwise may decide to remove the mask."

The Applicant's Advocacy and Position on COVID-19 Precautions

[16] The AJC, by way of the affidavit of its President, David McNarin [the McNarin Affidavit], has provided a detailed history of its advocacy efforts on behalf of its members to ensure that their health and safety are protected. In short, the Applicant has advocated for the maximum possible use of virtual hearings. Where an in-person hearing must be held, the Applicant has sought to ensure that court facilities are safe, including by having adequate ventilation, and for the mandatory wearing of protective face masks by all participants in judicial proceedings, including counsel, witnesses, court staff, and judges.

[17] The AJC alleges that CAS and the federal courts have failed to properly address its concerns.

[18] The Applicant's expert, Dr. Lisa Brosseau, a Certified Industrial Hygienist, reviewed the Federal Court and Tax Court of Canada's guidelines, along with the March 2021 CAS Guidelines. In her opinion, these guidelines are inadequate for preventing transmission of SARS-CoV-2, the virus that causes COVID-19.

The Respondent's Position on COVID-19 Precautions

[19] The Respondent has submitted the affidavit of Adele Anderson, the Acting Director General, Human Resources of CAS [the Anderson Affidavit]. She states that she was advised that, in preparing its guidelines, CAS consulted with external partners including other Canadian heads of court administration, Public Services and Procurement Canada and the COVID-19 Public Health Measures Task Group led by the Public Health Agency of Canada.

[20] Ms. Anderson notes that CAS does not decide whether a hearing will be held in person or virtually, describes investments that CAS made to facilitate virtual hearings, and notes that "[t]here are no practical limits to the number of virtual hearings that can be held." Ms. Anderson also discusses several external reviews of CAS's facilities, including reviews of physical controls and air quality.

[21] Ms. Anderson states that she is unaware of any reported cases of a participant testing positive for COVID-19 following an in-person hearing in a federal court proceeding. Additionally, she states that she is unaware of any visitor to CAS facilities, including visitors to registry counters, testing positive for COVID-19 following attendance at CAS-managed facilities.

Issues

[22] This application raises, and the parties addressed, the following five issues:

1. Is any of the evidence filed on this application inadmissible?
2. Is this application moot?
3. Does the Applicant have adequate alternative remedies?
4. Is CAS prevented from mandating virtual hearings and masking due to judicial independence?
5. Do the CAS safety measures breach section 7 of the *Canadian Charter of Rights and Freedoms* [the *Charter*]?

Analysis

(1) Is any of the evidence filed on this application inadmissible?

[23] Both parties argue that parts of the evidence before this Court constitute inadmissible hearsay. The Applicant submits that paragraphs 35-36 and 40-41 of the Anderson Affidavit are inadmissible, as they are double hearsay. The Applicant submits that these paragraphs disclose what Ms. Anderson was told by other CAS employees, who were in turn told these facts by an outside company, Pinchin Ltd. [Pinchin]. The Applicant submits that no reason was given why a representative of Pinchin could not provide their own affidavit, nor why the actual assessments made by Pinchin could not be included as exhibits to Ms. Anderson's affidavit.

[24] The Respondent disputes the Applicant's characterization of the Anderson Affidavit. The Respondent submits that this evidence forms part of CAS's records and is accessible to Ms. Anderson in her capacity as the Acting Director, Human Resources of CAS.

[25] For its part, the Respondent submits that part of paragraph 71 of the McNarin Affidavit is inadmissible hearsay. In this paragraph, Mr. McNarin lists a number of alleged incidents that have occurred in Canadian courts that are concerning from a health and safety perspective. The Respondent submits that this list of incidents of concern is inadmissible double hearsay. The Respondent further submits that this list recites alleged courtroom incidents with no indication of which courts were involved, how he came to know of these incidents, or what personal knowledge he has of them.

[26] Hearsay evidence is inadmissible for the truth of its contents unless it falls into the one of the established statutory or common law exceptions or if, pursuant to the principled approach to hearsay articulated by the Supreme Court of Canada in *R v Khan*, [1990] 2 SCR 531, it meets the requirements of necessity and reliability.

