Federal Court  Cour fédérale

Date: 20220222

Docket: T-1402-21

Citation: 2022 FC 239

Ottawa, Ontario, February 22, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DEMOCRACY WATCH and WAYNE CROOKES

Applicants

and

PRIME MINISTER OF CANADA
COMMITTEE OF THE PRIVY COUNCIL
ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

[1] The Respondents move for an order striking the Notice of Application and costs. They say that the application is moot, the legal argument advanced by the Applicants is doomed to fail, the application is an impermissible attempt to relitigate an issue that has already been decided by the Federal Courts and is thus an abuse of process, and the Applicants have no standing to bring this application.

[2] The application seeks judicial review of the decision of Prime Minister Trudeau and the Committee of the Privy Council made on August 15, 2021, in the form of Order in Council 2021-0892, to advise the Governor General to call an election. The Applicants submit that the Prime Minister acted in contravention of section 56.1 of the *Canada Elections Act*, SC 2000, c 9 [the Act], which prohibits him from calling an election before the fixed election date set out in the section 56.1 of the Act unless, under the unwritten constitutional "confidence convention" that underlies section 56.1, a vote of non-confidence occurs in Parliament before that fixed date. At the time of the decision, the fixed election date was October 16. 2023.

[3] Specifically, the Applicants seek the following relief:

> An order and declaration that the Prime Minister and Committee of the Privy Council violated subsection 56.1(2) of the *Canada Elections Act* (S.C. 2000, c. 9) by advising, in Order in Council 2021-0892 on August 15, 2021, the Governor General of Canada to issue writs of election.

[4] The test on a motion to strike is whether the application, assuming the facts pled are true, would be doomed to fail, as set out by the Federal Court of Appeal in *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33:

> In motions to strike applications for judicial review, this Court uses the same threshold. It uses the "plain and obvious" threshold commonly used in motions to strike actions, sometimes also called the "doomed to fail" standard. Taking the facts pleaded as true, the Court examines whether the application:
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> > …is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" - an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour*

> *Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; cf. *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959.
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> *(Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc*., 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 47.)

[5] As the Applicants note, this is a high bar and is reserved for exceptional cases where the application is clearly bereft of any chance of success.

[6] The Supreme Court of Canada has cautioned that "the motion to strike is a tool that must be used with care. The law is not static and unchanging" and courts must ensure that a "novel but arguable claim" can proceed: *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 [*Imperial Tobacco*] at para 21.

[7] The Applicants submit that this application has a chance of success " because: (i) it raises serious legal issues for review; (ii) the legal issues are not moot, and; (iii) the Applicants should be granted private and public interest standing."

[8] With respect to mootness, I agree with the Respondents that there is no live controversy between the parties vis-à-vis the 2021 election; however, in my view, the remedy the Applicants seek may have some impact on future elections. Indeed, from the very manner in which the application is drawn, it is clear that the Applicants are looking forward to the next election.

[9] The issue of whether the application is moot and whether, if it is, the Court ought to exercise its discretion to hear the matter is not the most serious attack on this application. Of greater concern is the submission of the Respondents that the application lacks legal merit and is doomed to fail because the Federal Court of Appeal decided the very issues raised herein in *Conacher v Canada (Prime Minister)*, 2010 FCA 131 [*Conacher*], leave to appeal to SCC refused, [2011] 1 SCR vi.

[10] *Conacher* related to the 2008 election. On September 7, 2008, the Prime Minister of Canada advised the Governor General of Canada to dissolve Parliament and to set a polling date of October 14, 2008. The Governor General exercised her power as advised. The applicants were Democracy Watch, and its President and Coordinator Duff Conacher. They applied to this Court by way of application for several declarations confirming that the Prime Minister's actions contravened section 56.1 of the *Canada Elections Act* and constitutional convention. They further submitted that the election was contrary to section 3 of the *Charter*, a claim not advanced herein. The application for judicial review and subsequent appeal to the Federal Court of Appeal were dismissed.

[11] The finding of the Federal Court of Appeal that there had been no contravention of section 56.1 is found in paras 5 and 7of its Reasons:

> [I]f Parliament meant to prevent the Prime Minister from advising the Governor General that Parliament should be dissolved and an election held, Parliament would have used explicit and specific wording to that effect in section 56.1. Parliament did not do so. In saying this, we offer no comment on whether such wording, if enacted, would be constitutional.
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> […]

> If the section were interpreted in the manner suggested by the appellants, the Prime Minister would be prohibited from advising the Governor General that an election should be held because of dire need or an event of grave importance. We do not accept that section 56.1 has that result. Such a drastic result would require the clearest of statutory wording. This is a further indication that section 56.1, as drafted, does not affect the Prime Minister's ability to give advice to the Governor General.

