Federal Court Cour fédérale

**Date: 20091210**

**Docket: T-1726-09**

**Citation: 2009 FC 1264**

**Ottawa, Ontario, December 10, 2009**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**WILLIAM SLOAN**

**Applicant**

**and**

**COMMISSIONER OF CANADA ELECTIONS**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] Apparently Voltaire never said:

> Je ne suis pas d'accord avec ce que vous dites, mais je me battrai pour que vous ayez le droit de le dire.

It may be that the phrase was invented by his English biographer, Evelyn Beatrice Hall, who wrote:

> I disapprove of what you say, but I will defend to the death your right to say it.

[2] Whatever its provenance, the phrase dramatically brings home a fundamental value of our Canadian way of life: freedom of expression, a freedom which long existed before it was enshrined in our *Charter of Rights and Freedoms* in 1982. It is this value which is at stake in this judicial review.

[3] Mr. Sloan ran in the 2008 federal election as a candidate of the Communist Party of Canada in the riding of Westmount--Ville-Marie. During the course of the campaign several of his posters were removed by City of Westmount employees.

[4] It would appear that the posters identified their source as required by law. “Authorized by the registered agent of the Communist Party of Canada” for the English posters, and “Autorisé par l’agent enregistré du Parti communiste du Canada” in the French versions. Mr. Sloan speculates that the following slogans on the posters may have annoyed somebody. “END CANADIAN SUPPORT OF APARTHEID ISRAEL” or “CESSEZ L’APPUI CANADIEN À L’APARTHEID ISRAELIEN” or “CANADA HORS D’AFGHANISTAN”.

[5] Mr. Sloan complained to the Commissioner of Canada Elections. The result, as published in the Canada Gazette, was that the Commissioner entered into what the *Canada Elections Act* calls a compliance agreement with the City of Westmount in which the City acknowledged that the removal was without reasonable notice to, and without the consent of, the registered agent of the Communist Party. The City committed itself to ensure future compliance with the *Act*. In deciding not to prosecute, an option which was open to him, the Commissioner took into consideration the

timely admission of the facts, the cooperation of the City and "the good faith of city officials, whose actions were based on public interest considerations."

[6] Mr. Sloan has filed an application for judicial review of that decision. He alleges that freedom of speech has been chilled, that the Commissioner both exceeded and refused to exercise jurisdiction and that various of his Charter rights have been infringed. The remedy he seeks is a declaration from this Court to that effect.

[7] What is currently before the Court is a motion by the Commissioner to strike the entire Notice of Application without leave to amend. In the alternative, should the Notice of Application not be struck, he seeks an order substituting the City of Westmount as respondent and granting him leave to reappear as an intervener.

[8] The grounds for the motion to strike are that Mr. Sloan has no direct interest in the compliance agreement entered into by the Commissioner with the City and that therefore he has no standing to apply for judicial review. Furthermore, the decision is not reviewable by this Court because the Commissioner owed no duty to Mr. Sloan and because his decision was part of his enforcement and prosecutorial rights and duties under a regulatory statute.

**ISSUES**

[9] There are four intertwined issues in this motion to dismiss.

i. Does Mr. Sloan have standing under the *Federal Courts Act* to make this application for judicial review?

ii. Does he have a reasonable cause of action?

iii. Should these questions be answered now, or left to the judge who hears the application on the merits?

iv. If the application is not to be dismissed at this stage, who should be party thereto as a respondent or intervener?

**DECISION**

[10] In my view, based on a very skeletal record, it is not plain and obvious that Mr. Sloan has no standing either personally or as a matter of public interest, or that his application is bereft of success. These matters are best left to the judge who hears the application on the merits.

[11] With respect to the second part of the Commissioner's motion, the Commissioner should be struck as a respondent and replaced by both the Attorney General of Canada and the City of Westmount. The Commissioner is given leave to intervene.

**DISCUSSION**

[12] The Commissioner is an independent officer appointed under section 509 of the *Canada Elections Act* by the Chief Electoral Officer. His duty is to ensure that the Act is complied with and enforced. Complaints or allegations of wrongdoing, such as that made by Mr. Sloan, are referred to him. If he believes on reasonable grounds that an offence has been committed, he may refer the

matter to the Director of Public Prosecutions. During an election period, he may also apply to a Court for an injunction ordering an infringer to comply with the law.

