Federal Court  Cour fédérale

**Date: 20230530**

**Docket: T-630-21**

**Citation: 2023 FC 750**

**Ottawa, Ontario, May 30, 2023**

**PRESENT: Madam Justice Sadrehashemi**

**BETWEEN:**

**NOEL SINCLAIR**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicant, Noel Sinclair ("Mr. Sinclair"), is a senior Crown prosecutor at the Yukon Regional Office of the Public Prosecution Service of Canada in Whitehorse, Yukon. In January 2021, Mr. Sinclair requested permission to seek the nomination as a candidate in the upcoming Yukon territorial election and for a leave of absence without pay during the election period. The Public Service Commission of Canada ("PSC") rejected Mr. Sinclair's request. Mr. Sinclair challenges this decision on judicial review.

[2] The election at issue was over before Mr. Sinclair sought judicial review in this Court. The Respondent argued that the Court should refuse to determine this application because the matter is moot and the Court should not exercise its discretion to hear the matter despite its mootness according to the factors set out in *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 [*Borowski*]. Mr. Sinclair argues that the matter is not moot because there remains a live controversy, namely his interest in participating in future elections and the declarations that he is seeking on judicial review. Alternatively, Mr. Sinclair argued that even if the matter is moot, the Court should decide the application due to the continuing adversarial context between the parties and because the short timelines in election nominations make these sorts of PSC decisions evasive of review.

[3] I agree with the Respondent that the matter is moot. Having found it moot, I decline to exercise my discretion to decide the judicial review on the merits.

[4] The election that was at the heart of Mr. Sinclair's request has passed and, other than an unsupported assertion that Mr. Sinclair intends to participate in future elections, there is little to ground the claim that there continues to be a live controversy between the parties. In my view, the declarations sought by the Applicant are inappropriate in these circumstances, given that the Applicant does not challenge the legislation itself and the evidentiary record is limited.

[5] My primary concern is that there will be no practical utility to deciding this judicial review on the merits, which, even if I were to agree with the Applicant, could only result in the Court quashing the decision of the PSC. Mr. Sinclair may decide to not seek a nomination again;

or if he does, the underlying facts that the PSC must assess may change, including the duties of his job, the mitigation measures proposed by the Director of Public Prosecutions ("DPP"), and the level of government or elected office sought.

[6] Based on the reasons below, I dismiss the application for judicial review because it is moot.

## II. Background

[7] On January 5, 2021, Mr. Sinclair sought permission from the PSC under subsection 114(1) of the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 [*PSEA*] to seek the nomination as a candidate in the Yukon territorial election in the electoral district of Takhini-Kopper King. There were no other potential candidates seeking that party's nomination in that riding and therefore no nomination process had been scheduled.

[8] On February 11, 2021, the DPP recommended that the PSC approve Mr. Sinclair's request with a number of mitigation measures in place.

[9] On March 9, 2021, Mr. Sinclair notified the PSC analyst considering his request that he expected an election to be called on March 12, 2021, which would trigger a ten-day nomination period. Mr. Sinclair indicated that he therefore required the PSC decision by March 16, 2021.

[10] On March 16, 2021, the PSC denied Mr. Sinclair's request. After considering the factors in subsection 114(6) of the *PSEA*, the PSC found that the risk factors could not be sufficiently

addressed to ensure that Mr. Sinclair's ability to perform his public service duties in a politically impartial manner would not be impaired, or be perceived as such.

[11] The election was held on April 12, 2021. Mr. Sinclair filed this application for judicial review three days later, on April 15, 2021.

## III. Analysis

### A. *Whether the Matter Is Moot*

[12] The determinative issue is whether the application for judicial review is moot. The test for determining whether a matter is moot is well known and set out in the Supreme Court of Canada's decision in *Borowski*. The first step is to determine whether a live controversy remains that affects or may affect the rights of the parties [*Borowski* at 353].

[13] Mr. Sinclair argues that a live controversy remains because this judicial review decision would affect him the next time he seeks permission to run in an election. As the Respondent notes, this Court has held that the role of judicial review is not to set a precedent for a hypothetical future case (*Cheecham v Fort McMurray #468 First Nation*, 2020 FC 471 at para 35). Mr. Sinclair's position also relies on a number of assumptions: i) that he will again seek permission to run for the same type of elected office; and ii) that the PSC would be considering the same circumstances: including the duties of his current role and the mitigation strategies recommended by the DPP. There is insufficient evidence in the record for me to consider the likelihood of these assumptions. There is no statement in Mr. Sinclair's affidavit about his future intention to run in any election, let alone one in the near future; nor is there any evidence about

the nature of his future duties, or the likelihood that the mitigation strategies suggested by the DPP will remain unchanged.

[14] This decision does not bind or materially affect a future decision maker considering a new request. While a future decision maker will have to explain why they are departing from a previous decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 131), any new request by Mr. Sinclair would ultimately have to be considered afresh.

[15] Mr. Sinclair also argues that a live controversy exists because of the declaratory relief he is seeking. Mr. Sinclair asks this Court to declare that: i) the PSC's decision disproportionately impacted his *Charter* rights; ii) with the exception of the DPP 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.

[16] As noted by the Respondent, this Court has held that seeking declaratory relief in and of itself does not establish a live controversy (*Rebel News Network Ltd v Canada (Leaders' Debates Commission)*, 2020 FC 1181 at para 42). I would further note that I am not convinced that the declaratory remedies sought are appropriate. Mr. Sinclair is asking me to write into the statute a presumption that is not there, and further to add procedural steps where that presumption is not followed. Even if the matter was not moot, these are extraordinary remedies

that are not appropriate given that the Applicant challenges an administrative decision not legislation and given the limited evidentiary record before me.

