Federal Court  Cour fédérale

Date: 20151013

Docket: T-60-15

Citation: 2015 FC 1155

Ottawa, Ontario, October 13, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

EMILIE TAMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

Overview

[1] In a decision dated December 16, 2014, the Public Service Commission [Commission] denied the request of the applicant, Emilie Taman, for permission and a leave of absence without pay to seek nomination and be a candidate in the next federal election pursuant to subsections 114(4) and (5) of the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 [PSEA].

[2] The applicant submits that the Commission's decision infringes her rights pursuant to paragraphs 2(b), 2(d) and section 3 of the *Charter*, and does not reflect a proportionate balancing of her *Charter* rights and the statutory objectives of the PSEA, and is, therefore, unreasonable.

[3] Upon consideration of the comprehensive submissions of the applicant and respondent, the legislation, the reasons for the Commission's decision, the record, and the jurisprudence, I find that, although the decision of the Commission limits the applicant's *Charter* rights, it does reflect a proportionate balancing of the *Charter* rights at stake, to engage in political activity and run for office, with the principle of political impartiality in the public service.

[4] The applicant followed the required procedure in her request for permission to seek the candidacy and pursue election and to obtain a leave without pay, with a view to returning to her position if she were unsuccessful in her candidacy or election. She provided comprehensive submissions to the Commission which noted her *Charter* rights, addressed all the relevant facts, described all aspects of her work, candidly highlighting those which could give rise to a perception of partiality, and suggested options to provide some "middle ground" to guard against such perceptions.

[5] The Director of Public Prosecution's [DPP] submissions to the Commission highlighted the need to ensure that the Office of the DPP [ODPP] discharged its prosecutorial duties in a politically impartial manner and to ensure that there would be no perception of political partiality on the part of federal prosecutors. The DPP's submissions focussed on the independence and integrity of the ODPP, of which the applicant is part, and not on the applicant's integrity, which

has never been questioned. The concern of the Commission, based on this input, is primarily about perception, which is as important as actual impartiality in the present context.

[6] The Commission considered the competing rights and interests at play as required pursuant to the PSEA. The decision reflects that the Commission considered all the facts and, based on its overall view, determined that the applicant's rights could not be fully protected while at the same time maintaining the objective of political impartiality in the public service. Measures to mitigate the impact of the limitation of the applicant's rights were considered, but were reasonably found to not be feasible to satisfy the Commission that the applicant's ability to perform her duties in a politically impartial manner would not be impaired or perceived to be impaired if she were to return to her duties.

[7] Although the decision has a significant impact on the applicant from her own perspective – because the trade-off for her is between maintaining her employment or pursuing her candidacy and election – the determination whether the decision reflects a proportionate balancing is guided by the jurisprudence which calls for the consideration of the statutory and factual context, and highlights that the goal is to protect *Charter* rights as fully as possible.

[8] The reality is that it is not always possible to strike a perfect balance either between competing *Charter* rights or between *Charter* rights and other rights and interests. Some rights may be required to give way to others in a manner which will be considered disproportionate by one party or the other. The notion of protecting *Charter* rights as fully as possible recognizes that rights are not absolute and full protection is not always possible.

[9] For the more detailed reasons that follow, the application is dismissed.

Background

[10] Ms Taman, a prosecutor in the Regulatory and Economic Prosecutions and Management Branch of the Public Prosecution Service of Canada [PPSC] submitted a request in November 2014 to the Commission pursuant to section 114 of the PSEA. Ms Taman requested permission to seek nomination as and, if nominated, be a candidate in the federal election to be held on October 19, 2015. She also requested a leave of absence without pay before and during the election period. The Commission denied her request on December 16, 2014.

[11] Ms Taman described her role and duties in her request, submitted in accordance with the applicable form and procedure, and in her submissions to the Commission which attached her work description. In her affidavit, she described that she is responsible for assessing investigative files to provide pre-charge legal advice or an opinion pre-charge regarding potential prosecutions; prosecuting files once the decision to prosecute has been made; appearing in court to prosecute; applying to a judge for various sentencing matters; negotiating with opposing counsel; and supporting other prosecutors on complex and lengthy cases or projects. In her affidavit, she noted that her team at the PPSC was responsible for regulatory offences other than drug offences and that she had carriage of, or worked on, prosecutions under the *Immigration and Refugee Protection Act*, SC 2001, c 27; the *Fisheries Act*, RSC 1985, c F-14; the *Income Tax Act*, RSC 1985, c 1 (5th Supp); and the *Lobbying Act*, RSC 1985, c 44 (4th Supp).

[12] In her submissions to the Commission, in response to specific questions in the request form, Ms Taman acknowledged that there could be a public perception that she would be unable to perform her duties impartially in the period leading up to the nomination and before and during the election period, but noted that her intention was to be on leave without pay during this period and not working and, if she returned to work, in the event that she did not receive the nomination or were not elected, the public would understand that there is a distinction between a lawyer's personal views and the positions they take in Court.

[13] The request for permission to the Commission, in the required form, included the views of the applicant's immediate supervisor [Team Leader] and senior management. The Team Leader indicated that he was not satisfied that the applicant's ability to perform her duties in a politically impartial manner would not be impaired or be perceived to be impaired during the election. He noted that her position may need to be filled in her absence. However, he indicated that if the applicant returned to work after not receiving the nomination or not being elected, he was satisfied that her ability to perform her duties in a politically impartial manner would not be impaired or be perceived to be impaired because the legal community and public understand that the advocate's job is to apply the law to a set of facts, not to make law. In other words, the Team Leader had concerns about the impairment or perceived impairment of the applicant's ability to perform her duties up to the election, but did not have these concerns if she were to return to work if not elected.

[14] The DPP expressed the opinion that seeking nomination or candidacy before or during an election period indicates a significant allegiance to a political party and its platform, which

would undermine the independence of the prosecutorial function and could lead to the public perception that the applicant's political allegiance influences her judgment as a prosecutor. The DPP also indicated that the applicant may be called to work on files of a political character, including offences under the *Lobbying Act*, the *Canada Elections Act*, SC 2000, c 9 and the *Parliament of Canada Act*, RSC 1985, c P-1.

[15] The DPP indicated that he was not satisfied that if the applicant returned to her position if unsuccessful in seeking the nomination or election, that her ability to perform her duties in a politically impartial manner would not be impaired or be perceived to be impaired. The DPP indicated that this raises the risk that the decisions made by the applicant could be perceived by investigators and the public as influenced by political considerations. In other words, the DPP had concerns about the impairment or perceived impairment of the applicant's ability to perform her duties both before the election period and upon her return to work, after having been a candidate in a federal election.

[16] The DPP also indicated that he could not accommodate the applicant's return to another, non-prosecutorial, position because the core activities of the ODPP are the prosecution of federal offences and the provision of advice to investigative agencies, both of which require political impartiality or the perception of political impartiality. The DPP added that it would be necessary to fill the applicant's position in her absence.

[17] The DPP provided additional comments to elaborate on the answers to specific questions in the request form indicating that partisan political activities by prosecutors undermine the

prosecutorial function; that independence is central to the prosecutorial decision-making process; that prosecutorial decision-making process is quasi-judicial; that prosecutors exercise their quasi-judicial duties in the public interest and must be free from partisan political influence; and, that his view is that federal prosecutors should abstain from any political activity. The DPP also noted a past incident where the ODPP was called upon to address a complaint related to an individual who had engaged in political activities prior to becoming a federal prosecutor.

[18] Ms Taman provided additional submissions to the Commission in response to senior management's comments, noting that: the DPP's position does not acknowledge her rights under the *Charter*; prosecutorial independence is institutional and her discretion is highly circumscribed; prosecutors ought not to be held to the same standard as judges when it comes to personal partisan activities; the views of the DPP are not shared by other jurisdictions where prosecutors have been candidates in elections and returned to their positions; former political candidates are not barred from joining the PPSC as prosecutors; the PPSC has not communicated its view that prosecutors should abstain from all political involvement; the mere possibility of complaints is not a basis to refuse a request; an individual prosecutor can be insulated from relatively rare politically sensitive prosecutions; and, remote hypotheticals should not be given undue weight. The applicant added that reasonable accommodations should be considered to overcome the barriers to women's representation in politics and suggested that there are ways to grant her request without undue burden on the PPSC, including by maintaining "firewalls" and assigning politically sensitive files to others.

