COURT OF APPEAL FOR ONTARIO

CITATION: Frank v. Canada (Attorney General), 2014 ONCA 485
DATE: 20140623
DOCKET: M43860 (C58876)

Sharpe J.A. (In Chambers)

BETWEEN

Gillian Frank and Jamie Duong

Responding Party/Applicants
(Respondents in Appeal)

and

The Attorney General of Canada

Moving Party/Respondent
(Appellant in Appeal)

Peter Southey, Gail Sinclair, Peter Hajecek for the applicant, The Attorney General of Canada

Shaun O'Brien and Amanda Darrach for the respondents, Gillian Frank and Jamie Duong

Heard: June 20, 2014

Motion for a stay of the judgment of Mr. Justice Michael A. Penny of the Superior Court of Justice dated May 2 and 15, 2014.

[1] The Attorney General of Canada moves for a stay pending appeal of a judgment holding that provisions of the *Canada Elections Act,* S.C. 2000, c. 9 (the "*Act*"), relating to the voting rights of non-resident Canadians are too

restrictive and extending the vote to all Canadian citizens resident outside Canada.

The *Charter* challenge to limits on voting by non-residents

[2] Voting by non-resident citizens has been a feature of Canadian elections, in one form or another, since the vote was extended to soldiers in World War I. The current regime dates from 1993. The *Act*, s. 11 provides that the following classes of citizens are eligible to vote by mail pursuant to a special procedure found in Part 11 of the Act:

> (*a*) a Canadian Forces elector;
>
> (*b*) an elector who is an employee in the federal public administration or the public service of a province and who is posted outside Canada;
>
> (*c*) a Canadian citizen who is employed by an international organization of which Canada is a member and to which Canada contributes and who is posted outside Canada;
>
> (*d*) a person who has been absent from Canada for less than five consecutive years and who intends to return to Canada as a resident;
>
> (*e*) an incarcerated elector within the meaning of that Part; and
>
> (*f*) any other elector in Canada who wishes to vote in accordance with that Part.

[3] The Part 11 procedure allows the non-resident citizen to register and vote by mail in a riding chosen by the voter based on contacts specified in the Act.

[4] The applicants, both resident in the United States for more than five years, challenged the denial of the vote to non-resident citizens absent from Canada for more than five consecutive years.

The judgment under appeal

[5] In a lengthy and carefully considered judgment, the application judge held that to the extent the *Act* disenfranchised citizens absent from Canada for more than five years, it violated their democratic right to vote right guaranteed by section 3 of the *Charter:*

> 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

[6] The application judge struck down s. 11(d) of the *Act* and related provisions and replaced the words of s. 11(d) with "an elector who resides outside of Canada".

[7] The Attorney General argued that Parliament had a pressing and substantial objective to limit non-resident voting pursuant to s. 1 of the Charter, namely:

1. to extend the right to vote to non-resident citizens but not to the point of giving rise to unfairness for Canada's resident voters, and

2. to maintain the proper functioning and integrity of Canada's electoral system and system of parliamentary representation.

[8] The application judge characterized those objectives as being so abstract, broad and symbolic that they barely qualified, if at all, as pressing and substantial for purposes of s. 1 analysis. However, the application judge proceeded to consider whether the limitation on non-resident citizen voting satisfied the proportionality test. He concluded that it did not. First, he found there was no rational connection between the objectives of fairness and avoiding possible election abuses and denying the vote to certain non-residents. Second, he found the five-year limitation overly drastic and that less restrictive means were available to achieve the same objectives. Finally, the application judge found that the substantial deleterious effect of losing the right to vote outweighed what he found to be the tenuous salutary impact of the law.

[9] The application judge refused to stay or temporarily suspend the declaration of invalidity. He stated, at para. 159: "An immediate declaration of invalidity would create no danger to the public or to the rule of law. Nor is this a situation where Parliament will be unable to hold an election due to the court's decision." He added that there was no evidence that an election was anticipated in the next 12 months.

Events following the judgment

[10] The judgment was handed down on May 2, 2014. On May 11, 2014, four federal by-elections were called for June 30, 2014 – two in Ontario and two in Alberta. Elections Canada immediately announced that the judgment would be complied with for all four by-elections and implemented the steps necessary to enable all Canadian citizens resident abroad to register and vote. As of June 16, 2014, thirteen non-resident citizens registered to vote (although it is not known how many of those would have been eligible under the prior regime). One of those individuals is the wife of one of the applicants who has already cast her ballot.

