



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Powers v. Mitchell*, 2019 NLCA 16

Date: March 26, 2019

Docket Number: 201701H0089 & 201701H0097

BETWEEN:

VICTOR POWERS, MARY FRANCIS,
and MARY HODDER

APPELLANTS

AND:

JULIE MITCHELL

FIRST RESPONDENT

AND:

CLYDE JACKMAN

SECOND RESPONDENT

AND:

JACQUELINE MULLETT

THIRD RESPONDENT

AND:

CANADIAN CIVIL LIBERTIES
ASSOCIATION

FOURTH RESPONDENT

AND:

ATTORNEY GENERAL OF
NEWFOUNDLAND AND LABRADOR

FIFTH RESPONDENT

Coram: Fry C.J.N.L., Welsh and White JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201101G7277
(2017 NLTD (G) 150 & 2017 NLTD (G) 178)

Appeal Heard: January 25, 2019

Judgment Rendered: March 26, 2019

Reasons for Judgment by: Welsh J.A.

Concurred in by: Fry C.J.N.L and White J.A.

Counsel for the Appellants: Andrew Fitzgerald

Counsel for the First Respondent: William Hiscock and Allison Conway

Counsel for the Second Respondent: Not Participating

Counsel for the Third Respondent: Not Participating

Counsel for the Fourth Respondent: Jennifer McAleer and Mark Watton

Counsel for the Fifth Respondent: Ian Kelly Q.C. and Daniel Glover

Welsh J.A.:

[1] This appeal arises from a challenge to provisions of the *Elections Act, 1991*, SNL 1992, c. E-3.1, regarding voting by special ballot in the 2011 and 2015 provincial general elections. By decision dated September 6, 2017, the applications judge declared that the impugned provisions infringed section 3 of the *Canadian Charter of Rights and Freedoms* and that the provisions were not saved under section 1 of the *Charter*. Following that decision, amendments regarding voting by special ballot were made to the *Elections Act* (SNL 2017, c. 17). The amended provisions are not before the Court in this appeal.

[2] At the hearing, the Court determined that the appeal is moot, and that this is not a circumstance in which the Court should exercise its discretion to hear the appeal. Following are the reasons for that decision.

[3] In addition, a decision on the question of costs, appealed by the Attorney General, was reserved and is dealt with below.

BACKGROUND

[4] The challenge to the legislation was commenced by an application by Julie Mitchell, the NDP candidate in the Burin-Placentia West electoral district.

Clyde Jackman, the Progressive Conservative candidate, and Jacqueline Mullett, the Liberal candidate for the district, named as respondents in the application, did not participate in the appeal. Also named as respondents in the application were Victor Powers, the Chief Electoral Officer at the relevant time, Mary Francis, a returning officer, and Mary Hodder, an election clerk (collectively, the “Election Officials”). The Attorney General was given notice of a constitutional question and participated in the application pursuant to section 57 of the *Judicature Act*, RSNL 1990, c. J-4. The Civil Liberties Association was granted intervenor status.

ANALYSIS

Mootness – Application of the Principles

[5] The issue of when a court should decline to hear an appeal on the basis that it is moot is discussed in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. Sopinka J., for the Court, set out an analytical framework, at page 353:

The approach in recent cases involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. ... I consider that a case is moot if it fails to meet the “live controversy” test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

Step One - No Live Controversy

[6] In *Borowski*, at page 354, repeal of legislation prior to hearing of an appeal is referenced as an example of a moot issue. In this case, pursuant to legislative amendments, the impugned legislation was repealed and replaced with new provisions. Whether the previous legislation infringed the *Charter* has become academic. The new legislation is not before this Court on the appeal.

[7] It follows that there is no longer a live controversy. In the result, the appeal is moot. It became necessary, then, to consider whether, despite a determination that the appeal is moot, the Court should exercise its discretion to hear the appeal.

Step Two - Exercise of Discretion to Hear the Appeal

[8] The discretion to hear a moot appeal is “to be judicially exercised with due regard for established principles” (*Borowski*, at page 358). As discussed in *Borowski*, the analysis involves a consideration of three rationales underlying the exercise of the discretion; that is, an adversarial context, consideration of judicial economy, and the adjudicative role of the courts. In applying the analysis, Sopinka J. cautioned, at page 363:

In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

Adversarial Context

[9] The first rationale arises from the court’s roots in an adversarial system. This is discussed in *Borowski*, at pages 358 to 359:

... The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.