The Decision

[19] The Commission cited the relevant statutory provisions. Pursuant to subsections 114(1) and (2) of the PSEA, an employee may seek nomination as a candidate before or during the election period or be a candidate before the election period only if he or she has requested and obtained permission from the Commission. Pursuant to subsection 114(3), an employee may only be a candidate during the election period if he or she has obtained leave without pay from the Commission. Finally, pursuant to subsections 114(4) and (5), the Commission may only grant permission or leave without pay if it is satisfied that the employee's ability to perform his or her duties in a politically impartial manner will not be impaired or perceived to be impaired.

[20] The relevant statutory provisions are set out in Annex A.

[21] The Commission noted that the applicant had sought permission in accordance with subsections 114(1), (2) and (3) of the PSEA and it had considered the information she provided as well as the information provided by her Team Leader and senior management at the ODPP.

[22] The Commission noted its concerns that the applicant's ability to perform her duties as a federal prosecutor in a politically impartial manner may be impaired or perceived to be impaired in light of the nature of her duties and the increased publicity, visibility and recognition that would be associated with seeking nomination and being a candidate in a federal election.

[23] The Commission found that as a federal prosecutor in the Regulatory and Economic Prosecutions and Management Branch, the applicant has a high level of autonomy and

decision-making power, noting that she: prosecutes federal regulatory offences; provides legal advice to the Royal Canadian Mounted Police [RCMP] and other federal organizations regarding federal prosecutions; may apply for seizure or forfeiture of property; is involved in plea and sentencing discussions; is involved in "determining issue resolution" on some files; is highly visible when she appears in Court; and, may be required to deal with the media.

[24] The Commission noted the views of the DPP that the applicant's candidacy publicly indicates a significant allegiance to a political party and its platform and that this would undermine the independence and prosecutorial function of the ODPP. The Commission found that this, in turn, could lead to a perception that the applicant is not able to perform her duties in a politically impartial manner.

[25] The Commission found that the risk to political impartiality could not be mitigated by a leave without pay or by the applicant assuming a non-prosecutorial role if she returned to work. The Commission noted that the ODPP had indicated that it could not accommodate these measures because it is a small organization, its core activities are the prosecution of offences and the provision of advice to investigatory agencies, and that few counsel positions do not exercise discretionary powers.

[26] The Commission concluded that it was not satisfied that being a candidate during the election period would not impair or be perceived as impairing the applicant's ability to perform her duties in a politically impartial manner. The Commission denied both the permission and leave without pay, which is a condition precedent to a public servant seeking election.

The Applicant's Overall Position

[27] The applicant argues that the decision of the Commission is unreasonable because it disproportionately limits her *Charter* rights, specifically paragraphs 2(b), 2(d) and section 3 of the *Charter*.

[28] The applicant does not challenge the constitutionality of the provisions of the PSEA, but rather argues that the decision of the Commission does not reflect a proportionate balancing of her *Charter* rights. The applicant argues that the Commission did not exercise its discretion in accordance with the principles established by the Supreme Court of Canada in *Doré v Barreau du Quebec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*] governing the review of administrative decisions which engage and limit *Charter* rights and values. The applicant submits that the effect of the decision is to prohibit all federal prosecutors from seeking candidacy and election and this blanket prohibition, combined with the Commission's failure to mitigate the impact of the limitation on her *Charter* rights, is not proportionate.

[29] The applicant seeks an order to set aside the decision of the Commission and to order that she is entitled to seek nomination as a candidate in the next federal election and is entitled to a leave of absence without pay during the election period.

The Respondent's Overall Position

[30] The respondent submits that the Commission applied the appropriate framework and its determination that there may be a perception of impairment of political partiality is justified by

the facts. The respondent acknowledges that the applicant's rights pursuant to paragraph 2(b) and section 3 of the *Charter* are affected by the decision, but disagrees that paragraph 2(d) is engaged. The respondent submits that the PSEA reflects the need to balance *Charter* rights and values with the competing objectives of the PSEA. The Commission has the discretion to permit or deny a public servant from seeking candidacy and election in a federal election in accordance with the provisions of the PSEA. The Commission conducted an assessment of the applicant's request and of her specific duties and its decision does not reflect a blanket prohibition on federal prosecutors. The Commission exercised its discretion reasonably and proportionately.

The Standard of Review of Administrative Decisions that Affect *Charter* Rights

[31] The parties agree that the standard of review to be applied to discretionary decisions which implicate *Charter* rights is reasonableness and, in this context, the approach has been established by the Supreme Court of Canada in *Doré* and more recently reiterated and applied in *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, 382 DLR (4th) 195 [*Loyola*].

[32] In *Doré*, the Supreme Court established that reviewing courts should apply the reasonableness standard to administrative decisions challenged on *Charter* grounds, but, in doing so, the reviewing court must assess whether the decision reflects a proportionate balancing of the *Charter* protections at stake and the relevant statutory mandate.

[33] The parties agree that a decision which reflects a proportionate balancing of *Charter* rights and values is a reasonable decision. However, the parties differ on whether the

Commission's decision reflects such a proportionate balancing in accordance with the framework set out in *Doré*.

[34] In *Doré*, the Supreme Court of Canada described the balancing required by the decision maker and the role of the Court on judicial review as follows:

> [55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In Lake, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).
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> [56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).
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> [57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality"

> (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.

[35] In *Loyola*, the Supreme Court of Canada reiterated and applied the *Doré* framework, noting that: "In the context of decisions that implicate the Charter, to be defensible, a decision must accord with the fundamental values protected by the Charter" (at para 37). The Court also noted the analogy with the concept of minimal impairment of *Charter* rights:

> [40] A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing. Both *R. v. Oakes*, [1986] 1 S.C.R. 103, and *Doré* require that *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160. As such, *Doré*'s proportionality analysis is a robust one and "works the same justificatory muscles" as the *Oakes* test: *Doré*, at para. 5.
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> [41] The *Doré* analysis is also a highly contextual exercise. As under the minimal impairment stage of the *Oakes* analysis, under *Doré* there may be more than one proportionate outcome that protects *Charter* values as fully as possible in light of the applicable statutory objectives and mandate: *RJR-MacDonald*, at para. 160.

[36] The guidance of the Supreme Court of Canada regarding how decision-makers should approach decisions implicating *Charter* rights and how Courts should judicially review these decisions is summarized below.

- The overall goal is to balance the *Charter* rights or values with the statutory objectives and to limit the *Charter* protected rights or values as little as

possible (or to protect the *Charter* rights and fully as possible) in light of the statutory objectives.

– To achieve this balance, the decision maker should:
  - Consider the statutory objectives;
  - Consider how the *Charter* value at issue will best be protected in view of the statutory objectives; and,
  - In doing so, balance the severity of the interference of the *Charter* protection with the statutory objectives.

– On judicial review, the question for the Court is whether the decision-maker followed the approach described above; i.e., whether the decision reflects a proportionate balancing of the *Charter* protections at play, taking into consideration the impact of the relevant *Charter* protections, as well as the nature of the decision and the statutory and factual context.

– What is a proportionate balancing?
  - A proportionate balancing is one that gives effect, *as fully as possible*, to the *Charter* protections at stake given the particular statutory mandate.
  - Looked at from the other perspective, this means that *Charter* protections should be affected as little *as reasonably possible* in light

of the statutory objectives; this mirrors the minimal impairment aspect of the *Oakes* test.

- The proportionality analysis should be "robust" and contextual.

– There may be more than one proportionate outcome. A "margin of appreciation" or deference is given to the decision-maker in balancing *Charter* values against broader objectives.

– Finally, a decision that proportionately balances *Charter* rights or values against the legislative objectives "falls within a range of possible, acceptable outcomes" and will be found to be reasonable on judicial review.