[27] The *Canada Evidence Act*, RSC 1985, c C-5, provides several statutory exceptions relating to documentary evidence. Relevant to this case are subsections 23(1) and 30(1). Subsection 23(1) provides that evidence of any proceeding in a Canadian or foreign court, or a record of any such proceeding, may be given by providing an exemplification or certified copy of the proceeding or record. Subsection 30(1) provides that "a record made in the usual and

ordinary course of business" is admissible, provided that oral evidence in respect of the evidence in the document would be admissible.

The Anderson Affidavit

[28] The impugned sections of the Anderson Affidavit set out the following facts:

> **Paragraph 35:** Ms. Anderson was advised by CAS's Facilities Manager that after a review by Pinchin of CAS's implementation of its COVID-19 preventative measures, CAS implemented all of Pinchin's recommendations by November 2020.
>
> **Paragraph 36:** Ms. Anderson was advised by the CAS's Deputy Chief Administrator, Corporate Services, that in January 2021 CAS implemented further measures in two of its locations, and Pinchin concluded that these measures met best practices.
>
> **Paragraph 40:** CAS installed air quality sensors at two of its facilities and Pinchin, having conducted air quality monitoring from January to September 2021, confirmed that air quality was within acceptable ranges for preventing COVID-19.
>
> **Paragraph 41:** In the summer of 2021, CAS made further adjustments to its prevention measures, in August 2021, Pinchin was again retained to inspect these adjustments, and final reports on those adjustments were unavailable at the time of her affidavit.

[29] With the exception of paragraph 41, the impugned paragraphs of the Anderson Affidavit are inadmissible hearsay and are struck.

[30] Paragraph 41 of the Anderson Affidavit does not constitute hearsay and is admissible because Ms. Anderson does not state that she is relying on information provided to her by others

and the information is likely to be available to her in her professional capacity as a senior CAS executive.

[31] The remaining paragraphs are not admissible for the truth of their contents. The text of the Anderson Affidavit is inconsistent with the Respondent's submission that the information she is providing is part of CAS's records and available to her. If this information were available to her, then she would not need to be advised by other CAS employees of the facts to which she has deposed. She would be able to speak to the information by reviewing the records herself.

[32] Ms. Anderson has not attached to her affidavit any reports from Pinchin or other persons speaking to the facts she has deposed. Had they been provided, they could have been admitted under the exception for business records. Furthermore, as noted by the Applicant, no reason has been given as to why the persons informing Ms. Anderson could not provide this information themselves. For both these reasons, Ms. Anderson's testimony on this point is not necessary and is not admitted under the principled approach.

The McNarin Affidavit

[33] Paragraph 71 of the McNarin Affidavit is as follows:

> 71. Between July 2020 and early 2021 I became increasingly concerned by the inconsistent approach of some judicial officers in various courts to compliance with reasonable health and safety measures to respond to the COVID-19 pandemic. I specifically raised these concerns in my letter of January 6, 2021, to the Canadian Judicial Council (Exhibit 6). I repeated my concerns in an email to the Deputy Minister of Justice Canada, Nathalie Drouin, on February 26, 2021 (Exhibit 5) discussed in greater detail at paragraph 32 above. The incidents which caused my

concern included judicial officers failing to comply with reasonable COVID-19 health and safety protocols during in-person court proceedings, citing judicial independence or their authority to control the court's process as a justification. These incidents had included instances where judicial officers had apparently:

a. Suggested that laws or rules relating to health and safety protocols do not apply in their courtrooms, or that they will decide what health and safety protocols are appropriate – not public health authorities;

b. Denied requests for remote/virtual hearings, despite the consent of all parties, and insisted that all of the court's proceedings will be conducted in-person;