[12] It is fair to observe that the relief sought in *Conacher* parallels that sought in this application. The Notice of Application in *Conacher* sought the following relief:

> a. that the Prime Minister's actions contravened section 56.1 [as enacted by S.C. 2007, c. 10, s. 1] of the *Canada Elections Act*, S.C. 2000, c. 9;
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> b. that the holding of the election on October 14, 2008 infringed the right of all citizens of Canada to participate in fair elections pursuant to section 3 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act*, 1982, Schedule B, *Canada Act* 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (Charter);
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> c. that a constitutional convention exists that prohibits a prime minister from advising the Governor General to dissolve Parliament except in accordance with section 56.1 of the *Canada Elections Act*; and
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> d. an order that costs be awarded to the applicants or, that no costs be awarded if the application is dismissed.
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> *Conacher v Canada (Prime Minister)*, 2009 FC 920 at para 2.

[13] The Applicants assert that in this application, filed some 13 years after the facts in *Conacher*, "a different factual and legal matrix presents itself to this Court for the review of the 2021 snap-election call, which gives rise to live legal issues meriting a full hearing with the benefit of evidence."

[14] The Applicants note that in the three elections preceding the 2021 election (2011, 2015, and 2019), the Prime Minister complied with section 56.1 of the Act and only advised the Governor General to call the election on the date specified or following a vote of non-confidence. They assert that this has established the "fixed election convention" which, together with other matters, "suggest[s] that this Court should come to a different conclusion than it did in its 2009 precedent."

[15] They rely, in part, on the following statement by Justice Stratas at para 6 of *Conacher*:

> Subsection 56.1(2) is a clear expression of the will of Parliament, a will that, on the express terms of subsection 56.1(1), in no way binds the Governor General. But under our constitutional framework and as a matter of law, the Governor General may consider a wide variety of factors in deciding whether to dissolve Parliament and call an election. In this particular case, this may include **any matters of constitutional law, any conventions that**, in the Governor General's opinion, may bear upon or determine the matter, **Parliament's will** as expressed in subsection 56.1(2), advice from the Prime Minister, **and any other appropriate matters**.
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> [emphasis mirrors that in the Applicant's memorandum]

[16] They submit that given this new fixed election convention, there should be a different result. I do not agree.

[17] First, it is far from established that there is any new fixed election convention as asserted. Second, the Applicants ignore that it is only conventions that "in the Governor General's opinion, may bear upon or determine the matter" that may be relevant to deciding whether to call an election.

[18] More importantly, the Federal Court of Appeal was clear in stating at para 7 of *Conacher*, "that section 56.1, as drafted, does not affect the Prime Minister's ability to give advice to the Governor General." That remains the law and is binding on this Court.

[19] I am mindful of the Supreme Court of Canada's comments in *Imperial Tobacco* that the law can evolve and that courts should ensure that claims should not be struck simply because they are novel. However, the Applicants' claims in this case are not novel. They are effectively the same claims as those in *Conacher*.

[20] The Applicants also submit that the recent decision of the UK Supreme Court in *R (Miller) v The Prime Minister*, [2019] UKSC 41 will also be relevant to the Court's determination of this application. In that case, it was the unanimous ruling of that court at para 50 that a decision by the Prime Minister to advise the Queen to prorogue Parliament "will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry on its constitutional functions as a legislature and as the body responsible for the supervision of the executive."

[21] It is far from clear what relevance this judgment has to the facts at issue in this application. However, a full answer to the submission is that however persuasive it may be, this Court is bound by the decision of the Federal Court of Appeal in *Conacher*. As such, this application has no chance of success.

[22] The Respondents asked, if successful, for costs of this motion. No costs were ordered in *Conacher* because the issue raised was novel. The issue raised here is no longer novel. It has been decided. As such, this application is an attempt to relitigate the issue lost previously. It is appropriate to award the Respondents their costs, which are fixed at $2,500.00.

ORDER IN T-1402-21

THIS COURT ORDERS that the motion for an order striking the Notice of Application is granted, with costs to the Respondents fixed at $2,500.00.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1402-21
STYLE OF CAUSE:	DEMOCRACY WATCH ET AL v PRIME MINISTER OF CANADA ET AL

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF THE PARTIES

ORDER AND REASONS:	ZINN J.
DATED:	FEBRUARY 22, 2022

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