[37] Although the Court has provided these guiding principles to decision-makers and to Courts reviewing such decisions, the practical application of the principles is not a simple matter.

The *Charter* Rights Implicated

Section 3

[38] Section 3 of the *Charter* provides that every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein. The right has been described by the Supreme Court of Canada as the "right to run for office" (*Figueroa v Canada (Attorney General)*, 2003 SCC 37 at paras 26, 29, [2003] 1 SCR 912).

[39] There is no dispute that the applicant's right to run for office is engaged and should be protected to the extent possible.

Paragraph 2(b)

[40] Paragraph 2(b) protects, as a fundamental freedom, freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[41] As noted by the applicant, the right of freedom of expression is interpreted broadly and purposively and encompasses "[a]n activity by which one conveys or attempts to convey meaning will prima facie be protection by s. 2(b)" (*Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at para 27, [2009] 2 SCR 295). The applicant's ability to communicate and convey information and messages to members of the political party that she seeks to represent as a candidate and to the public in her efforts to be elected as a Member of Parliament is clearly implicated by the decision and should be protected to the extent possible.

Paragraph 2(d)

[42] Paragraph 2(d) protects, as a fundamental freedom, freedom of association.

[43] The applicant submits that the Commission's decision violates her freedom of association pursuant to paragraph 2(d), because the decision violates her right to freely associate with a political party and seek nomination to be a candidate of that party. Although she is not prevented

from being a member of a political party, she submits that other aspects of paragraph 2(d) are infringed. The applicant notes that freedom of association has three aspects: constitutive, derivative and purposive (*Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at paras 51-54, [2015] 1 SCR 3). The applicant argues that the decision violates the derivative aspects of freedom of association, the right to associational activity that specifically relates to other constitutional freedoms, because running for office is a constitutionally protected activity. The applicant adds that the importance of political parties to the democratic process should not be overlooked and that paragraph 2(d) contemplates more than simply associating with others, including political parties, and that a purposive approach recognises that the right to associate encompasses seeking the nomination to represent a political party and seeking election.

[44] The respondent disputes that paragraph 2(d) is engaged because the applicant is not prohibited from being a member of any political party or seeking the nomination of a specific political party. Although she is prohibited from seeking nomination for political office while employed by the public service, she may still associate with others to support another candidate for office.

[45] For the purpose of this judicial review, it is not necessary to determine the scope of the applicant's paragraph 2(d) rights and how, if any, these rights have been affected. The applicant's rights pursuant to paragraph 2(b) and section 3 are clearly affected and the applicant's argument that her right to associate is also affected is closely linked in these circumstances to the content of the paragraph 2(b) and section 3 rights implicated. The issue is

whether the decision proportionately balances the *Charter* rights with the statutory objectives. The identification of the right to associate will not affect the outcome of this judicial review.

The Issue

Does the decision of the Commission reflect a proportionate balancing of the Charter rights at stake in light of the statutory objectives and is the decision, therefore, reasonable?

The Applicant's Submissions

[46] The applicant argues that the Commission's decision disproportionately infringes her *Charter* rights in view of the nature of the decision, the statutory context and the factual context.

Nature of the Decision

[47] The applicant submits that the decision amounts to a ban on all federal prosecutors as candidates in a federal election. Such a blanket prohibition is inconsistent with *Harquail v Canada (Public Service Commission)*, 2004 FC 1549, 264 FTR 181 [*Harquail*]. Although the Court dismissed the judicial review of a decision denying permission to a federal prosecutor for mootness and the decision predates *Doré*, the Court's comments, which criticized the Commission for not conducting a comprehensive inquiry and for considering remote possibilities, is relevant to the present circumstances (at para 36). In other words, a comprehensive inquiry would support a positive decision for a federal prosecutor by the Commission.

[48] The applicant points to the Commission's decision, which refers to "federal prosecutor" repeatedly, in support of her argument that the decision amounts to a blanket prohibition on prosecutors. The Commission noted that it "has concerns that Ms. Taman's ability to perform her duties in a politically impartial manner as Counsel, working as a federal prosecutor, may be impaired or perceived to be impaired"; "[a]s a federal prosecutor ... Ms. Taman has a high level of autonomy and decision-making"; "[h]is [the DPP's] concerns relate to … the nature of Ms. Taman's duties as a federal prosecutor"; and, "Ms Taman is highly visible when she appears in Court as a federal prosecutor."

[49] The applicant also notes that the concerns raised by the Commission regarding her visibility, autonomy and decision-making power; involvement in plea and sentencing discussions; application for seizure and forfeiture; and possible provision of information to the media as relevant factors would be true of all federal prosecutors.

[50] The applicant submits that the PSEA and the related *Political Activities Regulations*, SOR/2005-373 [Regulations] are inconsistent with a blanket prohibition based on job title. The PSEA and the Regulations require a fact based and contextual inquiry, including consideration of the nature of the election, the nature of the duties, and the level and visibility of the position. The applicant argues that the Commission failed to "drill down" to look at her duties and instead focussed on federal prosecutors as a broad category.

[51] The applicant also points to the Commission's reliance on the views of the DPP which related to the nature of the mandate of the ODPP and the nature of the applicant's duties as a

federal prosecutor, rather than on the applicant's specific duties and the types of prosecutions she conducts. The Commission accepted the DPP's overall position that being a federal prosecutor is incompatible with being a candidate for public office, without consideration of other views and factors.

[52] The applicant argues that the decision, which amounts to an effective prohibition on federal prosecutors as a category, is by nature disproportionate (*Loyola* at para 70).

Statutory Context

[53] The applicant argues that the decision is inconsistent with the PSEA, the Canada Elections Act and provincial statutes.

[54] Section 112 of the PSEA sets out its purpose and recognizes the right of employees to engage in political activities while maintaining the principle of political neutrality in the public service. The applicant argues, however, that the Commission did not consider her right to engage in political activities. Although the PSEA seeks to balance both interests, the Commission's starting point and focus was the preservation of political neutrality.

[55] The applicant acknowledges the long standing principle and constitutional convention regarding political neutrality in the public service, but submits that the convention does not trump the *Charter* rights that should be protected. The jurisprudence which addresses similar issues regarding political neutrality recognizes that political neutrality and duties of loyalty are to be balanced with other rights (*Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at p 97,

82 DLR (4th) 321 [*Osborne*]; *Fraser v Canada (Public Service Staff Relations Board)*, [1985] 2 SCR 455 at pp 467-470, 23 DLR (4th) 122 [*Fraser*]).

[56] The applicant submits that the test established to determine conflicts of interest for public servants should also apply to decisions made pursuant to subsections 114(4) and (5) of the PSEA. In *Threader v Canada (Treasury Board)*, [1987] 1 FC 41 at para 23, [1986] FCJ No 411 (QL) (FCA) [*Threader*], the Court stated the test for conflicts of interest as:

> Would an informed person, viewing the matter realistically and practically and having thought the matter through, think it more likely than not that the public servant, whether consciously or unconsciously, will be influenced in the performance of his official duties by considerations having to do with his private interests?

[57] The applicant argues that the Commission failed to consider whether a reasonable, fully-informed person would conclude that she would be influenced in the performance of her duties by partisan political considerations and, therefore, made a decision inconsistent with the statutory context of the PSEA. The applicant acknowledges that subsections 114(4) and (5) reflect the concept set out in *Threader* to some extent but adds that there should be an objective element – the perspective of the fully-informed person – to the provision and the Commission have considered the balancing through this lens.

[58] The applicant provided some historical background about the eligibility of public servants to seek candidacy and election. Originally, County Crown Attorneys and public servants were barred from sitting as members of Parliament. The introduction of the *Public Service Employment Act*, RSC 1970, c P-32, s 32 in 1968 allowed public servants below the rank of deputy head to run for office with permission. In 2000, the prohibition in the *Canada Elections*

Act on public servants being candidates in a federal election was repealed, leaving the PSEA as the governing statute.