[10] Collateral consequences may satisfy this requirement. For example, the presence and interests of intervenors with a stake in the outcome may provide the necessary adversarial context (*Borowski*, at page 360).

[11] Ms. Mitchell, who began the litigation with her application challenging the provisions in the *Act* regarding voting by special ballot, submitted that the Court should decline to hear this appeal because the adversarial context has disappeared with the passage of time and amendments to the *Act*.

[12] The Attorney General took the position that, although the legislation had been amended, this Court’s review of the previous legislation may assist government in the future when considering or proposing further amendments. In my view, this is not a persuasive reason for proceeding with the moot appeal. If an opinion on the constitutional validity of current or future legislation is desirable, it is open to the Lieutenant-Governor in Council to put a reference to this Court pursuant to section 24 of the *Court of Appeal Act*, SNL 2017, c. C-37.002. A reference would allow the Lieutenant-Governor in Council to request

the opinion of the Court on current or draft legislation or on specific questions put in the reference.

[13] Finally, it is difficult to see how the Election Officials would have an interest in the constitutional validity of the previous legislative provisions since it would be their responsibility simply to apply the legislation in place at the time of an election.

[14] It follows that, in these circumstances, the adversarial context rationale would not support proceeding to hear this moot appeal.

Judicial Economy

[15] The second rationale to be considered is the concern for judicial economy based on the “need to ration scarce judicial resources among competing claimants” (*Borowski*, at page 360). Examples where it may be appropriate to exercise the discretion to hear a moot case, discussed in *Borowski* at pages 361 to 362, are: (1) special circumstances warrant resolution of the dispute; (2) a decision, while not resolving the parties’ dispute, will nevertheless have some practical effect on their rights; (3) an important issue of a recurring nature, but brief duration, may evade judicial review because the issue will virtually always disappear before it is ultimately resolved; and (4) the issue is of public importance and its resolution is in the public interest.

[16] None of these examples would apply in the circumstances of this appeal. As discussed above, a reference by the Lieutenant-Governor in Council, if considered necessary or appropriate, would best serve judicial economy. That option would put before the Court current issues and questions.

[17] It follows that judicial economy would not support proceeding to hear this moot appeal.

Role of the Court as the Adjudicative Branch of Government

[18] The third rationale underlying the discretion of the Court to hear a moot appeal is discussed in *Borowski*, at page 362:

The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. ...

[19] It is undoubtedly the role of the legislature to determine the appropriate public policy relevant to rules regarding elections and the casting of ballots. The Court's role is to ensure the constitutional validity of the relevant statute and regulations. That role was exercised in this case when Ms. Mitchell brought her application under the *Charter*. Addressing the applications judge's decision that the provision regarding voting by special ballot did not pass constitutional muster is a matter for the legislature, not the courts.

[20] It follows that the Court's role as the adjudicative branch of government would not support proceeding to hear this moot appeal.

Summary

[21] For the above reasons, the Court concluded at the hearing that this appeal is moot and that, applying the appropriate rationales, this was not a case in which the Court should exercise its discretion to hear the appeal.

Costs

[22] In a separate decision on costs, the applications judge ordered that Ms. Mitchell was entitled to her party and party costs as against the Attorney General, under column 3 of the scale of costs, from after the 2015 provincial general election (2017 NLTD(G) 178). The Attorney General appeals that decision and submits that, regardless of the outcome of the appeal, there should be no order as to costs in this Court or in the Court appealed from.

[23] I begin the analysis with section 267 of the *Elections Act*, which addresses the question of costs:

(1) The procedure governing the hearing of a matter and the provisions respecting the awarding of costs found in the *Judicature Act* and the Rules of Court apply, with the necessary changes, to election applications and the trial of them.

(2) Notwithstanding subsection (1), where there is a conflict between a provision of this Part and a provision of the *Judicature Act* or the Rules of Court, the provision of this Part prevails.