c. Required federal Crown counsel having carriage of a matter to travel from one province to another for lengthy in-person proceedings, thereby potentially placing Crown counsel and others at risk because, for example, their home base or the place of the proceedings is a COVID-19 hotspot, they must travel by air, they must self-isolate, and they must stay in hotels and eat their meals outside of their home – sometimes for weeks;

d. Travelled from one province to another to preside over in-person proceedings without self-isolating;

e. Required counsel to appear for in-person hearings where there seemed to be no apparent necessity for doing so;

f. Allowed or instructed counsel and other court attendees to remove their masks during proceedings for lengthy periods in the face of public health guidance that COVID-19 is transmitted via airborne means over distances exceeding two meters and that masks should be worn indoors;

g. Instructed Crown counsel to remove their masks because everyone else in the courtroom had, at the judge's invitation, removed their masks;

h. Instructed counsel to remove their masks during submissions, apparently because judges felt it was easier to hear;

i. Removed their masks during the entirety of in-person proceedings in court or worn a visor (without a mask) which did not cover their nose and mouth;

j. Refused to wear a mask during in-person proceedings;

k. Engaged in a public debate in court on the record with counsel questioning the scientific validity of health and safety protocols to protect against COVID-19;

l. Demanded that Crown counsel produce scientific literature to support counsel's position that masks should be worn at all times in court to prevent the spread of COVID-19;

m. Berated counsel for raising questions about the adequacy of health and safety protocols in court;

n. Failed to ensure that other COVID-19 health and safety protocols (e.g., physical distancing) were observed in the courtroom; and

o. Allowed court staff who were exhibiting COVID-19 symptoms to remain in court for lengthy periods of time and continue to work.

[34] I agree with the Respondent that the list of incidents in paragraph 71 of the McNarin Affidavit is inadmissible hearsay. Looking first to the nature of the evidence, Mr. McNarin does not appear to have any personal knowledge of the alleged incidents. It is therefore hearsay.

[35] The only exception that could be applicable is the principled approach. Looking to necessity, the hearsay evidence is not necessary. Subsection 23(1) of the *Canada Evidence Act* allows for the filing of court records. If the Applicant wished to demonstrate these incidents, it could have provided evidence such as transcripts of the proceedings or decisions showing that the venue and the offices of counsel were in different provinces, necessitating interprovincial travel.

[36] With respect to reliability, Mr. McNarin gives no evidence of how he came to hear of these incidents. He fails to identify any specific proceeding in which these incidents occurred and fails to name the sources of his information. Without such information, it is impossible for the Court to assess its reliability. At a bare minimum, docket numbers or citations for these decisions could have been provided.

[37] The list of incidents in this paragraph constitutes inadmissible hearsay evidence and is struck.

(2) Is this application moot?

[38] The Respondent submits that this application is moot. The Attorney General submits that the issues raised in this application are hypothetical and based on speculation. The Respondent notes that the Applicant has failed to provide any evidence of any member of the Applicant suffering harm because of an appearance in a federal court proceeding. The Respondent submits that there is no evidence to support the Applicant's assertion that presiding federal judges will conduct hearings in a manner that is inconsistent with public health advice.

[39] The Respondent submits that this Court should not exercise its discretion to hear this application despite it being moot. The Respondent submits that courts should avoid lawmaking in the abstract and that the role of judicial review is not to set precedent for future cases.

[40] I agree with the Applicant that there is a live controversy between the parties and the matter is not moot.

[41] The Applicant has raised concerns with the working conditions faced by its members. The Applicant views these working conditions as unsafe. While CAS is not the employer of the Applicant's members, the AJC has alleged that CAS is responsible, at least in part, for these working conditions.

[42] I do not accept that the AJC needs to demonstrate that one of its members, or any person, has contracted COVID-19 because of their participation in an in-person proceeding in a federal court. As noted by the Supreme Court of Canada in *R v White*, [1999] 2 SCR 417 at paragraph 38, for alleged infringements of section 7 of the *Charter*, "[t]he first question to be resolved is whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of those interests." Actual harm is not required. Imminent harm is sufficient to ground a section 7 claim.