[59] The *Canada Elections Act* continues to bar County Crown Attorneys from becoming candidates, but by definition, this means the Senior or Regional Crown Attorney and does not include assistant Crown Attorneys, such as the applicant.

[60] The applicant submits that it is clear that Parliament turned its mind to whether certain groups should be prohibited from seeking candidacy and election in the *Canada Elections Act*. If Parliament intended to prohibit all federal prosecutors from being candidates, it would have also done so in the PSEA.

[61] The applicant also points out that provincial statutes set out class or category based rules for political activity. Generally, in every province except New Brunswick, provincial statutes permit non-managerial prosecutors to run for office.

[62] The applicant argues that, in considering whether the Commission's decision reflects a proportionate balancing of her *Charter* rights, the approaches taken in other jurisdictions are relevant considerations, particularly because she is in a non-managerial role and because options to minimally impair her *Charter* rights should have been considered.

Factual Context

[63] The applicant argues that the Commission did not consider several relevant facts in making its decision and in determining whether a fully-informed person would conclude that she would be influenced in the performance of her duties by political considerations.

[64] The applicant highlights that she sought leave without pay in order to seek the nomination and, if successful, to seek election, and would not have been working and performing the duties which the Commission found to be visible, autonomous and of a decision-making nature in this period. There would be no opportunity to create a perception of impartiality given that she would not be working.

[65] The applicant submits that her discretion is carefully circumscribed. Prosecutorial independence does not mean that prosecutors act without supervision or have absolute discretion; it means that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions (*Krieger v Law Society of Alberta*, 2002 SCC 65 at para 30, [2002] 3 SCR 372) [*Krieger*].

[66] The PPSC Deskbook, which sets out the guiding principles which all federal prosecutors, and persons acting as federal prosecutors, must follow, provides that prosecutors are accountable for the decisions and actions they take to their managers, including the Chief Federal Prosecutor, the Deputy Director of Public Prosecutions and, ultimately, the DPP. They must make decisions in accordance with the relevant policy, directives and guidelines. Prosecutors must consult with

experienced colleagues and supervisors or managers when facing difficult decisions and consult within government on some matters.

[67] The applicant points to several extracts from the Deskbook, including Chapter 2.1, Independence and Accountability in Decision-Making, which notes that the independence of the prosecutor is that of the DPP, which is delegated to prosecutors, but explains that this refers to institutional independence.

[68] The applicant acknowledges that she would exercise a degree of discretion in the courtroom as issues arise, but would still be guided by the applicable policies and directives set out in the Deskbook.

[69] The applicant also notes that in *Krieger* at para 29, the Supreme Court of Canada recognized that the Attorney General, although a member of Cabinet, is fully independent when exercising his or her prosecutorial functions. The applicant argues that other prosecutors can be expected to be just as independent.

[70] The applicant also points out that she is in a non-managerial and relatively junior position. She notes that the Supreme Court held that the "level of a public servant" is relevant to whether that public servant should be permitted to engage in a political activity (*Osborne* at p 97).

[71] The applicant submits that her only interaction with the media was after the Commission's decision. It was not realistic for the Commission to consider the remote possibility of interaction with the media as a factor suggesting a perception of partiality. In *Harquail*, the Court found that it is only reasonable for the Commission to conduct its inquiry into an applicant's responsibilities within some realistic context (at para 35). Moreover, if she were contacted by the media, the Deskbook guides prosecutors to consult with management before speaking to the media.

[72] The applicant adds that there is no evidence that she is "highly visible" and it is not clear what this factor is intended to address. While she would be seen in a public courtroom, this does not suggest lack of partiality and would not constitute "visibility" as contemplated by the PSEA.

[73] The applicant notes that she has not been involved in "politically sensitive" prosecutions. Regulatory prosecutions are not generally politically sensitive. In addition, this risk could be avoided by not assigning politically sensitive files to her.

[74] The applicant adds that there is no evidence of a reasonable apprehension of political partiality or actual harm to the PPSC. Rather, the PPSC referred to only one past instance where a defendant unsuccessfully brought a motion to remove a prosecutor because that prosecutor was a former political candidate. The remote possibility of a complaint is not a reason to refuse her request.

[75] The applicant submits that the Commission did not acknowledge the views of her Team Leader who had a better grasp of her specific duties. The applicant agrees that *Harquail* can be distinguished on its facts because, in that case, the Deputy Minister of Justice supported the applicant's request and the Commission denied it. However, the principle from *Harquail*, that an applicant's supervisors are in the best position to know the scope of their responsibilities and the visibility of their position, is equally applicable. The applicant submits that the Commission preferred the concerns of the DPP over the views of the Team Leader without explanation.

[76] The applicant also submits that the Commission did not consider the PPSC Code of Conduct, which does not prohibit prosecutors from engaging in political activities or prohibit prosecutors from becoming candidates in the federal election. Nor did the Commission consider the rules of professional responsibility governing lawyers and the principle that lawyers are expected to separate their personal views from the positions they take on behalf of a client. The applicant submits that her role as a prosecutor does not constitute an endorsement of government policy, nor would her endorsement or criticism of government policy impede her ability to advocate for the Attorney General.

[77] The applicant points out that there is no prohibition on a former political candidate obtaining employment as a federal prosecutor.

[78] The applicant submits that the Commission focused on the discretion she exercises but did not consider that other officials exercise similar discretion yet are not barred from running for elected office. The applicant points out that RCMP members and other police officers are

permitted to run for public office and submits that they exercise similar or greater discretion than prosecutors.

The Respondent's Submissions

Statutory Objectives

[79] The respondent submits that the purpose of the PSEA is to balance the rights of employees to freedom of expression and participation in the democratic process with the importance of a politically impartial public service. This is clear from the preamble to the PSEA and in the statutory provisions. The balancing required is "built in" to the provisions of section 114.

[80] Actual and perceived political neutrality is an essential feature of the public service and Canadian democracy and this principle has been recognized in the jurisprudence. Although a constitutional convention does not enjoy the same status as a constitutional right, it still must be part of the balancing exercise. A public servant's right to expression may need to be constrained to ensure impartiality (*Osborne* at p 97, *Fraser* at pp 467-470, *Haydon v Canada (Treasury Board)*, 2005 FCA 249 at paras 23, 35, [2006] 2 FCR 3 [*Haydon*]).

[81] The respondent adds that the PSEA recognizes that permission to be a candidate and to seek election can be denied, i.e., the rights can be restrained and denied in accordance with the statutory considerations. As long as a proportionate balancing is done, the decision is reasonable.

Nature of the Decision

[82] The respondent submits that the decision was specific to the applicant's request and duties and does not amount to a blanket prohibition against prosecutors running for office. Any future request involving a prosecutor would be decided by the Commission on its specific facts and circumstances.

[83] Subsection 114(6) sets out the factors to be considered, including the employee's duties, and the level and visibility of the employee's position. The list of factors is not limited to these examples and will vary with the circumstances. All of the factors relating to the applicant's duties were considered.

Statutory Context

[84] The respondent disputes that the statutory context of the *Canada Elections Act* should be considered. The Commission was only required to make its decision based on the PSEA and the information before it.

[85] The respondent also submits that the approach set out in provincial statutes is not relevant to the determination of whether the Commission's decision is reasonable and proportionate. Other jurisdictions may have different statutory frameworks than the PSEA, but the PSEA governs.

Factual Context

[86] The respondent submits that the findings made by the Commission, which cumulatively led to its decision, are all supported by the facts.

[87] The PSEA requires the Commission to assess the visibility, level and nature of an employee's position or duties, which is what the Commission did. The Commission's finding that the applicant had a high level of autonomy, discretion and visibility is supported by the record.

[88] The respondent acknowledges that the applicant does not have absolute discretion in decision-making. Although the Deskbook sets out policy and directives and provides guidance to all federal prosecutors and, in accordance with the Deskbook, the applicant would consult with colleagues and managers on specific issues, she still has a degree of discretion.