[24] Section 267(3) of the *Elections Act* addresses the award of costs against election officials:

Notwithstanding subsection (1), costs shall not be awarded against the Chief Electoral Officer or a returning officer unless he or she has failed to comply with this Act and

- (a) he or she was not acting in good faith;
- (b) [repealed];
- (c) he or she intended to
 - (i) affect the result of the election,
 - (ii) permit a person to vote whom he or she believed was not qualified to vote, or
 - (iii) prevent a person from voting whom he or she believed was qualified to vote.

[25] The Attorney General submits that the applications judge erred in ordering the Attorney General to pay Ms. Mitchell's costs incurred after the completion of the 2015 provincial general election. That date was chosen because it was at that point that Ms. Mitchell's personal interest in the litigation, as a candidate, ended. That is, the order for costs was limited to the litigation related to the public interest in having the constitutional validity of the impugned legislation determined.

[26] In concluding that an award of costs against the Attorney General was warranted, the applications judge described factors to be considered:

[43] On careful reading of the authorities cited by counsel, the trial and court of appeal decisions in *M. v. H.*, and Orkin's, *The Law of Costs* section 219.5 (Costs in *Charter* Litigation), it is clear that historically the intervenors referenced in support of the general rule against a costs award, were not the Attorney General but rather unions and public interest groups of various forms with not for profit status or otherwise. Such intervenors had an interest in the proceedings but would not be directly affected by the result.

[44] When, as is the case in this somewhat unusual litigation, the Attorney General is an intervenor, and is directly affected by the result of the constitutional challenge, I conclude that application of the general principle against an award of costs, requires consideration of other factors.

[45] Firstly, Orkin's text section 219.5 provides: "Canadian courts have expressed the view that litigation involving the *Canadian Charter of Rights and Freedoms* should not be beyond the reach of citizens of ordinary means or, putting it another way, that a *bona fide Charter* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden"

...

[47] Secondly, I have already outlined the facts of this unusual litigation and highlighted that once the Province held the subsequent 2015 General Election, [Ms. Mitchell's] personal interest [as a candidate] in the litigation came to an end. Thereafter, Ms. Mitchell's Application was limited to her public interest in seeking to have the impugned sections of the *Elections Act, 1991* declared unconstitutional. She did not, similar to the Applicant in *Carter*, have a personal, proprietary or pecuniary interest in the litigation.

[48] Thirdly, ... I would characterize pre-writ special ballot voting as an important issue and the proceedings as complex. The Application had "wider implications for the community at large and there was nothing of a frivolous nature about the challenge" There was no suggestion that to award costs in this case would open the floodgates to marginal applications

[49] Fourthly, while I received no evidence about her expenses, common sense suggests that the engagement of counsel in litigation that has been ongoing since 2011 carries significant financial consequences. There was no suggestion that [Ms. Mitchell] had received any public funding in her challenge.

[50] Fifthly, the Attorney General took a full participatory role in the action

[51] Finally, [Ms. Mitchell] was successful in her public interest challenge to the legislation and the Attorney General was unsuccessful in its defence of the legislation.

[27] The applications judge's rationale for exercising her discretion to order costs against the Attorney General is comprehensive and, in my view, correct.

[28] Regarding costs of the appeal, for the same reasons as expressed by the applications judge, I would order that Ms. Mitchell is entitled to her party and party costs as against the Attorney General, under column 3 of the scale of costs in the *Court of Appeal Rules*. I note in passing that, although the appeal as to the constitutional validity of the impugned legislation was initiated by the Election Officials, I am satisfied that section 267(3) applies and that, as a result, costs may not be awarded against those parties. (See discussion on this point by the applications judge, at paragraphs 22 to 29.)

SUMMARY AND DISPOSITION

[29] For the reasons set out above, at the hearing, the Court declined to exercise its discretion to hear the appeal regarding voting by special ballot which it determined was moot as a result of legislative amendments. Accordingly, that appeal was dismissed.

[30] For the reasons discussed by the applications judge, I would dismiss the Attorney General's appeal as to costs. Further, regarding costs of the appeal, I would order that Ms. Mitchell is entitled to her party and party costs as against the Attorney General, under column 3 of the scale of costs in the *Court of Appeal Rules*.

B. G. Welsh J.A.

I Concur: _____

D. E. Fry C.J.N.L.

I Concur: _____

C. W. White J.A.