Federal Court of Appeal

Cour d'appel fédérale

Date: 20181026

Docket: A-348-17

Citation: 2018 FCA 195

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
LASKIN J.A.

BETWEEN:

DEMOCRACY WATCH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 7, 2018.

Judgment delivered at Ottawa, Ontario, on October 26, 2018.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: RENNIE J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

[1] The *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2, requires certain public office holders, including ministers of the federal Crown, to divest their "controlled assets" as defined in the Act, either by selling them or by placing them in a blind trust.

[2] At the time of his appointment as Minister of Finance, the Honourable Bill Morneau held among other things interests in two private companies. Minister Morneau was the sole

shareholder of one of these companies. It in turn held a two-thirds interest in the other company, in which Minister Morneau held the remaining one-third interest. The latter company held a significant interest in Morneau Shepell Inc., a human resources company that has dealings with the Government of Canada.

[3] The Office of the Conflict of Interest and Ethics Commissioner, who administers the Act, advised Minister Morneau in a letter sent in February 2016 that he did not personally hold any assets considered to be “controlled assets” under the Act, so that no divestment of these interests was required. The letter further advised that in the Commissioner’s opinion, the best measure of compliance with the Act would be to put in place a conflict of interest screen. This, the letter stated, was required to prevent any appearance of preferential treatment to Morneau Shepell and prevent any conflict of interest situation from arising in relation to his indirect interest in the company. The form of conflict of interest screen suggested in the letter involved designating a senior staff member to ensure that Minister Morneau would have no participation in any discussion or decision, and no communication with government officials, that would involve the interests of Morneau Shepell.

[4] The question whether Minister Morneau should have placed the shares in Morneau Shepell in a blind trust became the subject of political controversy. Ultimately, on November 30, 2017, Minister Morneau stated in the House of Commons that he had sold “all the shares in [his] family company.” The Commissioner’s public registry shows that Minister Morneau no longer owns any interest in the two private companies that were the subject of the Commissioner’s advice.

[5] By section 66 of the Act, a “decision or order” of the Commissioner is subject to judicial review in this Court, restricted to the grounds set out in paragraphs 18.1(4)(a), (b) and (e) of the *Federal Courts Act*, R.S.C. 1985, c. F-7: that the Commissioner (1) acted without jurisdiction, acted beyond his or her jurisdiction, or refused to exercise his or her jurisdiction, (2) failed to observe a principle of natural justice or procedural fairness, or (3) acted or failed to act by reason of fraud.

[6] Democracy Watch, a not-for-profit organization that advocates on matters relating to government accountability, commenced this application for judicial review on November 16, 2017. It named only the Attorney General, and not Minister Morneau, as a respondent. It argues that the Commissioner’s letter constitutes a “decision or order” subject to judicial review, that contrary to the Commissioner’s position, the shares of Morneau Shepell held through the two private companies constituted “controlled assets” of Minister Morneau, and that the Commissioner’s failure to require Minister Morneau to divest these shares was a refusal to exercise her jurisdiction. It also submits in support of these arguments that there is no authority under the Act to establish a conflict of interest screen.

[7] The Attorney General responds to each of these arguments on the merits. She also raises three preliminary objections as grounds on which the Court should dismiss the application without entering into the merits: that there is no reviewable “decision or order,” that Democracy Watch lacks standing to bring the application, and that the application is moot.

[8] In my view, the application can and should be dismissed on the ground that it is moot, and that in all of the circumstances the Court should not exercise its discretion to decide a moot proceeding. It is therefore not necessary to deal with the Attorney General's other preliminary objections. This Court has addressed some of the issues raised in this case in its decision in *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194, in which judgment is also being delivered today. The applications in the two cases were heard one after the other by the same panel of the Court.

[9] I turn now to explain my conclusion on the issue of mootness.

[10] As the leading authority on mootness – the Supreme Court's decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353-363, 1989 CanLII 123 – makes clear, the mootness analysis proceeds in two stages. The first question is whether the proceeding is indeed moot: whether a live controversy remains that affects or may affect the rights of the parties. If the proceeding is moot, a second question arises: whether the court should nonetheless exercise its discretion to hear and decide it.

[11] On the first question, Democracy Watch argues that the proceeding is not moot because, although Minister Morneau has sold his shares, the Commissioner may have made many other similar determinations, shielded from public view by confidentiality, as to what assets constitute "controlled assets," and there is a legitimate controversy as to the meaning of this statutory term. But this is a consideration relevant to the second question, whether the discretion should be

exercised to decide a moot case, rather than to the prior question of whether the proceeding is moot.

[12] In my view, the disposition of shares by Minister Morneau in November 2017 renders the application moot. With the sale of the shares “the substratum of [the proceeding] has disappeared” (*Borowski* at 357), and a decision of this Court on whether the Commissioner should have called for divestment would have no practical effect.

[13] The second question is more difficult. According to *Borowski* (at 358-363), three factors bear on this Court’s decision whether to exercise the discretion: (1) the presence or absence of an adversarial context, (2) the appropriateness of applying scarce judicial resources, and (3) the Court’s sensitivity to its role relative to that of the legislative branch of government. The consideration of these factors is not a mechanical process. Rather, the discretion should be exercised cumulatively, recognizing that the factors may not all point in the same direction.