[89] The respondent also points to the applicant's work description which states that the applicant is required to"[exercise] prosecutorial discretion before the courts to present a fair, complete and just prosecution" and also that the "work requires quickly adapting and reacting to developments in the courtroom and to finding solutions within short time frames at times without access to reference materials."

[90] The respondent notes that the Briefing Note provided to the Commission by the Political Activities and Non-Partisanship Directorate of the Commission summarized and analyzed the information gathered with reference to the nature of the election, the nature of the applicant's

duties, the level and visibility of her position and reflected the input of the applicant, her Team Leader and senior management.

[91] The Briefing Note summarizes the applicant's duties, including decision-making responsibility with respect to whether to prosecute, responsibility for the prosecution once a decision to prosecute is made, and the provision of legal opinions at the pre-charge stage. In addition, it refers to the Annual Report of the PPSC which indicates that the role of a prosecutor is quasi-judicial.

[92] Similarly, the finding that the applicant has visibility is based on the Commission's assessment of the applicant's duties which require her to be in a public courtroom setting, visible to the public and accessible to the media.

[93] The Commission's finding that she may be contacted by the media is also supported by the record. Although the applicant had not previously been contacted by the media and the Deskbook sets out the policy to relay media contacts where possible, it is not a remote possibility that the applicant would be faced with media inquiries requiring a prompt response.

[94] The respondent also notes that the applicant acknowledged, in her response to questions on the form seeking permission from the Commission, that there could be a public perception that she would be unable to perform her duties in a politically impartial manner before or during the election. In her submissions in response to those of management, she acknowledged that this perception could arise with respect to some files, particularly pursuant to the *Lobbying Act*. The

respondent adds that the applicant recently had responsibility for two prosecutions under the *Lobbying Act*, which she also acknowledged.

[95] The respondent submits that the applicant's reliance on *Harquail* to support her argument that remote possibilities are not relevant considerations does not assist her. The Commission did not consider remote possibilities. It is quite possible that the applicant would be engaged by the media and could work on politically sensitive files.

[96] In *Harquail*, the Court commented that had the application not been moot, it would have had concerns about the decision, including that the Commission did not take into account the input of the Deputy Minister. In the applicant's case, the Commission considered the views of the applicant's Team Leader and senior management, including the DPP. The Commission did not ignore the views of the Team Leader, but attached more weight to the views of the DPP. The Commission is the decision-maker, not the Team Leader or the DPP, and the Commission had a reasonable basis to prefer the views of senior management.

[97] The respondent reiterates that the PSEA governs. Although provincial statutes may take a different approach and the RCMP and other police may be permitted to seek elected office, the applicant's request is governed by the PSEA.

[98] The respondent submits that the Commission's decision reflects its consideration of whether the applicant's request could be accommodated. The Commission referred to leave

without pay and assignment to a non-prosecutorial role, but found, based on the input of the DPP, that due to the size of the organization and its mandate, this was not an option.

[99] The respondent notes that in *Canadian Broadcasting Corporation v Warden of Bowden Institution*, 2015 FC 173, [2015] FCJ No 155 (QL) [*Bowden*], the Court applied the *Doré* framework and found the decision to reflect a proportionate balancing despite the fact that the Warden had not specifically referred to the *Charter* rights to be considered, as the Warden's consideration of the rights was evident from the substance of the decision (at para 52). In addition, the Warden considered and was open to accommodation to mitigate the impact, which demonstrated proportionality, although this was ultimately not feasible (at para 57).

The Decision reflects a proportionate balancing and is reasonable

[100] As noted in *Doré*, the ultimate or overall question on judicial review is whether the decision reflects a proportionate balancing of the *Charter* rights at stake, limiting these rights as little as possible in light of the statutory objectives.

[101] The Court must first consider the nature of the decision and the statutory and factual context.

Nature of the decision

[102] The decision is made pursuant to the PSEA by the Commission, which is tasked with, among other things, administering the provisions of the PSEA relating to political activities of employees and deputy heads (section 11).

[103] As noted below with respect to the statutory context, the request made by the applicant was made in accordance with the PSEA, the Regulations and in the mandated form.

[104] The request process permits the applicant to make initial submissions and further submissions in response to those of management. The Commission also received a summary of the information gathered and a preliminary assessment in the form of a Briefing Note prepared by the Political Activities and Non-Partisanship Directorate of the Commission before making its decision.

[105] By its nature, the decision has a significant impact on the applicant's rights pursuant to paragraph 2(b) and section 3 of the *Charter* to seek the candidacy of a political party and seek election in the October 2015 federal election. Although the applicant is not prohibited from freely expressing herself or exercising her right to run for political office, she cannot exercise these rights and maintain her position as a federal prosecutor and public servant.

[106] The applicant characterizes the decision as a "blanket prohibition" on all federal prosecutors and argues that the Commission failed to grasp that her duties and attributes, which it found to be of concern, are the same duties performed by all federal prosecutors. The applicant

notes that the Commission continually referred to her duties "as a federal prosecutor" and relied only on the views of the DPP, which would apply to federal prosecutors as a group. The applicant also argues that this prohibition is inconsistent with the statutory context and legislative intent, which calls for a duties-based assessment.

[107] Relying on *Loyola* at para 70, the applicant argues that the effect of the prohibition, which she refers to as an "effective prohibition", is an indication that the decision is disproportionate.

[108] I agree that in some circumstances, this may be an indication of disproportionality, but it is not a determinative factor. *Loyola* says only that, on the facts of that case, a decision which amounts to a prohibition may be an additional or reinforcing reason to find a decision disproportionate:

> [70] The disproportionate nature of this decision is reinforced by the fact that the Minister's decision effectively prohibits Loyola from teaching about Catholic ethics from a Catholic perspective. […]

[109] However, in the present case, I do not agree that the decision is based on the applicant's job title as a federal prosecutor rather than on the duties that she performs in her role as a federal prosecutor and public servant. If the decision were a "blanket prohibition" on all federal prosecutors, the Commission would not have considered her specific duties as a member of the team responsible for Regulatory and Economic Prosecutions, her job description, her submissions, and the submissions of her Team Leader and senior management.

[110] Contrary to the applicant's submissions, the Commission did "drill down" and thoroughly assessed her specific duties as she described them and as they were described in her work description.

[111] As noted by the applicant, the Commission stated the applicant's duties "as a federal prosecutor" several times in its decision. However, this is a necessary and factual characterization, which provides the necessary context for the description of her duties and the assessment of the factors by the Commission. Without this context, the reference to the applicant's specific duties, including the review of files, the provision of pre-charge advice and opinions and the seizure of property, would not make sense.

[112] The DPP clearly expressed the view that political involvement is not appropriate for federal prosecutors. The DPP may convey the same view with respect to any similar request made by other federal prosecutors. This may signal to other federal prosecutors that permission to run for a federal election would not likely be granted. However, the Commission's decision is not a prohibition against all federal prosecutors, as the decision was made based on consideration of the applicant's specific request and related to her specific duties. Other requests would be determined on a case-by-case basis.

Statutory Context and Objectives

[113] The preamble of the PSEA includes the statement that "Canada will continue to benefit from a public service that is based on merit and non-partisanship and in which these values are independently safeguarded."

[114] Part 7 governs political activities and requests for permission to seek candidacy and run for election.

[115] Section 112 sets out the purpose of Part 7, specifically recognizing the right of employees to engage in political activities while maintaining the principle of political impartiality in the public service.

[116] Section 114 governs the requirements for seeking permission and leave without pay to seek nomination as a candidate in a federal, provincial or territorial election. Both subsections 114(4) and (5) adopt the same test for determining if permission should be granted; the Commission must be satisfied that "the employee's ability to perform his or her duties in a politically impartial manner will not be impaired or perceived to be impaired."

[117] Subsection 114(6) directs that the Commission may take relevant factors into consideration "such as the nature of the election, the nature of the employee's duties and the level and visibility of the employee's position." This is not a closed list.