[13] Section 517 deals with another option open to him, Compliance Agreements. These agreements are aimed at ensuring compliance with the Act. The Commissioner must believe on reasonable grounds that a person has committed, is about to commit or is likely to commit an act or omission which would constitute an offence under the *Canada Elections Act*. If the agreement is honoured, that is the end of the matter. The agreement may include a statement by the contracting party, in this case the City of Westmount, in which it admits responsibility for the act or omission that constitutes the offence.

[14] The record, such as it currently is, does not indicate what caused the City of Westmount to remove the posters, or even whether it was requested to do so by the Commissioner. Did someone who was annoyed with the slogans on the poster complain to the City? Inquiries within a court setting may well be justified. In his affidavit opposing the motion to strike, Mr. Sloan refers to the following passage said to be taken from the website of Marc Garneau, the successful candidate:

> Marc Garneau joints the Canadian Jewish Congress (CJC) in denouncing the possibly illegal campaign activities of the Communist Party of Canada (CPC).
>
> Over the course of the current campaign, the CPC has posted signs in Westmount—Ville-Marie with the slogans “Out of Afghanistan” and “End Canadian Support to Apartheid in Israel”, among others. “This is a violation of current electoral laws and an affront to the democratic process,” declared Marc Garneau. “I support the CJC’s complaints to Elections Canada and request that the Communist Party of Canada take down those signs immediately!”

> The Canadian Jewish Congress argues in its complaint that the CPC's signs violate article 407 of the Canada Elections Act in that they do not "directly promote or oppose a registered party, its leader or a candidate during an election period." They are therefore not a legitimate election expense. Moreover, given that the goal of an election is to espouse a particular candidate or party, these signs go against the very spirit of our democracy. The Liberal Party of Canada candidate stands behind the CJC and calls upon all other candidates in this campaign to join him in condemning the CPC's disgraceful propaganda.
>
> Marc Garneau and the Liberal Party of Canada are long time friends of Israel and Canada's Jewish community. "It is particularly shocking to me that the CPC would so abuse the electoral system with inflammatory statements," stated Mr. Garneau. "We need dialogue and discussion, not senseless rhetoric," he concluded.

[15] Contestation of decisions of federal boards, commissions or other tribunals is by way of application in accordance with rule 300 and following of the *Federal Courts Rules*. They are intended to be summary in nature. Thus the courts are somewhat loathe to entertain interlocutory motions which would bring the application to an end before a hearing on the merits. Rule 221, which deals with striking of pleadings, is not directly applicable to applications (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.,* [1995] 1 F.C. 588 (C.A.)). Nevertheless, as indicated in *David Bull* and other cases such as *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, superior courts have the inherent power to control their own process and to dismiss out of hand litigation they consider frivolous or vexatious or which discloses no reasonable cause of action. A pleading, or an application for judicial review, should not to be struck unless it is "plain and obvious" that, with the facts assumed to be true, the legal propositions therein are doomed to failure. As Madam Justice Wilson stated in *Operation Dismantle* at 486-7:

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a

> reasonable cause of action, *i.e.* a cause of action "with some change of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All. E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada (1981)*, 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed".

See also *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959).

[16] It is not for the Court at this stage to weigh an applicant's chance of success on the balance of probabilities. If there is a chance Mr. Sloan may succeed, he should not be "driven from the judgment seat" at the outset.

[17] I am by no means satisfied that Mr. Sloan has no standing personally, or as a matter of public interest. There are three requirements for public interest standing: a) a serious issue to be tried; b) a direct genuine interest in the matter; and c) there is no other reasonable and effective matter to bring the issue to court (*Canada Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 253).

