Date: 20080225

Docket: T-755-07

Citation: 2008 FC 246

Ottawa, Ontario, February 25, 2008

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ROBERT KEITH RAE

Applicant

and

THE CHIEF ELECTORAL OFFICER OF CANADA and THE FEDERAL LIBERAL AGENCY OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

[1] Those who take an interest in the public affairs of this country know that Robert Keith ("Bob") Rae ran for the leadership of the Liberal Party of Canada at its convention held in Montreal in December 2006. They may not know that, strictly speaking, Mr. Rae is still a leadership contestant as his final financial returns to the Chief Electoral Officer are only due this coming June.

[2] In order to offset the costs of the convention, the Liberal Party imposed a leadership "entry fee" of $50,000 on Mr. Rae and on the other 10 leadership contestants. As it turns out, far more delegates registered than anticipated, and the convention actually turned a tidy profit.

[3] The Party resolved to refund the entry fee to Mr. Rae and to the other leadership contestants, subject to the approval of the Chief Electoral Officer. However, he takes the position that such a payment from a political party to a leadership contestant is prohibited by section 404.3 of the *Canada Elections Act*. This is a judicial review of that decision.

THE *CANADA ELECTIONS ACT*

[4] The *Canada Elections Act* was amended in 2003 by "*An Act to amend the Canada Elections Act and the Income Tax Act (political financing)*, S.C. 2003, c. 19. The summary accompanying the legislation states that the amendments extended disclosure requirements to, among others, party leadership contests and introduced limits to the contributions that may be made to parties, candidates, electoral district associations, as well as to leadership and nomination contestants. The amendments also require leadership contestants to report contributions received and expenses incurred to the Chief Electoral Officer.

[5] Anxious not to run afoul of the new enactments, well before the convention was held, the Liberal Party opened a dialogue with the Chief Electoral Officer. One of the many questions it asked was whether it was entitled to impose an "entry fee" on leadership contestants, something it had done in the past.

[6] Jean-Pierre Kingsley, the then Chief Electoral Officer, responded in the affirmative. It was his opinion that the "entry fee" would constitute a transfer from the contestant to the Liberal Party as well as a leadership campaign expense, neither of which were prohibited. Shortly

thereafter, realizing that the “entry fee” could not be two things at once, he opined that the fee would constitute a transfer and should be reported as such. In the interim reports required by the Act, both Mr. Rae and the Liberal Party have treated the $50,000 as a transfer from him to it.

[7] The word “transfer” is not defined but still has some special connotations under the Act. A transfer is not a “contribution”. Contributions carry with them a limit of $1,000. Transfers do not.

[8] There were basically three ways Mr. Rae and the other contestants could finance their campaigns. Contributions could be made to them directly or to the Liberal Party but “designated” to a particular contestant. They could also borrow. In accordance with the Act, all these activities are transparent and must be reported, as indeed has been the case. As aforesaid, it was only after the convention proved to be a financial success that the Party sought the Chief Electoral Officer’s approval before returning the “entry fee” to Mr. Rae and the other contestants. His negative opinion was based on subsection 404.3(1) of the Act which provides:

404.3 (1) No registered party and no electoral district association of a registered party shall provide goods or services or transfer funds to a leadership contestant or a nomination contestant, unless the goods or services are offered equally to all contestants.	**404.3** (1) Il est interdit à un parti enregistré et à l'association de circonscription d'un parti enregistré de fournir des produits ou des services ou de céder des fonds à un candidat à la direction ou à un candidat à l'investiture, sauf si les produits ou les services sont offerts également à tous les candidats.

[9] It should be noted in passing that the equality provision in this 2003 amendment only modifies the provision of goods or services. It does not apply to the transfer of funds. Minutes of the Standing Committee on Procedure and House Affairs indicate that this provision was added to cover the possibility of goods or services being offered in common, such as by a political party providing a venue and refreshments at riding nomination meetings or leadership debates.

[10] The parties, and the Court, are in agreement that the 2003 amendments do not impose upon the Chief Electoral Officer the obligation of running leadership conventions. That is a matter for the political parties themselves. The Liberal Party was under no requirement to impose an “entry fee” upon leadership contestants. In the alternative, it could have gone about things differently. For instance, it could have made it a condition of the campaign that the contestants cover any convention financial shortfall, up to a cap of $50,000 each. Had it done so, there would have been no transfer of funds from Mr. Rae to the Liberal Party and so no need to consider whether the refund to him would constitute a transfer within the meaning of the Act. However, Mr. Rae and the Liberal Party have to cope with what they did, not with what they could have done. More to the point, there is no evidence that the Liberal Party gave thought to a refund before the convention was held.

THE ISSUES

[11] As I see it, there are three issues:

a. Was the opinion of the Chief Electoral Officer a decision which is subject to judicial review by the Federal Court?

b. If so, what is the standard of review: correctness, reasonableness *simpliciter* or patent unreasonableness?

c. What is the proper construction to be put on section 404.3 of the *Canada Elections Act*?

WAS THERE A DECISION?