[118] The balancing of the statutory objectives is built into section 112. The test set out in sections 113 and 114, along with the considerations to be taken into account, complements the overall goal of balancing these objectives. It is implicit in the scheme of the PSEA that the right to engage in political activity may have to give way to the objective of ensuring that employees are able to perform their duties in a politically impartial manner and that permission to engage in political activity may be denied.

[119] As noted in *Doré*, the statutory objectives at issue may have more than one goal. In *Doré*, in considering the standard of review, Justice Abella referred to an earlier decision of the Supreme Court of Canada in *Pinet v St Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 SCR 528 [*Pinet*], where the issue was whether a disposition made by the Ontario Review Board, pursuant to the provisions of the *Criminal Code*, RSC 1985, c C-46 that required it to make a determination that was the least restrictive to the accused while considering the need to protect public safety and other factors, i.e., "twin goals", was reasonable. The Court in *Pinet* noted that the liberty interest was a *Charter* protected right but may be limited by the need to balance public safety in determining the least restrictive disposition (at paras 32, 56).

[120] In the present case, the PSEA also has twin goals: it requires the Commission to recognize and balance the employee's right to engage in political activities and the objective of maintaining the principle of political impartiality in the public service. Although not specifically identified as a *Charter* right in the PSEA, clearly the right to engage in political activity and the right to freedom of expression in doing so are *Charter* protected rights.

[121] The applicant's submissions to the Commission highlighted her constitutional right to political expression and participation and the need for the Commission to make its decision in accordance with the *Charter*. Although the Commission did not identify the rights at stake as *Charter* rights, the decision and the decision-making process reflect that the Commission considered all the submissions, the applicant's goal of seeking candidacy and running for office, and the impact of a refusal, which would limit these rights. An additional or specific reference to the applicant's *Charter* rights is not essential.

[122] The applicant argues that the decision is inconsistent with the statutory context including the *Canada Elections Act* and provincial statutes. If I properly understand the argument, the applicant's submission is that the PSEA is far more restrictive than other statutes and, in a contextual analysis, these other statutes would highlight that the Commission's decision is not a proportionate balancing of rights.

[123] The applicant also argues that the decision in effect is a prohibition on all federal prosecutors and that such prohibitions are not contemplated by the PSEA because Parliament would have specifically set out such a prohibition as it had in the *Canada Elections Act*. I do not agree, as noted above, that the decision is a blanket prohibition. Moreover, Parliament is not bound to take an identical approach in all federal legislation. Although the *Canada Elections Act* may have identified only County Crown Attorneys as not eligible (and not assistant Crown Attorneys, such as the applicant), the *Canada Elections Act* does not apply nor do provincial statutes. The decision at issue was made pursuant to the PSEA, which governs all public servants, including all federal prosecutors. The PSEA does not prohibit any particular group of employees, except deputy heads.

[124] Reference to other statutes governing the same or similar conduct might have some relevance if the challenge were to the PSEA. However, that is not the case in the present application.

[125] Section 114 demonstrates that Parliament intended public servants to be able to seek nomination or run as candidates only when this will not impair or be perceived as impairing their

ability to perform their duties in a politically impartial manner. Parliament did not intend to explicitly set out each category of public servant that should be excluded from running for political office.

[126] The applicant also argues that the decision is contrary to the statutory context of the PSEA because, in applying the test set out in subsection 114(4), the Commission did not use the lens of the fully-informed person. The applicant argues that the Commission ignored relevant facts in determining whether a fully-informed person would think she would be influenced by her political views in the performance of her duties.

[127] The applicant suggests the test for political impartiality pursuant to subsection 114(4) should be guided by the test or lens for conflicts of interest for public servants which the Federal Court of Appeal set out in *Threader* at para 23 to ask whether an informed person would think that the public servant would be influenced by their political views in the performance of their duties. The test in *Threader* was adapted from the test for bias established in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369, 68 DLR (3d) 716.

[128] The applicant submits that, in light of this test or lens, the Commission failed to consider several relevant facts that an informed person would understand and which would not support a finding that the applicant's ability to perform her duties would be impaired or would be perceived to be impaired. The applicant raised, for example: that she would be on leave while she performed overt political activities; that former political candidates are not barred from

joining the public service; and, that the role of a lawyer and professional codes of conduct convey that a lawyer can separate their private views from their professional duties.

[129] First, the Commission did not fail to consider the facts noted by the applicant.

[130] Second, the *Threader* test or fully-informed person lens has not been adapted and adopted in the jurisprudence for application by the Commission to decisions pursuant to section 114.

[131] Third, as the applicant acknowledged, aspects of this test are embedded in section 114 which requires that the Commission be satisfied that "being a candidate during the election period will not impair or be perceived as impairing the employee's ability to perform his or her duties in a politically impartial manner." Section 114 sets out examples of the factors that the Commission should consider including the nature of the election, the nature of the employee's duties, and the level and visibility of the employee's position. These factors are objective. The Commission is tasked with making the determination and the Commission is "informed".

Factual Context

[132] The Commission understood the factual context and its findings are supported by the evidence on the record. It did not ignore or misconstrue the applicant's submissions regarding the relevant factual context.

[133] The Commission did not overlook that the applicant would be on leave and not performing her duties during the election period. The decision clearly conveys that the

Commission understood that she would not be working as a prosecutor while she engaged in overt political activities, given that it considered whether the risk to political impartiality could be mitigated by leave without pay. The Commission considered both parts of the applicant's request as contemplated by the PSEA: permission to seek candidacy and a leave without pay.

[134] The Commission's finding that the applicant had a "high level of autonomy and decision--making" is well supported by the applicant's work description, the Deskbook, and the submissions of the applicant and senior management.

[135] Although the applicant does not have absolute discretion, she has the authority to exercise significant discretion relative to other public servants.

[136] The applicant mischaracterizes herself as a junior prosecutor. While she may be more junior than others in the hierarchy of the PPSC, and while other prosecutors may have greater autonomy and discretion by virtue of their greater years of experience and supervisory roles, the applicant has almost ten years of experience and has a degree of autonomy and discretion not enjoyed by other public servants. The Commission considered the level of her position, along with her duties and work description relative to other positions in the public service. The fact that she is not a manager is not indicative of a "low level" position.

[137] The Deskbook addresses many issues a federal prosecutor will face, but still relies on prosecutors to implement these policies as the circumstances dictate. The issue of prosecutorial discretion is addressed in several chapters of the Deskbook. The prosecutor must think and react

on the spot and this calls for the exercise of discretion, including with respect to which Deskbook policy is applicable.

[138] The Preface of the Deskbook states that "[p]rosecutors possess a significant amount of discretion in the criminal justice system. To ensure public confidence in its administration, prosecutorial discretion must be exercised in a manner that is objective, fair, transparent and consistent." The purpose of the Deskbook and the guidance it offers is to realize these objectives. Prosecutors make decisions without fear of political interference or improper or undue influence. They are accountable to the DPP and, via the DPP, to the Attorney General and the Canadian public for the way they exercise this responsibility.

[139] Chapter 2.1, Independence and Accountability in Decision-Making, describes the principle of independence as it applies to federal prosecutors and notes, "[t]he interaction of the principles of independence, accountability and consultation mean that what is protected is a system of prosecutorial decision-making in which the prosecutor is an integral component. A large measure of independence is conferred on Crown counsel, but absolute discretion is not."

[140] Chapter 2.6, Consultation within the Public Prosecution Service of Canada, reiterates that prosecutors are accountable to the DPP and that the independence of the prosecutor is the institutional independence of the ODPP. Chapter 3.5, Delegated Decision-Making, notes that the vast majority of prosecutorial decisions are made by federal prosecutors acting on behalf of the DPP.

[141] While the Deskbook guides the exercise of discretion and constrains it to some extent, it confirms that prosecutors have discretion.