The Attorney General's stay motion

[11] I note that Elections Canada was not served with this motion. In my view, it should have been served as it would be immediately and directly impacted by the effect of a stay. I allowed the motion to proceed as it is apparent from correspondence in the record that Elections Canada is fully aware of this motion and its legal counsel has outlined the steps Elections Canada could take in the event a stay is granted.

[12] It is common ground that to obtain a stay the Attorney General must satisfy the familiar three-part test and show:

1. that there is a serious question to be determined;

2. that irreparable harm to the public interest will be suffered should the stay not be granted; and

3. that the balance of convenience and public-interest considerations favor a stay.

Serious question to be tried

[13] This appeal will almost certainly be decided on the basis of the s. 1 analysis. I share the application judge's concern that the objectives identified by the Attorney General as being sufficient to justify limiting the right to vote are broad, symbolic and rhetorical. In oral argument, counsel insisted that Parliament's central concern was election fairness. It is not clear to me how denying a citizen the right to vote can be justified on the basis of electoral fairness. The objectives identified by the Attorney General obscure what appears to me to be the real issue, namely, whether the five year limit on non-resident voting can be justified on the basis that it is necessary to sustain our geographically determined, constituency-based system of representation. As the Supreme Court of Canada observed in *Sauvé v. Canada (Chief Electoral Officer),* [2002] 3 S.C.R. 519, the prisoner voting case, "[v]ague and symbolic objectives" render proportionality analysis hollow. However, I do not say that the Attorney General has failed to show that the appeal is arguable. While the application judge gave full and fair consideration of the s. 1 issue, there does appear to be an argument to be made on the other side.

Does the Attorney General have a presumptive or automatic right to a stay?

[14] The Attorney General submits that as guardian of the public interest it has something approaching an automatic right to a stay due to a presumption of irreparable harm and that the balance of convenience favours maintaining the "status quo". I am unable to accept that proposition. It is inconsistent with what occurred in the prisoner voting litigation where a stay was refused pending appeal: *Sauvé v. Canada (Chief Electoral Officer),* [1997] 3 F.C. 628, aff'd. [1997] 3 F.C. 643 (C.A.), leave to appeal dismissed [1997] S.C.C.A. No. 264. It is also inconsistent with the general principle that the decision to grant or withhold a stay lies in the discretion of the court.

[15] The Attorney General relies on the following passage from *Bedford v. Canada (Attorney General),* 2010 ONCA 814, 330 D.L.R. (4th) 162, at para 13:

> ...I must determine whether a stay should be granted in a context where (1) there is a *prima facie* right of the government to a full review of the first-level decision; (2) the government has a presumption of irreparable harm if the judgment is not stayed pending that review; and (3) the responding parties must demonstrate that suspension of the legislation would provide a public benefit to tip the public interest component of the balance of convenience in their favour.

[16] In my view, that passage must be read in its proper context and when so read, it is apparent that a court will only grant a stay at the suit of the Attorney General where it is satisfied, after careful review of the facts and circumstances

of the case, that the public interest and the interests of justice warrant a stay. In that case, the government filed a substantial volume of evidence to demonstrate the very real and tangible harm that would result if the matter of prostitution were left completely unregulated. It is clear from reading the reasons as a whole that Rosenberg J.A. only granted a stay in because, after reviewing and weighing that body of evidence, he was (at para. 72) "satisfied that the moving party ha[d] satisfied irreparable harm test".

[17] It is the case that very often, the public interest in the orderly administration of the law will tilt the balance of convenience in favour of maintaining impugned legislation pending the final determination of its validity on appeal: See, for example *RJR-MacDonald Inc. v. Canada (A.G.),* [1994] 1 S.C.R. 311 at p. 346

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[18] However, I cannot agree with the Attorney General that there is a *presumption* approaching an automatic right to a stay in every case where a

court of first instance has ruled legislation to be unconstitutional. As Lamer J. also held in *RJR-MacDonald*, at p. 343, that "the government does not have a monopoly on the public interest." See also *Bedford*, at para. 73: "The Attorney General does not have a monopoly on the public interest, and it is open to both parties to rely upon the considerations of public interest, including the concerns of identifiable groups."