[12] Section 18.1(3)(b) of the *Federal Courts Act* empowers the Federal Court on an application for judicial review to:

declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[13] The Chief Electoral Officer is a federal board, commission or tribunal. If not a "decision", the opinion was certainly an "act". As Mr. Justice O'Reilly put it in *Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2004 FC 85, 245 F.T.R. 42 at paragraphs 8 and 9:

> [8] This Court has jurisdiction to review a "decision, order, act or proceeding of a federal board, commission or other tribunal"

> acting under powers provided by an Act of Parliament: *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 2, 18.1(3)(b). This role extends beyond formal decisions. It includes review of "a diverse range of administrative action that does not amount to a 'decision or order', such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a statutory agency of a public programme.": *Markevich v. Canada*, [1999] 3 F.C. 28 (QL) (T.D.), at para. 11, reversed on other grounds, [2001] F.C.J. No. 696, reversed on other grounds, [2003] S.C.J. No. 8.
>
> [9] Still, the administrative action sought to be reviewed must flow from a statutory power. The decision-maker need not be exercising any particular statutory authority, but must at least have statutory powers affecting the rights and interests of others: *Markevich*, above, at para. 12. […]

[14] Indeed, the Chief Electoral Officer is not attempting to escape the superintending power of this Court. He emphasizes that if the Liberal Party had actually refunded Mr. Rae, he would have decided that the payment was illegal. I add that rule 64 of the *Federal Courts Rules* provides that no proceeding is subject to challenge simply on the ground that only a declaratory order is sought, and that the Court is entitled to make a binding declaration of right.

STANDARD OF REVIEW

[15] It has been established in countless decisions of the Supreme Court that judicial review of an administrative decision is approached pragmatically and functionally (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; and *Voice Construction Ltd. v.*

Construction and General Workers' Union, Local 92, 2004 SCC 23, [2004] 1 S.C.R. 609) As mentioned by Chief Justice McLachlin in *Dr. Q* at paragraph 26, this approach draws out the information needed to determine the degree of deference to which the original decision maker is entitled.

[16] There are four contextual factors to take into account under this approach:

a. The presence or absence of a privative clause or statutory right of appeal;
b. The relative expertise of the tribunal compared with that of the Court;
c. The purpose of the legislation in general and the challenged provisions in particular;
d. And finally, the nature of the question: law, fact or mixed law and fact.

[17] The *Canada Elections Act* contains no privitive clause or statutory right of appeal.

[18] The Chief Electoral Officer obviously has more expertise in supervising the conduct of elections and related matters. Section 16 of the Act requires him to ensure that all election officers act with fairness and impartiality and in compliance with the Act. He is vested with all the powers necessary to perform his duties and functions in administering the Act. Section 17 even gives him, during an election period, if an emergency, an unusual or unforeseen circumstance or an error makes it necessary, the power to adapt any provision of the Act. The question remains, however, whether he is owed deference by the Court in his interpretation of section 404.

[19] The overall purpose of the *Canada Elections Act* is to ensure that the democratic right of adult Canadians to vote is properly respected and that the whole process from riding nominations, to leadership conventions, to by-elections and general elections, unfolds on a level-playing field. More particularly, the provisions relating to leadership campaign expenses are intended to be transparent, to limit the amount of contributions an individual may make and to prevent party apparatchiks from financially favouring one leadership contestant over another.

[20] Finally, two questions remain. Is the proposed payment by the Liberal Party to Mr. Rae a transfer? If so, is it prohibited by section 403 of the Act? In my opinion, the first question is a mixed one of fact and law, and the second a pure question of law.

[21] Although Parliament may robe a tribunal with the power to decide questions of law, including the statutory interpretation of its enabling legislation (*Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 50), I see nothing in the Act to derogate from the norm that findings of fact are not disturbed unless patently reasonable, mixed questions of fact and law are reviewed on a reasonableness *simpliciter* standard, and questions of law as a matter of correctness. The legal issue is the correct interpretation of section 403 of the *Canada Elections Act*. The Chief Electoral Officer's opinion is not entitled to deference (see: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 (*Biolyse*), particularly at paragraph 36).

[22] Previous cases dealing with the role of the Chief Electoral Officer under the *Canada Elections Act* were considered by Madam Justice Heneghan in *Sinclair v. Conservative Party of Canada*, 2004 FC 1628, 2004 F.C.J. No. 1966 (QL). It was not necessary for the purposes of that case to specifically analyse the pragmatic and functional approach to judicial review in this context. However her holding that the Chief Electoral Officer's findings of fact were unassailable and that he prematurely accepted a merger application of the Progressive Conservative Party and the Canadian Reform Conservative Alliance Party contrary to a specific provision of the Act is consistent with this approach.

ANALYSIS

[23] As mentioned above, the Chief Electoral Officer came down with the opinion that the proposed "entry fee" would constitute a transfer from the candidates to the party, rather than a leadership campaign expense.

[24] In my opinion, either characterization would be reasonable. This is a mixed question of fact and law, and so that opinion should not be disturbed.