[43] If the CAS Guidelines truly represent a risk to the Applicant's members, then every upcoming in-person hearing attended by one of its members represents an imminent risk of harm. The Applicant has alleged an imminent risk of harm as a direct result of CAS's inaction. In my view, this establishes a live controversy between the parties.

(3) Does the Applicant have adequate alternative remedies?

[44] Absent exceptional circumstances, an application for judicial review should not be entertained until the applicant has exhausted all adequate remedial administrative processes. The Federal Court of Appeal described this principle in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*] at paragraphs 30-32:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point.
>
> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway. Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience. Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge.
>
> [cited authorities deleted]

[45] The Respondent submits that the Applicant has two adequate alternative remedies: The Applicant's members may grieve under the collective agreement between the Treasury Board

and the ACJ [the Collective Agreement] or they can file complaints under the *Canada Labour Code*, RSC 1985, c L-2 [the Code] alleging unsafe working conditions.

[46] The Respondent submits that, at its core, this dispute is about the health and safety of counsel appearing before the federal courts as a part of their employment. The Respondent submits that this dispute is therefore a labour dispute and notes that courts generally decline jurisdiction to hear labour related disputes in favour of legislated dispute resolution procedures, even where the court may have jurisdiction (citing *Wojdan v Canada (Attorney General)*, 2021 FC 1341 at para 15; *Vaughan v Canada*, 2005 SCC 11 at para 39).

[47] The Respondent notes that the Collective Agreement allows employees to grieve "as a result of any occurrence or matter affecting [their] terms and conditions of employment," which it submits includes the requirement to appear in person in court proceedings. The Respondent submits that it is premature to hear this matter, as it avoids the grievance procedure under section 208 of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 (citing *Gupta v Canada (Attorney General)*, 2021 FCA 202 at para 7).

[48] The Respondent submits that the Code provides options for employees to have their health and safety concerns addressed by filing a complaint under section 127.1 and by providing employees with a right to refuse dangerous work under subsection 128(1). The Respondent submits that potential exposure to COVID-19 would fall under the ambit of dangerous work and submits the definition of a "work place" ("lieu de travail") under section 122 of the Code includes third-party premises, such as a federal courthouse. The Respondent submits that it is

immaterial that the work place is not controlled by the employer; what is relevant is whether the employees' activities are controlled by the employer.

[49] The Respondent lastly submits that the Applicant's own Guidance to Members on Ensuring Their Health and Safety for Court and Tribunal Proceedings [the AJC Guidance] concedes that courtrooms are work places where employees' activities are controlled by the employer:

> **Legal Protections for Counsel**
>
> Counsel who appear in Canadian court or tribunal hearings are protected by section 7 of the *Canadian Charter of Rights and Freedoms (Charter)*. They have the right to security of the person, which includes the right to a safe work environment and the right to not have their health or safety put at risk. A failure to respect the section 7 rights of counsel could provide the basis for an application for relief under section 24 of the *Charter* or other legal action.
>
> Courthouses and courtrooms as well as tribunals and tribunal hearing rooms are workplaces where activities that are controlled by the employer are carried out by federal Crown counsel, federal prosecutors and other AJC members.
>
> Under section 124 of the *Canada Labour Code* (CLC), Part II, the employer has an obligation to ensure that workplaces are healthy and safe for its employees. Also, under section 128 (1) of the Code, an employee may refuse to work in a place or perform an activity if the employee, while at work, has reasonable cause to believe that a condition exists in the place that constitutes a danger to the employee, or the performance of the activity constitutes a danger to the employee or to another employee.
>
> Similarly, article 26.01 of the Law Practitioner (LP) Collective Agreement requires that, *"[t]he Employer shall continue to make all reasonable provisions for the occupational safety and health of lawyers. The Employer will welcome suggestions on the subject from the Association and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury."*

[50] The AJC submits that this dispute cannot form a grievance because CAS is not the employer. The Applicant submits that the CAS Guidelines have been issued in its capacity as the administrator of the federal courts. The Applicant submits that the Collective Agreement only allows for grievances on matters affecting the "terms and conditions of employment" and that CAS's decision does not relate to employment terms and conditions.