[17] I am satisfied that there is no longer a live controversy and that the matter is moot.

B. *Whether the Court Should Decide the Matter Notwithstanding its Mootness*

[18] At the second step of the *Borowski* test, I have to decide whether to exercise my discretion to decide the judicial review notwithstanding its mootness [*Borowski* at 353]. I have to consider a number of factors cumulatively, understanding that some may point in opposite directions or be more relevant in the circumstances. These factors include: i) the presence of an adversarial relationship; ii) the need to promote judicial economy; and iii) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

[19] I find that there continues to be an adversarial relationship given that the case was fully argued before me (*Borowski* at 363).

[20] The real issue is whether there is any practical utility in deciding the application when the election has already passed. The practical utility in deciding relates to the last two *Borowski* factors: the need to protect judicial resources and to be sensitive to the Court's adjudicative role. I find that there is limited practical utility in expending judicial resources in deciding this matter and that to do so in the absence of a live controversy carries with it the problem of creating a legal precedent for its own sake instead of resolving a particular dispute (*Canadian Union of*

*Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 [*CUPE (Air Canada Component)*] at para 13).

[21] Given my earlier findings about the limited evidence on Mr. Sinclair's future political plans and duties and the inappropriateness of the remedies sought, the practical utility in deciding this matter is minimal. At best, a decision from this Court would guide a future decision maker *if* Mr. Sinclair decided to seek a nomination or run again and *if* his job duties and the mitigation measures suggested by the DPP do not change significantly. But, as I have already said, this requires me to accept a number of assumptions that are not well supported.

[22] This Court in *Harquail v Canada (Public Service Commission)*, 2004 FC 1549 [*Harquail*] declined to hear a moot matter in similar circumstances. The Court held that even though the timing of underlying events meant that the decision of the PSC was evasive of judicial review, the Court was "not satisfied that future cases involving a request for a leave of absence to seek nomination will be equally evasive of review." The Court then suggested that an employee could, for example, seek advance permission before the official call for a nomination and request an expedited judicial review hearing.

[23] Here too, given the timeline of the PSC's decision and the end date of the nomination period, it is unlikely that Mr. Sinclair could have obtained a timely judicial review. Mr. Sinclair noted in his affidavit that though an election was not yet called, he requested permission in January 2021 because the election was expected to be called in the spring or fall of 2021. While

there may well have been reasons to prevent Mr. Sinclair from making his request to the PSC sooner, these reasons are not explained in the evidence before me.

[24] Mr. Sinclair argues that his situation and that of the applicant in *Taman v Canada (Attorney General),* 2017 FCA 1 [*Taman*], whose case he asserts may have also been found moot had it not been for Ms. Taman's ongoing grievance process, are evidence that the Court was mistaken in *Harquail* when it held that these PSC decisions were not always evasive of review. The problem with this submission is its reliance on limited examples. There have only been two other cases, *Harquail* and *Taman,* in approximately twenty years that have challenged PSC decisions related to candidacy in elections. The Applicant presented no evidence of a systemic, recurring problem of, for example, Crown prosecutors who wish to seek elected office but refrain from doing so because of the evasiveness of review of PSC decisions (*British Columbia Civil Liberties Association v Canada (Royal Mounted Police),* 2021 FC 1475 at para 25).

[25] This Court in *Harquail* also noted:

> The Court may also exercise its discretion if an application raises issues which engage the national or public interest. Although important values are implicated in this case, the decision is very factual and applies discretely to the applicant and does not engage the public interest in a practical sense (*Harquail* at para 23).

[26] I find the same reasoning applies here but with more force since the decision of the Federal Court of Appeal in *Taman*. In *Taman,* which as noted was not moot because of an ongoing grievance process, the Federal Court of Appeal extensively reviewed the *PSEA* and the relevant considerations for these requests. I acknowledge that Mr. Sinclair argued that the PSC did not follow *Taman,* but evaluating this assertion requires an assessment of the specific facts

before the PSC. Even if I agree with Mr. Sinclair that these applications tend to be evasive of review, the application for judicial review before me depends on considering how the PSC applied *Taman* to Mr. Sinclair's particular circumstances and because these circumstances are subject to change, my decision may have limited practical utility. Deciding the matter in these circumstances risks creating a legal precedent for its own sake and making law in the abstract (*Borowski* at 362; *CUPE (Air Canada Component)* at para 13; *Right to Life Association of Toronto v Canada (Attorney General)*, 2022 FCA 220 at para 26).

[27] Accordingly, I decline to exercise my discretion to decide the application for judicial review.

## IV. Costs

[28] The parties advised that they had agreed that the losing party would pay $3,000 in costs to the other party. Accordingly, I order the Applicant to pay the Respondent, the Attorney General of Canada, $3,000 in costs.

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is dismissed; and

2. The Applicant must pay the Respondent, the Attorney General of Canada, $3,000 in costs.

"Lobat Sadrehashemi"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-630-21 |
| **STYLE OF CAUSE:** | NOEL SINCLAIR v. ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | NOVEMBER 2, 2022 |
| **JUDGMENT AND REASONS:** | SADREHASHEMI J. |
| **DATED:** | MAY 30, 2023 |

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| | |
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