IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Mahony* v. *Chief Electoral Officer of Canada, et al.*
2004 YKSC 42

Date: 20040624
Docket No.: 04-A0051
Registry: Whitehorse

Between:

BIG BEN MAHONY

Petitioner

And

THE CHIEF ELECTORAL OFFICER OF CANADA
THE ATTORNEY GENERAL OF CANADA

Respondents

Before: Mr. Justice L.F. Gower

Appearances:

Sa Tan	For the Petitioner
Keith D. Parkkari	For the Respondent, Chief Electoral Officer of Canada
Brett P. Webber and Suzanne Duncan	For the Respondent, Attorney General of Canada

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Mahony, a devotee of the “Rhinoceros” philosophy, unsuccessfully attempted to run as a candidate for the Yukon in the federal general election to be held on Monday, June 28, 2004. His attempt to file his nomination paper and deposit with the returning officer by the close of nominations on June 7th was apparently rejected because he did not have a statement signed by an auditor consenting to act in that capacity.

[2] He applied on June 16th by Petition seeking a declaration that s. 83(2) of *Canada Elections Act*, S.C. 2000, c. 9, (the *"Act"*), which requires a candidate to appoint an auditor, is contrary to s. 3 of the *Charter* and therefore of no force and effect. He also applied by a Notice of Motion on June 16th for various forms of interim relief. Primarily, he sought a stoppage or a stay of the election in the Yukon. Secondarily, if such a stay were granted, he sought an order to hold a subsequent election and to require Elections Canada to appoint an auditor for him in that election.

[3] The main question of the constitutionality of s. 83 was adjourned by me to meet the 30-day minimum notice requirement in the *Constitutional Questions Act,* R.S.Y. 2002, c. 39. However, because time is of the essence, I allowed the Petitioner to proceed with his Notice of Motion on short notice. I am treating the Notice of Motion as an application for an interim injunction, pending the later determination of the constitutional question.

PRELIMINARY ISSUES

[4] Earlier, I dismissed applications by the Attorney General and the Chief Electoral Officer to strike out the Petition and Notice of Motion respectively for failure to comply with the *Rules of Court*. I ruled that the power to strike out pleadings should only be exercised where it is plain and obvious the claim cannot succeed, and that any doubt on the point should be resolved in favour of permitting the pleadings to stand.

[5] Technically however, this action should have been brought under Rule 8 of the *Rules of Court* by a Writ of Summons. Petitions are authorized as originating applications under Rule 10, but that Rule does not contemplate the kind of relief sought

in the Notice of Motion, which is set out below. Consequently, I could have struck out the entire application (that is, both the Petition and the Notice of Motion) pursuant to Rule 19(24) of the *Rules of Court*. However, that would have precluded consideration of the merits of the Petitioner's arguments. Also, noting that the Chief Electoral Officer and the Attorney General withdrew their objection on this procedural issue, I allowed the matter to proceed in its present form. This is subject to the right of the Respondents to make fresh applications under Rule 52(8) for discovery and cross-examination prior to the hearing of the constitutional question, and also under Rule 52(1) for a direction that there be a trial of the proceeding on the constitutional question.

RELIEF SOUGHT

[6] As I said, I am treating the Notice of Motion as being, in effect, an application for an interim injunction. That application seeks:

> 1. A stay of the general election in the Yukon; and
>
> 2. If such a stay is ordered, then
>
>> (a) destruction of the ballots cast in the election to date; and
>>
>> (b) an order to hold a new general election in the Yukon; and
>>
>> (c) an order requiring Elections Canada to appoint an auditor for the Petitioner; and
>>
>> (d) costs.

ANALYSIS

[7] I will deal first with the question of a stay of the general election in the Yukon, because the answer to that question will determine whether it is necessary to address the remaining forms of relief sought in the Notice of Motion.

[8] *Harper* v. *Canada (Attorney General)*, [2000] 2 S.C.R. 764, restated and confirmed the long-standing three-part test for granting interim injunctions:

> (a) whether there is a serious question to be tried;
>
> (b) whether there will be irreparable harm to the applicant if the injunction is not granted; and
>
> (c) which of the applicant or respondent(s) will suffer greater inconvenience, on balance, if the injunction is not granted.

Serious Question

[9] On the first part of the test, Iacobucci J., in *Figueroa* v*. Canada (Attorney General)*, [2003] 1 S.C.R. 912, at paras. 29 and 30, highlighted the importance of the right of each citizen to run for office and for voters to support such candidates:

> It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses. In each instance, the democratic rights entrenched in s. 3 ensure that each citizen

> has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process.
>
> …
>
> The fundamental purpose of s. 3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life of the country. Absent such a right, ours would not be a true democracy.