[51] The AJC also submits that its members cannot file health and safety complaints. The Applicant submits that a courthouse is not a "work place" for lawyers who only attend to argue cases. Even if it is a work place, the Applicant submits that the nature of its concerns are those relating to a work place itself and not to activities performed in the work place. The AJC submits that this means that these concerns cannot be the subject of a complaint to the employer. The Applicant submits that even if the concerns fall under the category of an activity, it is CAS that controls the activity and not the employer.

[52] Lastly, the AJC submits that its own guidance to its members is not a legal opinion and does not prevent the present application from being brought.

A Grievance as Remedy

[53] The AJC is correct that its members cannot bring a grievance against CAS, as it is not an employer of its members. However, the Applicant's members may still bring a grievance against their actual employers. As noted by the Respondent, the Collective Agreement allows members to grieve if they feel aggrieved "as a result of any occurrences or matter affecting [their] terms and conditions of employment."

[54] Attendance as counsel in a proceeding is clearly done at the direction of counsel's employer and is a term and condition of employment. In my view, a requirement of the employer that a member appear in person in a court proceeding where it is thought that it is an unsafe place is a health and safety issue that may be grieved. I agree with the AJC Guidance that their members' employer has an obligation to ensure that their workplace is safe and that employees may refuse to perform unsafe work.

[55] The AJC Guidance outlines directions from its member's employers as to what they should do if they are concerned regarding COVID-19 precautions in an in-person hearing. It tells counsel to ask for an adjournment, seek a remote appearance if the concerns cannot be addressed, and, if protocols cannot be met when court resumes, "inform the court that you cannot continue and will be removing yourself from the courtroom, with the full support of your management" [emphasis added].

[56] It was suggested at the hearing that refusing to continue might have an adverse impact on the Applicant's members' careers. If so, that too may be grieved.

[57] The AJC Guidance sets out a number of situations in which it believes that the employers' directions are engaged. All of the concerns raised in this application are included in this list. In particular, this list includes the denial of a remote hearing when an in-person hearing is unnecessary, hearings that require counsel to travel to attend, hearings in which all participants are not masked, and facilities with poor ventilation and air quality.

A Complaint under the Code as Remedy

[58] The relevant provisions of the Code are reproduced in Annex A below.

[59] Section 122 of the Code defines a "work place" as "any place where an employee is engaged in work for the employee's employer."

[60] Section 124 of the Code provides a general duty of an employer to "ensure that the health and safety at work of every person employed by the employer is protected." There is nothing limiting this duty to work places controlled by the employer.

[61] Subsection 125(1) of the Code sets out specific obligations of employers, including duties to provide proper safety equipment (Code, s 125(1)(l)), to ensure adequate ventilation (Code, s 125(1)(n)), and to ensure that the activities of persons granted access to the work place do not endanger the health and safety of employees (Code, s 125(1)(y)). Subsection 125(1) of the Code specifically provides that employers have these responsibilities to employees not only in work places that the employer controls, but also "in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity."

[62] Section 127.1 of the Code sets out a detailed, multi-step internal complaint procedure for alleged breaches of the employer's obligations under sections 124 and 125. Employees can complain to their supervisor (Code, s 127.1(1)). Unresolved complaints may be investigated by

a work place committee or a health and safety representative, and complaints that remain unresolved can be referred to the Head of Compliance and Enforcement.

[63] Section 128 of the Code provides employees with the right, subject to certain exceptions, to refuse to work in a place if a condition in that place constitutes a danger to the employee. It does not limit the "place" to one that is controlled by the employer. Section 128 also allows an employee to refuse to perform an activity if the performance of the activity constitutes a danger to the employee. Again, it does not limit the performed "activity" to those activities performed in work places controlled by the employer.