[25] The Federal Liberal Agency of Canada, the legal entity of the Liberal Party, which was added as a respondent by court order, suggested that the "entry fee" should really be characterized as a deposit, which could be declared refundable *ex post facto*. Its constitution contemplates deposits but not entry fees. However it cannot invoke its own insider rules against the Chief Electoral Officer who was not privy thereto and had no interest therein. I am satisfied

that once Mr. Rae paid the $50,000 to the Liberal Party, property therein vested in it. This is the position taken by the Chief Electoral Officer, a position with which I agree.

[26] It follows that a payment or refund from the Party to Mr. Rae would also be a transfer.

PRINCIPLE OF STATUTORY INTERPRETATION

[27] The modern approach to statutory interpretation as formulated by Elmer Driedger has been approved by the Supreme Court in such cases as *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559. In his *Construction of Statutes* (2nd Ed., Toronto: Butterworths,1983) he said at page 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[28] The *Biolyse* case, above, serves as a good illustration of this principle. At issue was the legal meaning to be given to the word "submission" as used within the *Patented Medicines (Notice of Compliance) Regulations.* Although regulations are limited in scope by their enabling statute, they are still construed on the same basis (*Glykis v. Hydro-Québec*, 2004 SCC 60, [2004] 3 S.C.R. 285).

[29] In *Biolyse*, the Court of Appeal gave "submission" its "plain meaning". The Supreme Court conceded that at first blush the word appeared to be all-inclusive (para. 43). However, after

following the Driedger approach and putting the words in context, it gave the word “submission” a more restricted meaning, more consistent with legislative intent.

[30] Were we to approach section 403 of the *Canada Elections Act* literally, or give it its “plain meaning”, then the proposed repayment would be a prohibited transfer. However, in my opinion, this would lead to a result not intended by Parliament.

[31] The Chief Electoral Officer’s interpretation would be a victory of form over substance, a position frowned upon by the Supreme Court in such cases as *Hamel v. Brunelle*, [1977] 1 S.C.R. 147.

[32] Had Mr. Rae instructed the Liberal Party to hold $50,000 from his “directed contributions”, there never would have been a transfer from him to the Liberal Party. Post-convention payment by the Liberal Party to him of the $50,000 would be the payment of a “directed contribution” which is perfectly legal as per subsection 403.3(3) of the Act.

[33] In the same vein, the Liberal Party also raised funds to defray the costs of the convention by imposing a 20% levy on contributions received by contestants in excess of $500,000. However, those funds were collected from “directed contributions” and following the convention were returned to the contestants without problem.

[34] Mr. Rae and the Liberal Party complain that the Chief Electoral Officer has been inconsistent in his application of section 403 as he treated the Green Party, in its subsequent leadership convention, differently. I do not agree. The Green Party had, in effect, asked if a "security deposit", a term not defined in the Act, could be refunded. In Information Sheet 26, created after the Liberal Party convention and updated from time to time by Elections Canada, it is stated that a refundable "security deposit" would not be a transfer if the rules of the contest were set out in writing before the payment was made and if, among other things, the conditions which had to be met to obtain the refund were within the control of the prospective contestants, such as the filing of reports or returns within a specified time.

[35] Thus, even if the rules imposed by the Liberal Party with respect to the "entry fee" provided that it would be refunded in whole or in part if not needed to offset the expenses of the convention, the Chief Electoral Officer would still consider a refund to be a prohibited transfer. The overall number of delegates attending the convention, and the overall cost thereof, would be beyond the control of any individual contestant.

[36] This interpretation, in my opinion, is incorrect. The purpose of the amendments to the *Canada Elections Act* was to impose on leadership contestants the obligation to report on contributions received and expenses incurred. The amendments also introduced limits on contributions that could be made to leadership contestants. Within the harmony of the Act as a whole, the Liberal Party intends to refund money paid to it by Mr. Rae. It is not attempting to favour him over the other contestants as it intends to refund each of them his or her $50,000 as

well. There is no question of favouritism or of attempting to circumvent contribution limits. The proposed “transfer” is a “retransfer” and is not captured by subsection 403.3(1) of the Act. Had the entry fee not been imposed, Mr. Rae could have used the money as he saw fit, subject, of course, to the confines of the Act. For instance, he could have reduced the borrowings he incurred in running for the leadership. It was not Parliament’s intent to prevent the Party from returning to Mr. Rae money which was his in the first place.

COSTS

[37] Although costs usually follow the event, the position taken by the Chief Electoral Officer was perfectly understandable. These important amendments had not previously been considered by the Court. In the circumstances there shall be no order as to costs.

ORDER

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review of the decision, order, act or proceeding of the Chief Electoral Officer in ruling that the reimbursement of a $50,000 entry fee paid by the applicant, and other leadership contestants to the Liberal Party of Canada, constitutes a prohibited transfer is granted.

2. It is hereby declared that the proposed payment does not constitute a transfer of funds by a registered party to a leadership contestant prohibited by sub-section 404.3(1) of the *Canada Elections Act*.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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