[10] Section 3 of the *Charter* states:

> 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.

[11] In *R.J.R. MacDonald Inc.* v. *Canada (Attorney General*), [1994] 1 S.C.R. 311, Sopinka and Cory JJ. said at p. 337, that the threshold for the serious question test was "a low one":

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[12] Therefore, despite some potential factual weaknesses in the Petitioner's case, I have no trouble concluding that there is a serious question to be tried here. Specifically, whether the requirement of the *Canada Elections Act*, cited above, that a candidate appoint an auditor in order to be eligible contravenes s. 3 of the *Charter*, and if so, whether such a limit is reasonable and can be demonstrably justified in a free and democratic society.

Irreparable Harm

[13] On the second part of the test, I have more difficulty. Sopinka and Cory JJ. in *R.J.R. MacDonald*, cited above, spoke about irreparable harm at p. 341 and said that the issue is whether the harm suffered by the applicant from a refusal to grant the interim injunction might not be remedied if the final decision does not accord with the interim one. That is, if s. 83(2) is eventually struck down, but the election is allowed to go ahead. Here I find a fundamental flaw in the Petitioner's argument. He submitted that the *Canada Elections Act* does not allow for contesting the validity of an election on s. 3 *Charter* grounds after an election has been held. However, s. 524(1)(b) of the *Act* states:

> Any elector who is eligible to vote in an electoral district, and any candidate in an electoral district, may, by application to a competent court, contest the election in that electoral district on the grounds that …
>
> > (b) there were irregularities, fraud or corrupt or illegal practices that affected the result of the election.

[14] It is also interesting to note that an application under s. 524 is to be dealt with "without delay and in a summary way", including allowance for oral evidence at the hearing (see s. 525(3)). Further, in the Yukon such an application is to be made to this Court, which may dismiss the application or declare the election null and void or may annul the election (see 531(2)). Lastly, an appeal from any such decision of this Court lies directly to the Supreme Court of Canada, which is mandated by the *Act* to hear the appeal "without delay and in a summary manner" (see s. 532).

[15] Counsel for the Attorney General conceded in their submissions that if a provision of the *Act* was found to be in violation of the *Charter* (and not saved under s. 1), that

could well result in a situation where there was either an irregularity or an illegal practice that affected the result of the election. Although “illegal practice” is partially defined in s. 502(1) of the *Act*, that definition is not comprehensive and the words are not otherwise a defined term under s. 2(1). Therefore, if a particular provision of the *Act* was found to be unconstitutional after an election has been held, but was followed during that election, this should constitute an unlawful or illegal practice. Alternatively, and at the very least, it should be an irregularity. In either case, a subsequent declaration of unconstitutionality, on these facts, would be expected to affect the result of the election, in the sense that but for the unconstitutional application of s. 83, there would have been one additional candidate receiving one or more votes.

[16] As counsel for the Attorney General put it, on the irreparable harm aspect of the three-part test, the Petitioner must show that he has no remedy other than an interim injunction. That is not the case here.

[17] The Petitioner also argued that, even assuming he could bring an application under s. 524(1)(b) to contest an election after the fact on *Charter* grounds, he would be precluded from doing so by the requirement for a minimum deposit of $1,000 as security for costs in s. 526(1), because he could not afford it. On that point, the Petitioner’s argument is premature. First, he has presumably had his nomination deposit of $1,000 returned to him, since he was not accepted as a candidate. Second, according to the Petitioner’s Affidavit #3, he apparently made a decision to pay the $500 retainer required by the auditor he selected (However, by the time the Petitioner made this decision, there was less than 10 minutes before the close of nominations and the auditor he selected

was temporarily unavailable to sign the consent statement.). This suggests that the Court should not presume the Petitioner has no financial ability to meet the requirement of security for costs in s. 526. Third, although counsel were unable to point me to a particular provision in the *Act*, they indicated their understanding was that if the Petitioner were successful on an application under s. 524(1)(b), then the $1,000 security for costs deposit would be returned to him. Fourth, the deposit would appear to cover both summary proceedings in the Yukon Supreme Court as well as in the Supreme Court of Canada. In that sense, the amount does not seem unreasonably high. Fifth, in any event, the Petitioner could challenge s. 526 as being unconstitutional, as part of his overall application to challenge s. 83(2) of the *Act*.

[18] In short, I am not satisfied that the Petitioner would suffer irreparable harm if I refuse the interim injunction. The Petitioner can apply after the fact to have the election declared null and void based on his *Charter* argument. If I am correct on this point, then there is no need to consider the “balance of convenience” aspect of the three-part test. However, I will do so out of an abundance of caution.