[142] The applicant's work description also clearly indicates that she exercises discretion and has autonomy. For example, under the heading "Effort - Critical Thinking and Analysis" the descriptors include: "Exercises prosecutorial discretion before the courts to present a fair, complete and just prosecution on criminal matters in accordance with law practice standards. The work must be carried out with professional fortitude, integrity, dignity and with the highest level of professionalism in order to uphold the ethical obligations of the Director of Public Prosecutions and as a member of the bar"; " Files or projects may be followed by the media"; "The work requires quickly adapting and reacting to developments in the courtroom and to finding solutions within short time frames at times without access to reference materials"; and, "Provides sound legal advice, opinions and guidance to colleagues, investigative agencies and partners on various files or project specific issues and a wide range of criminal law subjects." Under the heading "Working Conditions" the descriptors include: "A public officer working in an adversarial environment exercising a quasi-judicial role where decisions impact human lives and the safety of communities and are under public scrutiny. This creates a unique type and level of stress"; and, "Scrutiny by the public and media pertaining to controversial files."

[143] The exercise of discretion, which is part of the consideration of autonomy and decision-making, appears to be viewed by the Commission in the context of government employees and not only in the context of other prosecutors.

[144] The Commission reasonably found that the applicant would have increased visibility as a result of seeking candidacy and is highly visible in her position given that she appears in a public courtroom on behalf of the Crown. Again, although the Commission was well aware that the applicant was a federal prosecutor, it considered her visibility as a public servant vis-a-vis other federal employees and not vis-a-vis other prosecutors who may have a higher profile due to particular cases or appearances in particular courts. In my view, this is the appropriate perspective, given the PSEA governs public servants in general.

[145] The applicant argued that the Commission considered several facts which do not justify refusing her request. While individually, this may be so, the Commission considered the cumulative effect of several facts, which, contrary to the applicant's arguments, are not remote possibilities.

[146] The applicant may be called upon to respond to the media and this could occur without the opportunity to consult with senior management, refer the inquiry to a media spokesperson or consult the Deskbook. Similarly, the applicant may be responsible for politically sensitive files. These are not impossible or remote possibilities; both are noted in her work description. The applicant's suggestion that such files could be reassigned overlooks that other factors would likely affect the practicality of reassigning files to other prosecutors who do not have similar impediments or other conflicts of interest. The fact that the DPP only referred to one past complaint regarding a prosecutor who was a former political candidate does not diminish the possibility that this could occur in the future.

[147] The Commission did not ignore the views of the applicant's Team Leader or rely exclusively on the views of the DPP. The applicant's request form included the input of the Team Leader as well as the input of the DPP. The Commission is responsible for weighing the evidence and is entitled to give more weight to the views of the DPP, who is analogous to a Deputy Minister, rather than the views of the Team Leader. There is no evidence to support the applicant's assertion that her Team Leader was more familiar with her duties than the DPP. The submissions of the DPP also highlighted the integrity of the Office, which is reflected in the role of all prosecutors.

[148] I also note the applicant's argument that the principle in *Harquail* should be followed and that a comprehensive inquiry is required. In the present case, the Commission did conduct a comprehensive inquiry. The Court in *Harquail* also found that the Commission should have given greater consideration to the views of the Deputy Minister. Although the applicant is critical of the Commission for preferring the views of the DPP over the views of her Team Leader, in accordance with *Harquail*, the Commission would have erred if it overlooked the views of the DPP, who, as noted above, is analogous to a Deputy Minister.

[149] The fact that former political candidates or office holders are not prohibited from being employed as federal prosecutors is not a relevant consideration with respect to the proportionality of the Commission's decision. The Commission made the decision pursuant to the PSEA which governs current public servants who seek permission to run for office.

[150] As noted above, the applicable statutes in other jurisdictions are not relevant and do not address the Commission's options to minimally impair or limit the impact on the applicant's *Charter* rights as little as possible. The approaches in other jurisdictions do not provide any other options that the Commission could have considered. The Commission considered the applicant's proposal for reassignment of her files and reassignment to another position.

[151] The fact that the RCMP or other police are not prohibited from seeking election is not relevant to the factual context and the Commission's finding that the applicant had a high level of autonomy and decision-making. The Commission applied the PSEA, which does not apply to the political activities of the RCMP. Moreover, the discretion exercised by the applicant as a federal prosecutor differs from the discretion of police to investigate and lay charges. For example, the applicant would provide advice to the RCMP on the charges to be laid or could decide not to pursue the prosecution of a charge laid by the RCMP. In my view, this is a different type of discretion which cannot be characterized as less discretion than that of the police.

[152] The applicant notes the PPSC Code of Conduct does not prohibit prosecutors from seeking election; however, neither does the PSEA. With respect to the applicant's submission that the Commission did not consider rules of professional conduct or the role of lawyers in general, the Commission considered the applicant's submissions which noted this, understood that she is a lawyer and referred many times to her duties in the context of her role as a federal prosecutor.

The Proportionate Balancing

[153] The applicant's view that the Commission focused on the statutory objective of a politically impartial public service, used this as its starting point and, as a result, overlooked her *Charter* rights to engage in political activity and failed to conduct a proportionate balancing, is not supported by the record.

[154] The Commission did not acknowledge the jurisprudence which calls on decision-makers to conduct a proportionate balancing where *Charter* rights are engaged (e.g., *Doré* or *Loyola*), but the decision reflects such a balancing.

[155] In *Bowden*, Justice Mosley considered whether the decision of a Warden to deny face-to-face access to an inmate due to concerns about public safety and the security of the institution was reasonable and proportional. Justice Mosley noted that the decision clearly affected the applicant's paragraph 2(b) rights, but this right is not absolute and had to be balanced against the need to protect the security of the institution and the safety of persons, including the staff and the prison population (at para 48).

[156] In the present case, as in *Bowden*, the applicant's *Charter* rights are not absolute and were balanced by the decision-maker against the objective of political impartiality.

[157] Part 7 of the PSEA has twin objectives, which in the present case, are in competition. One of the objectives – to engage in political activity – reflects *Charter* rights. Although the Commission did not use *Charter* language or specifically acknowledge that the applicant had

asserted *Charter* rights, the substance of the decision is more important than the specific language used. In *Bowden*, Justice Mosley noted:

> [52] The Warden did not explicitly make reference to the constitutional protection afforded to freedom of expression in her letter. This could be understood to mean that the decision-maker ignored or minimized the importance of expressive interests in the balancing exercise. However, *Doré* does not say that it is mandatory for decision-makers to explicitly refer to *Charter* values in their analyses. The substance of the decision must be taken into account, not whether it pays lip service to the *Charter*. The letter states that the Warden took into consideration the submissions made by Ms Shephard and counsel for the applicants. Those submissions expressly referenced the *Charter*. While reasonable people might disagree with the outcome, there is nothing on the record before me to suggest that the Warden ignored or minimized those values. [Emphasis added.]

[158] The Commission used the statutory language rather than *Charter* language, but, in determining whether to grant the applicant permission to seek the candidacy and election and whether to grant a leave of absence without pay to do so, the Commission considered both objectives of the PSEA. The decision reflects that it considered all the relevant facts which support its findings, including that the applicant had a high level of autonomy, decision-making and visibility.

[159] The Court's role is not to reweigh the evidence. As noted above, the Commission was entitled to attach more weight to the submissions of the DPP, who conveyed the view that the applicant's candidacy indicates a significant allegiance to a political party which would undermine the independence of the prosecutor's role. The Commission concluded that this could lead to the perception that the applicant was not able to perform her duties in a politically impartial manner. However, in reaching this decision, the Commission also considered the other

information available, including the work description. It then assessed the applicant's duties, the level of her position, her visibility and the other relevant factors.

[160] As noted by the respondent, a public servant's right to expression – and I would add the related right to run for office – may need to be constrained to ensure impartiality in the public service (*Osborne* at p 97, *Fraser* at pp 467-470, *Haydon* at para 23). While the constitutional convention regarding political neutrality is not a *Charter* right, it remains a relevant factor in the balancing exercise.