[18] It was Mr. Sloan who made the complaint, it was his posters which were torn down, and yet according to the Commissioner there is no manner in which the issue may be brought to Court. As noted by Mr. Justice Pelletier in *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2006 FCA 144, 350 N.R. 101 at para. 17:

> Standing is a device used by the courts to discourage litigation by officious inter-meddlers. It is not intended to be a pre-emptive determination that a litigant has no valid cause of action. There is a distinction to be drawn between one's entitlement to a remedy and one's right to raise a justiciable issue.

[19] The Commission relies upon the recent decision of the Federal Court of Appeal in *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, 389 N.R. 72. Indeed that case proves the point. It was the judge on the merits of the application who held that Irving had no standing (*Irving Shipbuilding Inc. v. Canada (Attorney General),* 2008 FC 1102, 336 F.T.R. 208). The matter was not decided on a preliminary motion.

[20] In any event, it is more appropriate for this matter to be left to the Applications Judge on the merits (*Canadian Generic Pharmaceutical Association v. Canada (Governor in Council)*, 2007 FC 154, aff'd 2007 FCA 375, 371 N.R. 46). As to the merits, perhaps a full record and full argument will shed judicial light on this matter. The Commissioner took into account "the good faith of city officials, whose actions were based on public interest considerations." What were those public interest considerations? Was it reasonable to take those considerations, whatever they were, into account? It would be premature to dismiss Mr. Sloan's application when the Court knows so little of the facts.

[21] Turning then to the issue as to who should be parties, the Commissioner submits that he should not be a party respondent. It has been well-established that the tribunal whose decision is under review should not itself take an adversarial position. Its defence should be taken up by someone else, usually the Attorney General under Rule 303. Mr. Sloan concedes that the Commissioner was named in error as a respondent. He submits that the proper respondent should be the Attorney General. I agree.

[22] The Commissioner suggests that the City of Westmount should be named as a party respondent. Mr. Sloan objects on the grounds that the City is not a federal board, commission or other tribunal. That, however, is not the point. If he succeeds in his judicial review, the City may well be adversely affected. It is appropriate that it be added as a party respondent (*Friends of the Oldman River Society v. Canada (Minister of Environment)*, [1993] 2 F.C. 651 (C.A.)). Although the City appears to have been copied in on the Commissioner's material, there is nothing in the record clearly stating that it consents to the Commissioner's motion. Consequently the order is *ex parte* as against it.

[23] Finally, the Commission seeks leave to be reinserted in the record as an intervener. In its discretion the Court often permits the tribunal whose decision is under review to intervene, such intervention being limited to such matters as its jurisdiction and process. I shall so order. I wish, however, to have further representations on the terms of the intervention before issuing appropriate directions. For instance, the tribunal is not normally given an independent right of appeal, and is usually not entitled to costs.

**ORDER**

**FOR REASONS GIVEN;**

**THIS COURT ORDERS that**:

1. The motion of the Commissioner of Canada Elections to strike the notice of application for judicial review is dismissed, without prejudice to the point being reargued at the hearing on the merits.

2. The Attorney General of Canada and the City of Westmount are added as party respondents.

3. Mr. Sloan shall serve copy of this order, his application for judicial review, the Commissioner's motion record (without copies of the attached jurisprudence), his affidavit and memorandum in reply upon the City.

4. The Commissioner of Canada Elections is struck as a respondent but given leave to intervene.

5. He shall seek directions, in accordance with rule 109, within 10 days hereof.

6. Production of the tribunal record, and all other matters are stayed pending the issuance of directions.

7. The style of cause is amended to read as follows:

**WILLIAM SLOAN**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**
**AND THE CITY OF WESTMOUNT**

**Respondents**

**and**

**COMMISSIONER OF CANADA ELECTIONS**

**Intervener**

8. Costs in the cause.

"Sean Harrington"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1726-09

**STYLE OF CAUSE:** William Sloan v. Commissioner of Canada Elections

**MOTION CONSIDERED IN WRITING, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES,* IN OTTAWA, ONTARIO, WITHOUT APPEARANCE OF THE PARTIES,**

**REASONS FOR ORDER AND ORDER:** HARRINGTON J.

**DATED:** December 10, 2009

**SOLICITORS OF RECORD:**

ROCCO GALATI LAW FIRM
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FOR THE RESPONDENT