The Balance of Convenience

[19] The third aspect of the three-part test is which of the two opposing sides will suffer the greater harm or inconvenience from the granting of an interlocutory injunction, pending the final decision on the merits. The public interest is a special factor to be considered in constitutional cases: *R.J.R. MacDonald Inc.*, cited above, at p. 343.

[20] In *Harper*, cited above, at para. 5, the majority noted that there are special considerations in determining the balance of convenience when legislation is under constitutional attack. On the one hand, there are benefits flowing from the law which is subject to challenge. On the other hand, the rights of an individual may be infringed by that law:

> … An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying … the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough …

One of the principles in play in the balance of convenience question is "the rule against granting the equivalent of final relief in interlocutory challenges to electoral statutes, even in the course of elections governed by those statutes": see *Harper*, cited above, at para. 7.

[21] In the case before me, allowing the interim injunction would give the Petitioner the ultimate relief he seeks in his application, at least with respect to the current election.

[22] One of the other directions from *Harper*, cited above, at para. 9, is that courts should not lightly order that legislation duly enacted for the public good is inoperable in advance of a complete constitutional review, "which is always a complex and difficult matter":

> It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

[23] While I suppose it would be possible for this Court to order the Petitioner to proceed with the main constitutional question within certain timelines, as counsel for the Attorney General submitted, a trial of that issue would likely take several months in any event. During that entire period, the people of the Yukon would be without representation in Parliament. Also, I take judicial notice that the current electoral race on a national scale is very close. Consequently, it is theoretically possible that the absence of an elected member of Parliament from the Yukon could impact upon whether there is a majority or minority government, or even which party forms the government.

[24] The British Columbia Supreme Court in *Delmas* v. *Orion 2000 Technologies Ltd.*, [1997] B.C.J. No. 836 held that, in considering the balance of convenience, courts should also take into account any “laches” by the applicants, that is, any neglect or omission to assert a right. In this case the Petitioner freely concedes he was aware of the problem with s. 83 of the *Act* long before his Petition was filed, and was not precluded from raising this issue much earlier.

[25] Further, as I stated earlier, the Petitioner can bring an application to have the election set aside and to correct any harm that he suffered *after* the election is held. That is surely more convenient that granting an interim injunction stopping the election. *Tan* v. *British Columbia (Chief Electoral Officer)*, [2001] B.C.J. No. 980 (B.C.S.C.) supports this conclusion.

[26] In summary on this point, I find the balance of convenience question is resolved against granting the interim injunction.

CONCLUSION

[27] I previously ordered that the relief sought in the Petition is adjourned until after July 19, 2004, which is the first date the matter may be heard after the 30 day notice period required by the *Constitutional Questions Act*, cited above. That adjournment is subject to the Petitioner filing and serving a Notice of Hearing, as well as any application by either of the Respondents for further particulars of the constitutional question to be argued. However, to be clear, I do not require the Petitioner to file and serve a separate pleading to constitute notice of his constitutional question - the Petition serves as such notice.

[28] As for the Notice of Motion, I have ordered that this hearing be conducted on short notice and without cross-examination on the Petitioner's affidavits in support. With respect to paragraphs 2 and 3 and part of paragraph 4, I dismiss the interim application to stop the federal election in the Yukon. As a result, it is not necessary for me to consider the remaining relief sought in paragraphs 4, 5, 6 and 7. I previously ordered that paragraph 8 of the Notice of Motion be struck out as frivolous, pursuant to Rule 19(24) of the *Rules of Court*.

[29] Mr. Tan for the Petitioner said repeatedly in his submissions that all the Petitioner wants is for his s. 3 *Charter* right to be respected. He can seek that relief after the election if he chooses. The Petitioner complains about being denied the opportunity to obtain that relief now. However, he should remember that his predicament is largely the result of his own conduct. He failed to bring his application prior to the election, even though he believed there was a problem with s. 83 for some time before then. He also

apparently waited until there was less than ten minutes before close of nominations on June 7th before deciding to retain an auditor, who by then was not available to sign the consent statement. And, he did not apply to this Court for relief until June 16th, only seven business days prior to the election.

[30] As a post-script, the Petitioner raised an interesting argument in his written submissions filed June 21, 2004. There, he said that if a candidate has no intention to accept contributions or incur expenses, then there is no need for him to appoint an official agent under s. 83(1) of the *Act*. Consequently, if a candidate does not require and has not appointed an official agent, then the requirement to appoint an auditor under s. 83(2) of the *Act* does not arise. Curiously, that argument presumes the constitutionality of s. 83(2). It therefore would have been more appropriate for the Petitioner to have raised that argument in an application for judicial review of the decision of the returning officer to refuse to accept his nomination, rather than as part of his *Charter* challenge.

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GOWER J.