

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240321

Docket: A-175-23

Citation: 2024 FCA 57

**CORAM: WEBB J.A.
WOODS J.A.
HECKMAN J.A.**

BETWEEN:

NOEL SINCLAIR

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on March 19, 2024.

Judgment delivered at Ottawa, Ontario, on March 21, 2024.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**WOODS J.A.
HECKMAN J.A.**

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Mr. Sinclair, a Crown prosecutor in Whitehorse, Yukon, applied to the Public Service Commission of Canada (the PSC) on January 5, 2021 for permission to seek the nomination as (and if successful to be) a candidate in the 2021 Yukon territorial election. On March 16, 2021, the PSC denied Mr. Sinclair's request.

[2] The election was held on April 12, 2021 and three days later on April 15, 2021, Mr. Sinclair filed an application with the Federal Court for judicial review of the decision of the PSC denying him permission to seek nomination as, and be, a candidate in that election. Mr. Sinclair, in his notice of application for judicial review, stated that he was seeking the following:

1. An order setting aside the PSC decision and declaring that the Applicant was entitled to seek nomination and be a candidate the Yukon territorial election held on April 12, 2021;
2. In the alternative, an order setting aside the PSC decision and remitting the matter back to the PSC for redetermination in accordance with any directions provided by this Court;
3. The costs of this application; and
4. Such further and other relief as this Honourable Court deems just.

[3] The Federal Court (*per Sadrehashemi J.*, 2023 FC 750) found that Mr. Sinclair's application was moot based on the test as set out in *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, 57 DLR (4th) 231 (*Borowski*). The election for which he was seeking to be a candidate was held before he made his application for judicial review. In this appeal, Mr. Sinclair does not challenge the finding that his application was moot.

[4] In *Borowski*, the Supreme Court of Canada identified the relevant criteria to be considered by a court in deciding whether to exercise its discretion to decide a matter that is moot:

- (a) the existence of an adversarial relationship between the parties;
- (b) the concern for judicial economy; and
- (c) the need for the court to be sensitive to its adjudicative role.

[5] The Federal Court Judge considered these factors and declined to exercise her discretion to decide the application for judicial review. Mr. Sinclair's application was therefore dismissed. In this appeal, Mr. Sinclair challenges this decision of the Federal Court Judge to decline to exercise her discretion to decide his application for judicial review.

[6] In my view, the Federal Court Judge did not commit any error that would warrant our intervention in declining to exercise her discretion to decide Mr. Sinclair's judicial review application, based on the record that was before her. This is sufficient to dismiss this appeal.

[7] Mr. Sinclair submitted that he is seeking statements of general principles from this Court that could be applied to any future decision of the PSC on an application by a public prosecutor for permission to be a candidate in an election.

[8] I would note that guidance has already been provided by this Court in *Taman v. Canada (Attorney General)*, 2017 FCA 1 (*Taman*) on what is to be addressed, from an administrative law perspective, in a decision of the PSC regarding a request by a public prosecutor to be a candidate in an election.

[9] Guidance has also been provided by the Supreme Court in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Language, Culture and Employment)*, 2023 SCC 31 (*CSFTNO*) (and the other decisions of the Supreme Court referred to therein) concerning the application of Charter rights and values in administrative decisions.

[10] It was not contested in this appeal that decisions by the PSC refusing to grant public servants permission to seek elected office must be justified to the applicants (*Taman* at para. 47; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 95) and must reflect a proportionate balancing of their Charter rights or the values underlying them (*CSFTNO* at para. 73).

[11] It is far from clear what other general guidance could be provided by this Court. The Federal Court Judge, in paragraph 15 of her reasons, referred to three declarations that Mr. Sinclair was seeking:

- i) the PSC's decision disproportionately impacted his *Charter* rights;
- ii) with the exception of the DPP [Director of Public Prosecutions] and the Deputy Directors of Public Prosecutions, federal Crown prosecutors are presumptively permitted to seek nomination and/or run as candidates in federal, provincial, or territorial elections; and
- iii) prior to issuing any decision contrary to that presumption, the PSC must refer that determination to this Court under subsection 18.3(1) of the *Federal Courts Act*, RSC, 1985, c F-7 on the issue of whether the PSC's proposed disposition disproportionately impacts the prosecutor's *Charter* rights.

[12] The first declaration relates directly to the PSC decision that is the subject of Mr. Sinclair's judicial review application. Since his application was moot and the Federal Court Judge did not exercise her discretion to decide his application even though it was moot, this requested declaration did not warrant any further consideration by the Federal Court Judge.

[13] Neither one of the other two declarations arise from the PSC decision nor are they identified as requested declarations in Mr. Sinclair's notice of application. These requested declarations are general declarations that Mr. Sinclair is seeking to have applied in a future decision of the PSC. The Federal Court Judge found that these requested declarations were not appropriate and Mr. Sinclair has not established that the Federal Court Judge erred in making this finding.

[14] There is one matter that was raised in argument that warrants a comment. The PSC in its decision found that a sufficient mitigating factor could not be identified for two specified risks to the perception of political impartiality that could result from granting Mr. Sinclair's request. In particular, the PSC referred to the risk stated as "reputational concerns related to the role of Crown prosecutors". It is not clear whether this statement is limited to Mr. Sinclair's role as a Crown prosecutor in Whitehorse or to all Crown prosecutors.

[15] Any decision under the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) to grant or deny permission for a public servant, who is otherwise eligible to be a candidate in an election, is to be based on the facts and circumstances related to that particular person. A blanket prohibition on any Crown prosecutor seeking to be a candidate in an election

would not be consistent with the purpose of Part 7 of the *PSEA*: “to recognize the right of employees to engage in political activities while maintaining the principle of political impartiality in the public service” (section 112 of the *PSEA*).

[16] I would dismiss the appeal. Since the parties agreed that the successful party would be entitled to \$3,000 in costs, I would award the respondent costs fixed in the amount of \$3,000.

“Wyman W. Webb”

J.A.

“I agree.

Judith Woods J.A.”

“I agree.

Gerald Heckman J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-175-23

STYLE OF CAUSE: NOEL SINCLAIR v. ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MARCH 19, 2024

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: WOODS J.A.
HECKMAN J.A.

DATED: MARCH 21, 2024

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