[64] In the present case, the employers, to some extent, can control the activities of its employees appearing in a federal court proceedings. They can do so because it is the employers, and not CAS, who require the Applicant's members to attend court proceedings. The employers may reduce the number of in-person proceedings by telling their employees to seek to have all hearings conducted virtually where possible. The employers may allow employees that feel uncomfortable appearing in person to have a matter transferred to a colleague who is willing to appear in person. In cases where an employee feels unsafe due to a lack of health and safety protections in a courtroom, the employers may allow employees to seek an adjournment and, if an adjournment is not granted, to withdraw as counsel. In doing so, the employers are able to manage the conditions of work activities and remove their employees from unsafe situations.

Conclusion

[65] Given that the Applicant has an alternative remedy, I agree with the Respondent that this application is premature. If the Applicant's members are being put in unsafe working conditions and, after pursuing these alternative remedies, the employers are unable to take reasonable steps to ensure safe working conditions, then and only then should the Applicant seek to challenge the CAS Guidelines.

[66] As was noted by the Federal Court of Appeal at paragraph 33 of *CB Powell*, "[c]ourts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously." I see no exceptional circumstances here that would cause me to circumvent those administrative processes.

Other Issues

[67] In light of the findings above, this application must be dismissed.

[68] The submissions directed to judicial independence, the division between the responsibilities of CAS and the judiciary, and section 7 of the *Charter* are novel and interesting. However, anything said would be *obiter*, and it would be inappropriate for the Court to embark on a discussion of these complex issues when that is not required to dispose of this application.

[69] Given the unique facts underlying this application, and in the exercise of my discretion, I determine that each party should bear its own costs.

JUDGMENT in T-1030-21

THIS COURT'S JUDGMENT is that the application is dismissed without costs.

"Russel W. Zinn"
Judge

Annex A

PART II
Occupation Health and Safety

Interpretation

Definitions

122 (1) In this Part,

[…]

work place means any place where an employee is engaged in work for the employee's employer; (*lieu de travail*)

[…]

Head of Compliance and Enforcement

122.21 (1) The Minister may designate a person as Head of Compliance and Enforcement.

[…]

General duty of employer

124 Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

Specific duties of employer

125 (1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

[…]

PARTIE II
Santé et sécurité au travail

Définitions et interprétation

Définitions

122 (1) Les définitions qui suivent s'appliquent à la présente partie.

[…]

lieu de travail Tout lieu où l'employé exécute un travail pour le compte de son employeur. (*work place*)

[…]

Chef de la conformité et de l'application

122.21 (1) Le ministre peut désigner un chef de la conformité et de l'application.

[…]

Obligation générale

124 L'employeur veille à la protection de ses employés en matière de santé et de sécurité au travail.

Obligations spécifiques

125 (1) Dans le cadre de l'obligation générale définie à l'article 124, l'employeur est tenu, en ce qui concerne tout lieu de travail placé sous son entière autorité ainsi que toute tâche accomplie par un employé dans un lieu de travail ne relevant pas de son autorité, dans la mesure où cette tâche, elle, en relève :

[…]

(l) provide every person granted access to the work place by the employer with prescribed safety materials, equipment, devices and clothing;

[…]

(n) ensure that the levels of ventilation, lighting, temperature, humidity, sound and vibration are in accordance with prescribed standards;

[…]

(y) ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees;

[…]

Internal Complaint Resolution Process

Complaint to supervisor

127.1 (1) An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident, injury or illness arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor.