[14] The first factor may support the exercise of the discretion where despite the absence of a concrete dispute, the issues will be fully argued by parties with a stake in the outcome. The second factor includes, where applicable, consideration of whether the case presents a recurring issue, but one that is of short duration or otherwise evasive of court review. The third factor recognizes that the courts’ primary task within our constitutional separation of powers is to resolve real disputes. As this Court has stated, “While Borowski and cases that apply it do not forbid courts in appropriate circumstances from determining a proceeding after the real dispute has disappeared, this underlying rationale reminds us that the discretion to do so must be

exercised prudently and cautiously": *Canada (National Revenue) v. McNally*, 2015 FCA 248 at para. 5.

[15] As to the first factor, though as noted above Minister Morneau was not made a party, the application has been fully argued on the merits by Democracy Watch and the Attorney General. An adversarial context therefore remains.

[16] As to the second factor, it is apparent that what it means to "hold" "controlled assets," so that section 17 of the Act requires divestment, presents a genuine issue of some public importance. The definition of "controlled assets" in section 20 of the Act reads as follows:

controlled assets means assets whose value could be directly or indirectly affected by government decisions or policy including, but not limited to, the following:	***bien contrôlé*** Tout bien dont la valeur peut être influencée directement ou indirectement par les décisions ou les politiques du gouvernement, notamment :
(a) publicly traded securities of corporations and foreign governments, whether held individually or in an investment portfolio account such as, but not limited to, stocks, bonds, stock market indices, trust units, closed-end mutual funds, commercial papers and medium-term notes;	**a)** les valeurs cotées en bourse de sociétés et les titres de gouvernements étrangers, qu'ils soient détenus individuellement ou dans un portefeuille de titres, par exemple, les actions, les obligations, les indices des cours de la bourse, les parts de fiducie, les fonds communs de placement à capital fixe, les effets de commerce et les effets à moyen terme négociables;
(b) self-administered registered retirement savings plans, self-administered registered education savings plans and registered retirement income funds composed of at least one asset that would be considered controlled if held outside the plan or fund;	**b)** les régimes enregistrés d'épargne-retraite et d'épargne-études et les fonds enregistrés de revenu de retraite qui sont autogérés et composés d'au moins un bien qui serait considéré comme un bien contrôlé s'il était détenu à l'extérieur du régime ou du fonds;

(c) commodities, futures and foreign currencies held or traded for speculative purposes; and	**c)** les marchandises, les marchés à terme et les devises étrangères détenus ou négociés à des fins de spéculation;
(d) stock options, warrants, rights and similar instruments.	**d)** les options d'achat d'actions, les bons de souscription d'actions, les droits de souscription et autres effets semblables.

[17] The Commissioner has interpreted this definition as extending only to assets that are publicly traded, and held directly by the public office holder rather than through a private corporation. At first blush the definition is open to a broader interpretation, one that takes into account that not all of the types of assets specifically listed in the definition are publicly traded, and that the opening words of the definition cover without limitation assets whose value government decisions or policy could affect. A broader interpretation could in effect make the divestment requirement in section 17 applicable to assets that are indirectly held.

[18] However, it is not apparent that this issue is evasive of review so as to warrant the further expenditure of judicial resources when its determination would amount to the giving of a legal opinion with no practical effect. If, as submitted by Democracy Watch, there may be many other similar cases, then there may well be other opportunities to bring the issue before the Court in a case that presents a live dispute.

[19] In my view the third factor also weighs against the exercise of the Court's discretion.

[20] While by section 66 of the Act the Court has a role to play in relation to the decisions and orders of the Commissioner, Parliament also plays a supervisory role. Under subsection 81(1) of

the *Parliament of Canada Act*, R.S.C. 1985, c. P-1, the Commissioner is an officer of Parliament, appointed after consultation with the leader of every recognized party in the House of Commons and approval by resolution of the House. Paragraph 90(1)(a) of the *Parliament of Canada Act* requires that the Commissioner report annually to the Senate and the House of Commons on his or her activities under the *Conflict of Interest Act*. Section 67 of the *Conflict of Interest Act* required a parliamentary committee to undertake a “comprehensive review of the provisions and operation” of the Act five years after its coming into force, and to submit a report to Parliament including any recommended changes. The adequacy of the Act’s definition and treatment of “controlled assets” was one of the issues canvassed before the committee, both by the Commissioner and by Democracy Watch. No changes to the Act resulted from the review.

[21] Individual parliamentarians may also play a role in seeing the *Conflict of Interest Act* enforced. By subsection 44(1) of the Act, a member of the Senate or House of Commons who has reasonable grounds to believe that a public office holder has contravened the Act may request that the Commissioner examine the matter. The Commissioner must do so, and report on the investigation, unless he or she determines that the request is frivolous or vexatious or was made in bad faith.

[22] I see Parliament’s role, coupled with the potential political sensitivity of the issues raised in this application, as calling for an extra measure of caution before the Court decides an issue that need not be decided to resolve a live dispute: see *Democracy Watch v. British Columbia (Conflict of Interest Commissioner)*, 2017 BCCA 366 at para. 14.

[23] Taking all of the *Borowski* factors into consideration, I conclude that the Court should not exercise its discretion to decide this moot application on its merits. It follows that I would dismiss the application. In all of the circumstances, I would do so without costs.

"J.B. Laskin"

J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-348-17
STYLE OF CAUSE:	DEMOCRACY WATCH v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 7, 2018
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	RENNIE J.A. DE MONTIGNY J.A.
DATED:	OCTOBER 26, 2018

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