[19] In my view, it is necessary to carefully review the particular facts and circumstances of this case in order to determine whether or not a stay is warranted.

Irreparable harm

[20] Turning to the specifics of this case, the Attorney General argues that irreparable harm would ensue if a close election were decided by the single vote of a non-resident voter ultimately found on appeal not to have the right to vote. I agree that such a scenario would amount to irreparable harm.

[21] However, elections decided by a very few votes are rare and in my view, the prospect of irreparable harm on that account is fairly remote.

[22] More important, the class of non-resident voters affected by the judgment face precisely the same risk of irreparable harm. Once the election has passed, the constitutional right to vote in that election will be lost forever. If the election is decided by one or a very few votes and if the judgment is affirmed on appeal, the

stay requested by the Attorney General will have improperly disenfranchised voters whose vote could have changed the result of the election. That would constitute irreparable harm to the non-resident voters and to the public.

[23] I conclude that any risk if irreparable harm claimed by the Attorney General is matched by the same risk of irreparable harm to non-resident voters.

[24] Nor do I see merit in the argument that Members of Parliament elected in an election governed by the judgment would somehow be different in any material way from those previously elected. All Members of Parliament are elected according to the law as it stands at the time of the election. There is no air of reality to the claim that Members of Parliament elected at by-election under a changed or amended law would be seen as different from their parliamentary colleagues elected under the earlier law.

[25] In my view, the consideration of irreparable harm is neutral and does not favour granting a stay.

Balance of convenience

[26] In my view, the balance of convenience in this case favours refusal of a stay. I reach that conclusion for the following reasons.

[27] First, this is not the typical case where a complex statutory scheme or administrative apparatus has to be dismantled or constructed in order to give effect to the trial judgment. In such cases, the balance of convenience will

typically favour a stay to avoid the cost and disruption that would flow from implementing a new regime based upon a trial judgment that may need to be undone in the event of a successful appeal.

[28] In the present case, Elections Canada immediately took the minimal administrative steps required to permit non-resident citizens to vote in accordance with the decision of the application judge. If a stay is granted, Elections Canada will have to undo what it has already done. It is clear from the record that it may not be possible for Elections Canada to determine in time for the by-elections which non-resident voters who registered after the judgment would have been eligible before the judgment. The terms of the stay requested by the Attorney General recognize that difficulty and ask for a qualified stay that applies "unless Elections Canada is unable to determine" if those who registered meet the pre-judgment requirements. In addition, at least one non-resident has cast her ballot. To grant a stay in this case would require Elections Canada to rescind the registrations of up to 13 non-resident electors and claw back the vote of a citizen who may well in the end have the right to cast her ballot. Granting a stay in this case would not avoid the cost and inconvenience of prematurely erecting or dismantling a scheme – it would do the opposite.

[29] Second, this is not a case like *Bedford* where the trial judgment creates a legislative void in an area of activity that needs to be regulated in the public interest. Allowing the judgment to operate does not create a void or gap in

Canada's election law. Nor does the judgment radically alter the class of those eligible to vote. The *Act* already grants many non-resident citizens the right to vote. The judgment under appeal merely extends the right to a broader class of non-resident citizens.

[30] As counsel for the applicants pointed out, it is highly unlikely that the judgment will produce a floodgate of votes from disinterested and disengaged non-resident Canadians. We know that the number of newly qualified non-resident voters who had registered as of June 16 is 13 or fewer. The non-resident must be both determined and informed. He or she must first register and then obtain a ballot. The non-resident voter cannot vote by simply marking an X beside one of the listed candidates but must complete a special ballot that requires the voter to know and write in the name of an actual candidate.

[31] I conclude that the balance of convenience does not favour granting a stay in this case.

Conclusion

[32] For these reasons, I conclude that while there is an arguable appeal, both sides demonstrate a similar risk of irreparable harm and the balance of convenience weighs in favour of refusing a stay. Accordingly, I dismiss the Attorney General's motion.

[33] If the parties are not able agree as to the costs of this motion, I will receive brief written submissions from the respondents within ten days of the release of these reasons and from the Attorney General within five days thereafter.

Released: RJS JUN 2 3 2014

Robert J. Harper J.A.