[…]

Investigation of complaint

(3) The employee or the supervisor may refer an unresolved complaint, other than a complaint relating to an occurrence of harassment and violence, to a chairperson of the work place committee or to the health and safety representative to be investigated jointly

l) de fournir le matériel, l'équipement, les dispositifs et les vêtements de sécurité réglementaires à toute personne à qui il permet l'accès du lieu de travail;

[…]

n) de veiller à ce que l'aération, l'éclairage, la température, l'humidité, le bruit et les vibrations soient conformes aux normes réglementaires;

[…]

y) de veiller à ce que la santé et la sécurité des employés ne soient pas mises en danger par les activités de quelque personne admise dans le lieu de travail;

[…]

Processus de règlement interne des plaintes

Plainte au supérieur hiérarchique

127.1 (1) Avant de pouvoir exercer les recours prévus par la présente partie — à l'exclusion des droits prévus aux articles 128, 129 et 132 —, l'employé qui croit, pour des motifs raisonnables, à l'existence d'une situation constituant une contravention à la présente partie ou dont sont susceptibles de résulter un accident, une blessure ou une maladie liés à l'occupation d'un emploi doit adresser une plainte à cet égard à son supérieur hiérarchique.

[…]

Enquête

(3) En l'absence de règlement, la plainte, sauf si elle a trait à un incident de harcèlement et de violence, peut être renvoyée à l'un des présidents du comité local ou au représentant par l'une ou l'autre des parties. Elle fait alors

l'objet d'une enquête tenue conjointement, selon le cas :

(a) by an employee member and an employer member of the work place committee; or

a) par deux membres du comité local, l'un ayant été désigné par les employés — ou en leur nom — et l'autre par l'employeur;

(b) by the health and safety representative and a person designated by the employer.

b) par le représentant et une personne désignée par l'employeur.

[…]

[…]

Referral to the Head

(8) The employee or employer may refer a complaint that there has been a contravention of this Part to the Head in the following circumstances:

Renvoi au chef

(8) La plainte fondée sur l'existence d'une situation constituant une contravention à la présente partie peut être renvoyée par l'employeur ou l'employé au chef dans les cas suivants :

(a) where the employer does not agree with the results of the investigation

a) l'employeur conteste les résultats de l'enquête;

(b) where the employer has failed to inform the persons who investigated the complaint of how and when the employer intends to resolve the matter or has failed to take action to resolve the matter;

b) l'employeur a omis de prendre les mesures nécessaires pour remédier à la situation faisant l'objet de la plainte dans les délais prévus ou d'en informer les personnes chargées de l'enquête;

(c) where the persons who investigated the complaint do not agree between themselves as to whether the complaint is justified; or

c) les personnes chargées de l'enquête ne s'entendent pas sur le bien-fondé de la plainte;

(d) in the case of a complaint relating to an occurrence of harassment and violence, the employee and the supervisor or designated person, as the case may be, failed to resolve the complaint between themselves.

d) s'agissant d'une plainte ayant trait à un incident de harcèlement et de violence, l'employé et son supérieur hiérarchique ou la personne désignée, selon le cas, n'ont pu régler la plainte à l'amiable.

[…]

[…]

Duty and power of Head

(10) On completion of the investigation, the Head

(a) may issue directions to an employer or employee under subsection 145(1);

(b) may, if in the Head's opinion it is appropriate, recommend that the employee and employer resolve the matter between themselves; or

(c) shall, if the Head concludes that a danger exists as described in subsection 128(1), issue directions under subsection 145(2).

[…]

Refusal to work if danger

128 (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

[…]

(b) a condition exists in the place that constitutes a danger to the employee; or

(c) the performance of the activity constitutes a danger to the employee or to another employee.

Pouvoirs du chef

(10) Au terme de l'enquête, le chef :

a) peut donner à l'employeur ou à l'employé toute instruction prévue au paragraphe 145(1);

b) peut, s'il l'estime opportun, recommander que l'employeur et l'employé règlent à l'amiable la situation faisant l'objet de la plainte;

c) s'il conclut à l'existence de l'une ou l'autre des situations mentionnées au paragraphe 128(1), donne des instructions en conformité avec le paragraphe 145(2).

[…]

Refus de travailler en cas de danger

128 (1) Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :

[…]

b) il est dangereux pour lui de travailler dans le lieu;

c) l'accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1030-21
STYLE OF CAUSE:	ASSOCIATION OF JUSTICE COUNSEL v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 28, 2022
JUDGMENT AND REASONS:	ZINN J.
DATED:	JULY 25, 2022

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