[161] Whether the limitation on the applicant's *Charter* rights can be mitigated or minimized is a difficult determination for the decision-maker and equally difficult for the Court on judicial review. The trade-off for the applicant is to either pursue her political activities and run for office or maintain her position as a federal prosecutor. The Commission did not foreclose the possibility that the impact on the applicant or on the public service, depending on the decision, could be mitigated in some way, but concluded, on the particular facts, that no such measures would address the risk to political partiality or the perception of political partiality. The Commission considered whether a leave without pay could be granted and whether the applicant could return to her position, but concluded that reassignment to a non-prosecutorial position was not feasible within the PPSC given its mandate and the fact that the vast majority of positions are prosecutorial positions.

[162] In *Bowden*, Justice Mosley found:

> [57] The record does indicate that the Warden took into consideration the accommodations proposed by the applicants to

> minimize the risk. While she concluded that these would not be sufficient, it is evidence that her mind was at least open to the possibility. […]

[163] As in *Bowden*, the record demonstrates that the Commission considered whether it could mitigate the impact of its decision on the applicant but ultimately found that there were no feasible options.

[164] The ultimate question is whether the Commission's decision protects the applicant's *Charter* rights as fully as possible, or put another way, whether it limits the applicant's *Charter* rights as little as possible, given the statutory objectives. In the present case, it was not possible to fully protect the applicant's right to freedom of expression and to engage in political activity and run for office while also permitting her to maintain her position and to return to it following the election, in the event she is not successful. While she is not prohibited from pursuing her rights, the cost of doing so is the loss of her position as a federal prosecutor and public servant.

[165] In *Doré* the Supreme Court of Canada confirmed that a "margin of appreciation" or deference is given to administrative bodies in balancing *Charter* values and broader statutory objectives, just as it would in a more traditional application of the reasonableness standard of review (at para 57). In this case, the Commission considered the competing rights and interests at play as required pursuant to the PSEA. After considering all the facts, relevant factors, possible ways to mitigate the limitation on the applicant's rights and the competing statutory objective, the Commission was not satisfied that the applicant's candidacy would not impair or be perceived to impair her ability to perform her duties in a politically impartial manner either

before the election or upon her return to work. The Commission's analysis reflects, to a great extent, the guidance to decision makers established in *Doré*.

[166] The decision of the Commission reflects a proportionate balancing and is, therefore, reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed and no costs are ordered.

"Catherine M. Kane"

Judge

ANNEX A

Relevant Statutory Provisions of the *Public Service Employment Act*

Purpose of Part 112. The purpose of this Part is to recognize the right of employees to engage in political activities while maintaining the principle of political impartiality in the public service.	Objet 112. La présente partie a pour objet de reconnaître aux fonctionnaires le droit de se livrer à des activités politiques tout en respectant le principe d'impartialité politique au sein de la fonction publique.
Employees 113. (1) An employee may engage in any political activity so long as it does not impair, or is not perceived as impairing, the employee's ability to perform his or her duties in a politically impartial manner.	Fonctionnaires 113. (1) Les fonctionnaires peuvent se livrer à des activités politiques, sauf si celles-ci portent ou semblent porter atteinte à leur capacité d'exercer leurs fonctions de façon politiquement impartiale.
(2) The Governor in Council may, on the recommendation of the Commission, make regulations specifying political activities that are deemed to impair the ability of an employee, or any class of employees, to perform their duties in a politically impartial manner.	(2) Le gouverneur en conseil peut par règlement, sur recommandation de la Commission, préciser les activités politiques des fonctionnaires ou des catégories de fonctionnaires qui sont réputées porter atteinte à cette capacité.
(3) In making regulations, the Governor in Council may take into consideration factors such as the nature of the political activity and the nature of the duties of an employee or class of employees and the level and visibility of their positions.	(3) Lorsqu'il prend des règlements, le gouverneur en conseil peut tenir compte notamment de la nature de l'activité politique et de celle des fonctions des fonctionnaires, ou des catégories de ceux-ci, ainsi que du niveau et de la visibilité de leur poste.
114. (1) An employee may	114. (1) Le fonctionnaire

seek nomination as a candidate in a federal, provincial or territorial election before or during the election period only if the employee has requested and obtained permission from the Commission to do so.

désireux d'être choisi, avant ou pendant la période électorale, comme candidat à une élection fédérale, provinciale ou territoriale doit demander et obtenir la permission de la Commission.

(2) An employee may, before the election period, be a candidate in a federal, provincial or territorial election only if the employee has requested and obtained permission from the Commission to do so.

(2) Le fonctionnaire qui a été choisi comme candidat à une élection fédérale, provinciale ou territoriale doit, pour la période précédant la période électorale, demander et obtenir la permission de la Commission.

(3) An employee may, during the election period, be a candidate in a federal, provincial or territorial election only if the employee has requested and obtained a leave of absence without pay from the Commission.

(3) Le fonctionnaire désireux de se porter candidat à une élection fédérale, provinciale ou territoriale doit, pour la période électorale, demander à la Commission et obtenir d'elle un congé sans solde.

(4) The Commission may grant permission for the purpose of subsection (1) or (2) only if it is satisfied that the employee's ability to perform his or her duties in a politically impartial manner will not be impaired or perceived to be impaired.

(4) La Commission n'accorde la permission aux termes des paragraphes (1) ou (2) que si elle est convaincue que la capacité du fonctionnaire d'exercer ses fonctions de façon politiquement impartiale ne sera pas atteinte ou ne semblera pas être atteinte.

(5) The Commission may grant leave for the purpose of subsection (3) only if it is satisfied that being a candidate during the election period will not impair or be perceived as impairing the employee's ability to perform his or her duties in a politically impartial manner.

(5) La Commission n'accorde le congé aux termes du paragraphe (3) que si elle est convaincue que le fait pour le fonctionnaire d'être candidat pendant la période électorale ne portera pas atteinte ou ne semblera pas porter atteinte à sa capacité d'exercer ses fonctions de façon

politiquement impartiale.

(6) In deciding whether seeking nomination as, or being, a candidate will impair or be perceived as impairing the employee's ability to perform his or her duties in a politically impartial manner, the Commission may take into consideration factors such as the nature of the election, the nature of the employee's duties and the level and visibility of the employee's position.

(6) Pour prendre sa décision, la Commission peut tenir compte notamment de la nature des fonctions du fonctionnaire, du niveau et de la visibilité de son poste et de la nature de l'élection.

(7) The Commission may make permission under subsection (4) conditional on the employee taking a leave of absence without pay for the period or any part of the period in which he or she seeks nomination as a candidate, or for the period or any part of the period in which he or she is a candidate before the election period, as the case may be.

(7) La Commission peut assujettir l'octroi de la permission visée au paragraphe (4) à la prise par le fonctionnaire d'un congé sans solde pour tout ou partie de la période au cours de laquelle il tente de devenir candidat ou, lorsqu'il est candidat, pendant la période précédant la période électorale.

(8) An employee ceases to be an employee on the day he or she is declared elected in a federal, provincial or territorial election.

(8) Le fonctionnaire déclaré élu dans une élection fédérale, provinciale ou territoriale perd dès lors sa qualité de fonctionnaire.

[…]

[…]

116. On granting an employee permission under subsection 114(4), leave under subsection 114(5) or permission under subsection 115(2), the Commission shall cause notice that it has done so, together with the name of that employee, to be published in

116. Dès qu'elle accorde la permission aux termes du paragraphe 114(4), le congé aux termes du paragraphe 114(5) ou la permission aux termes du paragraphe 115(2), la Commission fait publier un avis de sa décision et du nom du fonctionnaire concerné dans

the *Canada Gazette*.	la *Gazette du Canada*.
Deputy Heads 117. A deputy head shall not engage in any political activity other than voting in an election.	Administrateurs généraux 117. Les administrateurs généraux ne peuvent se livrer à aucune activité politique, à l'exception du vote dans le cadre d'une élection.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-60-15
STYLE OF CAUSE:	EMILIE TAMAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 1, 2015
JUDGMENT AND REASONS:	KANE J.
DATED:	OCTOBER 13, 2015

APPEARANCES:

Mr. Christopher C. Rootham Mr. Andrew Reinholdt	FOR THE APPLICANT
Mr. Michael Roach Mr. Adrian Bieniasiewicz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nelligan O'Brien Payne LLP Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT