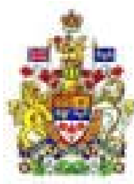
Federal Court of Appeal  Cour d'appel fédérale

Date: 20110228

Docket: A-63-10

Citation: 2011 FCA 74

CORAM: **EVANS J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

THE CHIEF ELECTORAL OFFICER OF CANADA

Appellant

and

L.G. (GERRY) CALLAGHAN, in his capacity as official agent for ROBERT CAMPBELL and DAVID PALLETT, in his capacity as official agent for DAN MAILER

Respondents

Heard at Ottawa, Ontario, on November 23-24, 2010.

Judgment delivered at Ottawa, Ontario, on February 28, 2011.

REASONS FOR JUDGMENT BY: THE COURT

Table of Contents

I INTRODUCTION [1] - [11]

II CEOC'S APPEAL

Statutory Framework [12] - [23]

CEOC's Decision [24] – [28]

Federal Court's Decision [29] – [34]

Issues and Analysis

Issue 1: Does the CEOC have the power to verify election expenses claimed by candidates? [35] – [78]

Issue 2: Was there sufficient material before the CEOC on which he could reasonably decline to state that he was satisfied that the Respondents had incurred a portion of the cost of the RMB advertisements which they claimed as election expenses? [79] – [106]

III RESPONDENTS' CROSS-APPEAL

Introduction [110] – [112]

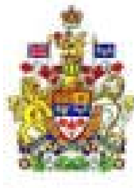
Statutory Provisions [113] – [115]

Federal Court's Decision [116] – [121]

Analysis [122] – [130]

Conclusion [131]

Federal Court of Appeal



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REASONS FOR JUDGMENT

THE COURT

I INTRODUCTION

[1] This is an appeal by the Chief Electoral Officer of Canada (CEOC) from a decision of the Federal Court (2010 FC 43). In that decision, Justice Martineau (Judge) granted the application for judicial review brought by the Respondents to this appeal. He ordered the CEOC to certify to the Receiver General that all the election expenses submitted by the Respondents in their capacity as the

official agents for two Conservative Party of Canada (Party) candidates at the 2005-2006 general election were eligible for reimbursement.

[2] The Judge held that the CEOC had wrongly refused to certify as election expenses payments made by the Respondents in respect of costs incurred for certain television and radio political advertisements that were broadcast in the Respondents' electoral districts. The Respondents had made the payments in question to the Party from funds which the Party had provided to them earlier that day for this purpose. The Judge concluded that the CEOC had erred by refusing to state that he was satisfied that the payments by the Respondents were for advertising costs that they had incurred.

[3] The Respondent Callaghan has cross-appealed the Judge's determination of the amount of the cost of the pooled political advertisements that should be allocated to him as an election expense. The Judge divided the cost equally among candidates in Mr Callaghan's region who had agreed to pool their resources to contribute to the cost of the advertisements which were broadcast the same number of times in each of their electoral districts.

[4] This litigation arises from a scheme devised by the Party in early December 2005, about a month into the election campaign, when it had already spent close to the maximum amount of the election expenses permitted under the *Canada Elections Act*, S.C. 2000, c. 9 (Act). Party officials invited Conservative candidates who had not reached their spending limit to contribute, with others in their region, to a pooled "regional media buy" (RMB).

[5] Candidates were asked by Party officials to commit an amount of money, up to their spending limits, for national advertisements produced for the Party, which would be broadcast in their electoral district, with a "tag line" indicating that the advertisement had been authorized by the official agent of the participating candidate. The Party paid into the bank accounts of participating candidates, including the two for whom the Respondents acted as official agents, an amount equal to the amount that each candidate had committed to the RMB. It was a condition of the transfer of these funds that the candidates remit an equivalent amount to the Party to pay for a share of the RMB advertising.

[6] The campaigns participating in this scheme, including those run by the Respondents, duly remitted the money, which they subsequently entered as an election expense, and claimed part of it back from the Receiver General by way of reimbursement. The payment by the candidate to the Party was to be made on the same day that the Party transferred the funds to the candidate. These arrangements are known as "in-and-out" transactions.

[7] On the basis of the documents submitted by the Respondents in support of their election expenses, the CEOC was not satisfied that the payments made to the Party through the in-and-out transactions represented the cost of advertisements that the Respondents, and the other candidates who participated in the in-and-out transactions, had in fact incurred. His concern was that the advertising costs might have been incurred, not by the candidates, but by the Party when it arranged with its advertising agent to have the advertisements broadcast and that, because the Party had almost reached its permitted spending limit, it had merely transferred these costs to participating

candidates through the in-and-out transactions. Accordingly, he refused to include these amounts in the certificate that the Respondents needed in order to obtain from the Receiver General reimbursement of election expenses for costs that they had incurred.

[8] On our analysis of the statutory scheme respecting election expenses, this appeal turns on the answer to the following question. Was there sufficient material before the CEOC on which he could reasonably decline to state that he was satisfied that the Respondents had incurred a portion of the cost of the RMB advertisements which they claimed as election expenses in their electoral campaign returns?

[9] With all respect to the Judge, who reached the opposite conclusion, in our view the CEOC's decision was not unreasonable. Accordingly, the appeal will be allowed and the Respondents' application for judicial review dismissed.

[10] The Respondent Callaghan's cross-appeal of the Judge's allocation of the costs of the pooled advertising among members of the pool will also be allowed. Since we have concluded that it was reasonably open for the CEOC on the information available to him to refuse to certify the disputed election expenses, there are no candidates' costs with respect to the RMB to allocate. In the absence of a decision by the CEOC on the question, the Judge should not have made his own calculation of the share of the advertising cost attributable to Mr Callaghan's candidate's campaign.

[11] This application for judicial review was originally brought by 35 of the 67 official agents whose candidates participated in the in-and-out transactions and claimed the cost of the RMB as an election expense that they had incurred. The particular circumstances of the different participants varied. So, in order to reduce complexity, only the current Respondents proceeded with the application. However, this is a test case, not a representative proceeding.

II CEOC'S APPEAL

Statutory Framework

[12] We set out the provisions of the *Canada Elections Act* of most immediate relevance to this appeal in our analysis of the issues of statutory interpretation. It is unnecessary to repeat them in this overview of the legislative scheme as it pertains to the appeal. Similarly, the factual background is detailed in our description of the CEOC's decision and in our analysis of the evidence available to the CEOC when he decided that he was not satisfied on the basis of the documents submitted to him that the cost of the RMB had been incurred by the candidates, rather than by the Party.

[13] The overall objectives of the Act were clearly explained by Justice Bastarache writing for the majority in *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, when he said (at para. 62):

> First, the State can provide a voice to those who might otherwise not be heard. The Act does so by reimbursing candidates and political parties and by providing broadcast time to political parties. Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well. In Canada, electoral regulation has focussed on the latter by regulating electoral spending through comprehensive election finance provisions. These provisions seek to create

> a level playing field for those who wish to engage in the electoral discourse. This in turn, enables voters to be better informed; no one voice is overwhelmed by another.
> [emphasis added]

[14] **Reimbursement** Registered parties and candidates are both entitled to a partial reimbursement of their election expenses from public funds. Candidates who receive more than 10% of the total number of votes cast are entitled to an initial reimbursement of 15% of their election expenses (section 464). On the submission of a candidate's electoral campaign return, and when satisfied that the candidate has complied with the statutory reporting provisions, the CEOC must provide a certificate setting out the final amount of reimbursement of the candidate's election expenses, which may not exceed 60% of the expense limit (section 465). Any surplus remaining in a campaign bank account after all debts have been paid, and any reimbursement received, goes to the party or to the electoral district association (sections 471- 472).

[15] Registered parties that receive at least 2% of the total number of votes cast, or at least 5% of the votes cast in the electoral districts where they ran candidates, are entitled to a reimbursement of 50% of their election expenses (section 435).

[16] **Spending limits** The Act contains formulae for calculating the spending limits of individual candidates (sections 440-441) and registered parties (section 422). It is an offence for candidates (paragraphs 497(1)(*s*), 497(3)(*p*) and 502(1)(*c*)) and parties to exceed these limits (paragraphs 497(1)(*l*), (3)(*g*) and section 507).

[17] The spending limits apply to "election expenses" which include (section 407) costs incurred in acquiring goods and services used for directly promoting a registered party, its leader or a candidate during an election period. (Personal expenses are also limited but are not relevant to this appeal.) Non-monetary contributions received by a candidate, and used for similar promotional purposes, also constitute election expenses. The commercial value of non-monetary contributions (defined in section 2) must be reported in a candidate's electoral campaign return and counts towards the spending limit: paragraph 451(2)(*i*). Monetary contributions to a campaign are reported separately and are not election expenses for the purpose of the statutory spending limit. However, to the extent that they are used by the candidate for an election-related cost, they are included in his or her election expenses.

[18] **Transfers** The Act provides separate spending limits for parties and candidates. In order to prevent spending limits from being defeated, a cost incurred by a party must be reported by the party, and included in its total of election expenses. A party may not transfer a cost that it has incurred to a candidate who has room in her or his spending limit. Monetary and non-monetary transfers between candidates are prohibited.

[19] However, the barrier between party and candidate finances is not impermeable, because the Act permits monetary and non-monetary transfers between a candidate and a party or its electoral district association (subsections 404.2(2), (2.1), (2.2) and (3)). Thus, for example, money, goods, or services transferred by a party to a candidate are not included in the party's election expenses and do not count towards the party's spending limit. However, when the money is spent by the

candidate on an election-related item, that amount is an election expense of the candidate, as is the commercial value of goods and services transferred by a party for use in a candidate's election campaign.

[20] **Official agents** A candidate must appoint an official agent before the campaign incurs an election-related cost or accepts a campaign contribution. The official agent acts, in effect, as treasurer of the campaign and is responsible for managing its finances and ensuring compliance with the rules regulating the financial aspects of a campaign (subsection 83(1) and sections 436 - 437). The official agent is responsible for keeping records of contributions and disbursements, and must submit to the CEOC an audited return, with supporting documents, after the election: see sections 451 - 456 for details. In order that campaigns do not accidentally exceed their spending limits, and to ensure proper accountability, only the candidate, the official agent, or a person authorized in writing by the official agent, may incur an expense (subsection 438(5) and paragraph 446(*c*)).

[21] Similar provisions apply to registered parties. The chief agent of a party is essentially the equivalent for the party of a candidate's official agent (section 415). The chief agent of the Party is the Conservative Fund Canada.

[22] Chief Electoral Officer of Canada The CEOC has overall responsibility for the conduct of elections in Canada, and exercises the powers and performs the functions and duties necessary for the administration of the Act (section 16). Public confidence in a fair electoral process depends

on the actual and perceived neutrality of the office. To underline the importance of the position to the maintenance of democracy in Canada, the CEOC is a Parliamentary officer, who holds office on terms similar to those of a superior court judge (subsection 13(1)), and communicates with the Governor in Council for the purposes of the Act through the designated Minister (subsection 15(4)).

[23] Of particular relevance to the present case, the CEOC receives the electoral campaign returns of candidates and parties. Normally, the CEOC accepts without further inquiry the documents that candidates and parties are required to submit in support of the election expenses claimed. However, when in doubt, the CEOC's auditors make further inquiries. For this purpose, the CEOC may require the production of documentary evidence to support the audited return (subsection 451(2.2)) and corrections to the documents (section 457). When satisfied that candidates and parties have fulfilled their statutory reporting duties, the CEOC certifies to the Receiver General the amount, if any, of their claimed expenses that are eligible for reimbursement (subsection 465(1)).

Decision of the Chief Electoral Officer of Canada

[24] Having reviewed the electoral campaign return and related documents for Robert A. Campbell, the Conservative candidate in the electoral district of Dartmouth-Cole Harbour, Nova Scotia, the CEOC wrote a letter, dated April 23, 2007, to Mr Callaghan, in his capacity as Mr Campbell's official agent. The letter stated as follows.

> The return includes a claimed election expense of $3,947.07 with the following description: "2005-2006 Candidate share of media advertisement". Having reviewed the supporting documents evidencing this expense and taking into account the circumstances in which the amount in question was invoiced to and paid for by the

> campaign, I wish to inform you that I am not satisfied that the documentation submitted establishes the claimed election expense. Accordingly, the amount of $3,947.07 invoiced to the campaign by the Conservative Fund of Canada will be excluded from the amount I will certify to the Receiver General of Canada for the purposes of reimbursement in accordance with section 465 of the *Canada Elections Act*.

The letter ended by saying that the CEOC would reconsider the decision to exclude the disputed expense if Mr Callaghan submitted further documentary evidence satisfying the CEOC that it was indeed an election expense.

[25] The CEOC sent an identical letter, bearing the same date, to Mr Pallett regarding the electoral campaign return for Dan Mailer, the Conservative candidate in the electoral district of London-Fanshawe, Ontario, and to the other participating campaigns.

[26] On April 25, 2007, the CEOC wrote to Susan Kehoe, Interim Executive Director, Conservative Party of Canada. He amplified as follows the reasons stated in the letter to the agents for refusing to include the disputed expenses in the certificate.

> My decision in relation to the "media buy" program was made on the basis of my assessment of the circumstances surrounding that program, which remain unresolved. Among other things, these included the fact that the internal invoicing between the party and the candidates was not adequately supported by third party documents, coupled with the absence of correlation between the various campaigns' share of the costs for the advertisements and their commercial value with respect to those campaigns. While there may be different ways of assessing the commercial value, the basis upon which it is done must be a reasonable one. Commercial value cannot be solely based on each campaign's willingness and ability to support a particular amount. This has been in the past, and remains, the position of Elections Canada.

[27] These letters followed a series of communications among the CEOC's office (including members of his audit team), the official agents for the various campaigns that had participated in the RMB, and Party officials, who assumed primary responsibility for dealing with the CEOC on the in-and-out transactions and the RMB.

[28] The reasons given in the CEOC's letters for his refusal to certify the RMB costs as election expenses incurred by the candidates are brief. However, as a result of the ongoing discussions with the CEOC's office, and the requests for further information, the Party was in no doubt about the nature of the CEOC's concerns. In this appeal, the Respondents do not challenge the adequacy of the CEOC's reasons.

Decision of the Federal Court

[29] The following is a summary of the Judge's reasons for granting the Respondents' application for judicial review of the CEOC's refusal to certify as election expenses the cost of the RMB advertising that they claimed that they had incurred, and for ordering the CEOC to issue the certificates that would enable the Respondents to obtain reimbursement from the Receiver General of their share of this cost.

[30] First, the Judge found that any question of law involving the interpretation of the Act is reviewable on a standard of correctness. Questions of mixed fact and law in this case are also reviewable for correctness. This is because the record before the Court included significant material

that was not before the CEOC when he advised the Respondents and the Party why he was not prepared to certify the disputed election expenses for reimbursement by the Receiver General.

[31] The Judge also applied the correctness standard to questions of mixed fact and law because the principal relief sought by the candidates was an order of *mandamus* to oblige the CEOC to provide the certificate on being satisfied that they had filed the documents required by the Act. Accordingly, the Judge said, he had to decide *de novo*, on the basis of the record before the Court, not that before the CEOC, whether the candidates were entitled to the remedy sought.

[32] Second, he held that the CEOC had the authority to examine the documents provided by the official agents in order to determine the accuracy of the information that they contained. In particular, the CEOC could consider whether the candidates had in fact incurred the costs on which their claim for the reimbursement of the disputed election expenses was based, and whether their financial return correctly stated the commercial value of goods and services supplied to them.

[33] Third, on the basis of the material before him, the Judge concluded that the costs of the RMB advertising were properly claimed by the Respondents as their election expenses, because they had incurred the cost of paying for the advertising which, he found, had been supplied to them by the Party. He also said that, even if he had reviewed the CEOC's decision on a reasonableness standard, he would have concluded that it was unreasonable for the CEOC not to be satisfied that the requirements of the Act had been complied with.

[34] The Judge granted an order of *mandamus* requiring the CEOC to provide new certificates to the Receiver General that include the disputed advertising expenses claimed by the Respondents, in accordance with his reasons. In addition, he granted an order of *certiorari* to quash the CEOC's decision refusing to include the disputed election expenses in the certificate.

Issues and analysis

Issue 1: Does the CEOC have the power to verify election expenses claimed by candidates?

(i) Introduction

[35] The Respondents argue that the CEOC's statutory function with respect to candidates' statements of election expenses is narrow in scope. Contrary to the Judge's conclusion, the Respondents assert that the CEOC is only authorized to review the documents submitted to him pursuant to the Act. His function, they say, is limited to ensuring that all the statutorily required documents have been submitted and, on their face, disclose that a candidate incurred an election expense as defined in the Act.

[36] Once satisfied that an official agent has submitted the required documents, the Respondents argue, the CEOC is under a duty to provide a certificate of compliance to the Receiver General, so that candidates can be paid the final instalment of the reimbursement of their election expenses. The Act confers no audit function on the CEOC with respect to candidates' electoral campaign returns. Hence, he is not entitled to go behind the documents submitted in order to determine if, for example, candidates have in fact incurred the costs claimed as election expenses, or have correctly stated the commercial value of goods or services provided to them.

[37] The Judge rejected this argument. He held that it is within the discretion of the CEOC to conduct an audit of a candidate's electoral campaign return as circumstances indicate. The audit may examine the accuracy of the return, including a claim in the return that a particular election expense represented a cost incurred by the candidate to promote his or her candidacy.

[38] In our view, the Judge was correct. We also agree with his conclusion that the CEOC was entitled to no deference on the question of statutory interpretation concerning the role of the CEOC. In any event, since the CEOC appears not to have ruled on the scope of his statutory mandate, there is no decision by the CEOC on this question to review.

(ii) Statutory provisions

[39] The following provisions of the Act are of immediate relevance to determining the scope of the CEOC's role with respect to election expenses. The starting point is subsection 465(1), which the CEOC relied upon when advising the Respondents that he was not satisfied that the payments that they had made to the Party through the in-and-out transactions were eligible for reimbursement under subsection 465(2) as election expenses of the candidates.

465.(1) On receipt of the documents referred to in subsection 451(1), or an update of them under subsection 455(1), 458(1) or 459(1), from a candidate named in a certificate referred to in subsection 464(1), the Chief Electoral Officer shall provide the Receiver General with a certificate that	465.(1) Dès qu'il reçoit pour un candidat dont le nom figure sur un certificat les documents visés au paragraphe 451(1) ou la version modifiée de tels documents prévue aux paragraphes 455(1), 458(1) ou 459(1), le directeur général des élections remet au receveur général un certificat établissant:
(a) states that the Chief Electoral	*a)* sa conviction que le candidat et son

Officer is satisfied that the candidate and his or her official agent have complied with the requirements of subsection 447(2) and sections 451 to 462;

…

(d) sets out the amount of the final instalment of the candidate's election expenses and personal expenses reimbursement.

(2) The amount referred to in paragraph (1)*(d)* is the lesser of
(a) 60% of the sum of the candidate's paid election expenses and paid personal expenses, less the partial reimbursement made under section 464, and

(b) 60% of the election expenses limit provided for in section 440, less the partial reimbursement made under section 464.

agent officiel ont rempli les conditions imposées au titre du paragraphe 447(2) et se sont conformés aux articles 451 à 462;

[…]

d) le montant du dernier versement du remboursement des dépenses électorales et des dépenses personnelles du candidat établi en conformité avec le paragraphe (2).

(2) Le montant visé à l'alinéa (1)*d)* est le moins élevé des montants suivants :
a) 60 % de la somme des dépenses électorales payées et des dépenses personnelles payées, exposées dans le compte de campagne électorale du candidat, moins le remboursement partiel déjà reçu au titre de l'article 464;
b) 60 % du plafond des dépenses électorales établi pour la circonscription au titre de l'article 440, moins le remboursement partiel déjà reçu au titre de l'article 464.

[40] Of the documents to be submitted pursuant to subsection 465(1), the most relevant for present purposes are those described in paragraphs 451(1)(*a*), (2)(*a*), (*b*) and (*i*).

451.(1) The official agent of a candidate shall provide the Chief Electoral Officer with the following in respect of an election:
(a) an electoral campaign return, substantially in the prescribed form, on the financing and expenses for the candidate's electoral campaign;

…

451. (1) L'agent officiel d'un candidat produit auprès du directeur général des élections pour une élection :

a) un compte de campagne électorale exposant le financement et les dépenses de campagne du candidat dressé, pour l'essentiel, sur le formulaire prescrit ;

[…]

(2) The electoral campaign return shall include the following in respect of the candidate:
(*a*) a statement of election expenses;
(b) a statement of electoral campaign expenses, other than election expenses;

…

(*i*) a statement of the commercial value of goods or services provided and of funds transferred by the candidate to a registered party, to a registered association or to himself or herself in his or her capacity as a nomination contestant;

…

(2) Le compte comporte les renseignements suivants à l’égard du candidat :
a) un état des dépenses électorales ;
b) un état des dépenses de campagne, autres que les dépenses électorales ;

[…]

i) un état de la valeur commerciale des produits et services fournis et des fonds cédés par le candidat à un parti enregistré, à une association enregistrée ou à sa campagne à titre de candidat à l’investiture ;

[…]

[41] An “electoral campaign expense” is in turn defined in section 406.

406. An electoral campaign expense of a candidate is an expense reasonably incurred as an incidence of the election, including
(*a*) an election expense;

…

406. Les dépenses de campagne des candidats sont constituées par les dépenses raisonnables entraînées par l’élection, notamment :
a) leurs dépenses électorales;

[…]

[42] “Election expense” is itself a defined term.

407. (1) An election expense includes any cost incurred, or non-monetary contribution received, by a registered party or a candidate, to the extent that the property or service for which the cost was incurred, or the non-monetary contribution received, is used to directly promote or oppose a registered party, its leader or a candidate during an election period.

407. (1) Les dépenses électorales s’entendent des frais engagés par un parti enregistré ou un candidat et des contributions non monétaires qui leur sont apportées, dans la mesure où les biens ou les services faisant l’objet des dépenses ou des contributions servent à favoriser ou à contrecarrer directement un parti enregistré, son chef ou un candidat pendant une période électorale.

(iii) CEOC's position

[43] Reading these provisions together in the context of the facts of the present case, the CEOC argues that subsection 465(1) requires that, before providing a certificate to enable the Respondents to obtain from the Receiver General a reimbursement of the money transferred by the candidates to the Party under the in-and-out scheme, the CEOC had to be satisfied that it constituted an election expense of the candidates as defined in subsection 407(1).

[44] The CEOC further submits that, to be eligible for reimbursement as an election expense, the expense must fall within the definition in subsection 407(1): "<u>any cost incurred</u> … <u>by a candidate</u>, to the extent that the … service for which the cost was incurred … is used to directly promote ... a registered party, its leader or a candidate during an election period."

[45] Despite the national nature of the advertisements appearing under the RMB, the CEOC does not now dispute that their purpose was "to directly promote" the candidates in whose electoral districts they were broadcast. Consequently, it is not necessary for us to express an opinion on whether the following underlined words of subsection 407(1), "directly promote ... <u>a registered party, its leader or a candidate</u> …" are conjunctive or disjunctive.

(iv) Respondents' position

[46] The Respondents advance three arguments to support their contention that subsection 465(1) requires the CEOC merely to "review" the documents submitted pursuant to it, in order to ensure that all the listed documents had been received, and not to look behind them to verify either that the

election expenses claimed were for costs actually incurred by the candidates in compliance with the Act, or even that the documents were authentic.

[47] First, the text of subsection 465(1) does not state that the CEOC may only provide a certificate if satisfied that a candidate's statement of election expenses is accurate and that the candidate has in fact incurred the underlying costs. Rather, the subsection requires that, "on receipt of the documents", the CEOC "shall provide the Receiver General with a certificate" that states, among other things, that the CEOC is satisfied that the candidates have complied with sections 451 to 462.

[48] For the most part, these latter provisions require a candidate's official agent to provide the CEOC with specified documents, and prescribe time limits within which they must be provided. Nowhere does the Act empower or require the CEOC to inquire into the accuracy of the statement of election expenses in a candidate's electoral campaign return. As this Court pointed out in *Stevens v. Conservative Party of Canada*, 2005 FCA 383, [2006] 2 F.C.R. 315 at para. 25 (*Stevens*), when the Act intends the CEOC to confirm the accuracy of information provided, it expressly says so (see, for example, section 51, subsection 366(3) and paragraph 368(*c*)).

[49] Second, the Act expressly provides for the investigation of suspected non-compliance, and for its enforcement. Thus, if the CEOC believes on reasonable grounds that an offence against the Act may have been committed, the CEOC may direct the Commissioner of Canada Elections (Commissioner) to make any inquiry that seems called for in the circumstances, and the

Commissioner shall proceed with the inquiry: section 510. And if, after making appropriate inquiries, the Commissioner has reasonable grounds to believe that an offence may have been committed, the Commissioner may refer the matter to the Director of Public Prosecutions (DPP) to consider whether to initiate a prosecution (subsections 511(1) and (2)).

[50] The CEOC instructed the Commissioner to investigate the in-and-out transactions that gave rise to the present litigation, with a view to forming an opinion on whether the Party may have committed an offence by exceeding its spending limit. Counsel advised us at the hearing that the Commissioner had completed the inquiries and that the matter was with the DPP.

[51] Third, the Respondents rely on the following statements in *Stevens* (at paras. 26-27) where, writing for the Court, Justice Décary said:

> The scheme of the Act seems obvious: as a general rule, the Chief Electoral Officer may, and must, accept information provided to him assuming that it is being provided by an authorized person and that it is accurate. It is not up to him to go beyond what is given or to question the mandate of the person giving the information and thus interfere in what can be called internal party, candidate, or elector affairs. It is therefore not surprising that the Act does not confer on the Chief Electoral Officer a specific power to investigate.
>
> It follows that the role of the Chief Electoral Officer, when he is to make a decision on an application submitted to him, is limited, in general, to ensuring that, on the face of the documents submitted by persons duly authorized, the conditions required by the Act are met.
>
> [emphasis added]

(v) Analysis

[52] Despite the apparent attractiveness of the Respondents' arguments, we, like the Judge, do not accept them. They reduce the role of the CEOC under section 465 in connection with candidates' statements of their election expenses to a degree that does not fit with the statutory scheme and its objectives. *Stevens* is distinguishable: the statements quoted above must be read in light of the particular provisions of the Act and the very different issues with which that case was concerned.

[53] **Subsection 465(1): text** The text of the subsection is compatible with the Respondents' interpretation; indeed, a literal reading of it lends support to their position for two reasons. First, subsection 465(1) does not make the CEOC's duty to provide a certificate conditional on his being satisfied that the requirements on the submission of documents have been complied with. It merely provides that on receipt of the documents, the CEOC shall provide a certificate stating that he is satisfied. In contrast, subsection 435(1), the parallel provision dealing with the certification of registered parties' election expenses for reimbursement, and paragraph 401(1)(*b*), on the amendment of the registry of parties, require the CEOC to take the actions prescribed by the relevant provisions, if he is satisfied of certain matters.

[54] These differences in the drafting of subsection 465(1) on the one hand, and of subsection 435(1) and paragraph 401(1)(*b*) on the other, may suggest that Parliament intended to confer a more limited role on the CEOC under subsection 465(1). However, it would be a mistake,

in our opinion, to attach determinative significance to what might be regarded as a rather subtle difference.

[55] Second, subsection 465(1) states: "On receipt of the documents … the Chief Electoral Officer shall provide … a certificate that …". This suggests that the certificate is to be provided more or less as soon as the statutorily required documents are received, which would not give the CEOC enough time to inquire into the accuracy of the information contained in the documents submitted, and the validity of the election expenses claimed.

[56] We agree that it is not clear from a literal reading of the text of subsection 465(1) that Parliament intended to entrust to the CEOC the verification of the transactions underlying the documents submitted by candidates. However, an examination of the words of the text of a statutory provision is only the starting point in interpreting its meaning.

[57] **Subsection 465(1): context and objectives** In our opinion, an examination of the broader statutory context indicates that subsection 465(1) does not mean what the Respondents say it means. We conclude that Parliament did not intend to circumscribe the CEOC's role by confining him to the largely clerical function of ensuring that candidates have submitted the documents specified in the Act and, when satisfied that they have, to providing a certificate to enable the Receiver General to reimburse the claimed election expenses.

[58] For the following reasons, it makes no practical sense, and is not consistent with the statutory scheme, to interpret the Act as leaving to the Commissioner sole responsibility for scrutinizing the documents and the supporting evidence in order to identify any offences in connection with statements of election expenses, and for checking that the documents are not forgeries.

[59] First, the CEOC has wide supervisory responsibilities for the conduct of elections, and the powers and functions necessary to administer the Act.

16. The Chief Electoral Officer shall *(a)* exercise general direction and supervision over the conduct of elections;	16. Le directeur général des élections : *a)* dirige et surveille d'une façon générale les opérations électorales;
…	[…]
(d) exercise the powers and perform the duties and functions that are necessary for the administration of this Act.	*d)* exerce les pouvoirs et fonctions nécessaires à l'application de la présente loi.

These provisions suggest a broader role under section 465 than a more or less mechanical "review" of the documents submitted against a check list, without regard to their accuracy or whether expenses claimed are in accordance with the Act.

[60] Second, a comparison of sections 465 and 464 is also instructive. Subsection 465 provides for the payment by the Receiver General of the final instalment of the reimbursement of a candidate's election expenses when the CEOC states that he is satisfied that the official agent has complied with the statutory reporting requirements. However, section 464 provides that the initial instalment of the reimbursement is made after the CEOC has provided a certificate setting out the

name of the elected candidate, the name of any candidate who received 10% or more of the valid votes cast, and the amount that is 15% of the spending limit. Unlike section 465, payment under section 464 does not require the CEOC to state that he is satisfied of anything, but simply to provide some simple information.

[61] Third, subsection 451(2.1) requires the official agent of a candidate to supply documents evidencing the election expenses claimed and, if the CEOC is of the opinion that the documents provided by the official agent are not sufficient, subsection 451(2.2) authorizes the CEOC to require further documents necessary to comply with subsection 451(2.1).

451. (2.1) Together with the electoral campaign return, the official agent of a candidate shall provide to the Chief Electoral Officer documents evidencing expenses set out in the return, including bank statements, deposit slips, cancelled cheques and the candidate's written statement concerning personal expenses referred to in subsection 456(1).	451. (2.1) L'agent official du candidat produit auprès du directeur général des élections, avec le compte de campagne électorale, les pièces justificatives concernant les dépenses exposées dans ce compte, notamment les états de compte bancaires, les bordereaux de dépôt, les chèques annulés ainsi que l'état des dépenses personnelles visé au paragraphe 456(1).
(2.2) If the Chief Electoral Officer is of the opinion that the documents provided under subsection (2.1) are not sufficient, the Chief Electoral Officer may require the official agent to provide by a specified date any additional documents that are necessary to comply with that subsection.	(2.2) Dans le cas où le directeur général des élections estime que les documents produits au titre du paragraphe (2.1) sont insuffisants, il peut ordonner à l'agent officiel de produire, à une date donnée, les documents supplémentaires à l'application de ce paragraphe.

[62] In the present case, the CEOC requested further information under subsection 2.2 in a letter, dated November 29, 2006, to Tabitha Fellman, official agent for Theresa Rodrigues, the Party's

candidate for the electoral district of Davenport, Ontario. In our view, these subsections would have little purpose if the CEOC's function does not include ensuring that election expenses claimed are properly supported by documentary evidence. If the CEOC's function under subsection 465(1) were as limited as the Respondents allege, the CEOC would never, or hardly ever, need to request candidates to provide the supporting evidence stipulated in subsection 451(2.1), or to require the production of additional documents under subsection 451(2.2).

[63] The existence of these powers suggests that candidates' duty to provide the documents described in the sections of the Act listed in subsection 465(1) implicitly requires that the information contained in them is correct. Similar indications are found in section 457, which authorizes the CEOC to "correct a document referred to in subsection 451(1) or 455(1), if the correction does not materially affect its substance", and in section 458, under which, at the request of a candidate, the CEOC may authorize corrections. Thus, in order to comply with the duty to submit the listed documents, candidates must submit documents that accurately reflect the costs that they actually incurred, and claimed as election expenses in accordance with the Act.

[64] Fourth, the fact that, unlike the CEOC, the Commissioner has the express power to make inquiries into possible offences under the Act does not persuade us that Parliament intended the Commissioner to have sole authority to inquire into the propriety of the expenses claimed in candidates' electoral campaign returns.

[65] Unlike the Commissioner, the CEOC has residual statutory powers and does not need a specific grant of authority to audit candidates' electoral campaign returns. Section 16 entrusts the CEOC with the exercise of powers and the performance of functions "necessary for the administration of the Act." In our opinion, monitoring the accuracy of candidates' claims for reimbursement from public funds, and their compliance with the statutory limits on election expenses, are functions necessary for the administration of the Act, and thus within the CEOC's responsibilities.

[66] It would surely be surprising if Parliament intended to oblige the CEOC to provide a certificate entitling a candidate to obtain a reimbursement of election expenses from public funds when the CEOC was not satisfied that an expense claimed was statutorily permitted. To limit the CEOC's function in the manner urged by the Respondents is not congruent with the broad powers and responsibilities of the office set out in section 16.

[67] Nor can it be said that by specifically empowering the Commissioner to inquire into suspected offences under the Act, Parliament implicitly withdrew from the CEOC's general functions the task of verifying the propriety of candidates' claimed election expenses. The CEOC and the Commissioner have different roles in the administration of the Act. Making inquiries with a view to possibly turning over a file to the DPP to decide whether to lay charges is one thing; it is another, however, to audit returns in order to be satisfied that candidates are entitled to be reimbursed from public funds for costs incurred during an election, and have included in their

electoral campaign returns a complete and accurate statement of their election expenses, as well as the commercial value of any non-monetary benefits that they had received.

[68] The Respondents say, however, that the CEOC's interpretation of the scope of his role under subsection 465(1) is not necessary in order to protect public funds from being paid out to reimburse ineligible expenses. They point to paragraph 501(1)(*a.1*), under which a candidate can be required to pay back a reimbursement following an inquiry by the Commissioner, and successful prosecution by the DPP.

[69] However, this provision for restitution is only a partial safeguard of public funds. The standard of proof in penal proceedings is high, and conviction may require proof of a guilty intent. Accordingly, paragraph 501(1)(*a.1*) is unlikely to include all candidates whose expenses should not have been reimbursed. Without the administrative check by the CEOC on the propriety of claimed election expenses, many irregularities could well slip through unnoticed.

[70] ***Stevens v. Conservative Party of Canada*** The Respondents rely on the paragraphs from the Court's reasons for judgment quoted at paragraph 51 of these reasons. Read literally, and without regard for context, they provide seemingly powerful reinforcement for the Respondents' position. Justice Décary stated that the CEOC is generally limited "to ensuring that, on the face of the documents submitted to him, … the conditions required by the Act are met" and is not "to go beyond what is given". In similar vein, he described (at para. 19) the CEOC's function as

"essentially the mechanical application of the very detailed meticulously drafted legislative provisions that leave almost nothing to chance …".

[71] However, context is as important to understanding reasons for judgment as it is to interpreting legislation and, in our view, two significant contextual factors make *Stevens* inapplicable to the present case.

[72] First, *Stevens* arose from a dispute about the registration of the Conservative Party of Canada following the merger of the Progressive Conservative Party and the Canadian Reform Conservative Alliance. The ultimate question for the Court in *Stevens* was whether the CEOC had duly authorized the merger of the parties under subsection 401(1), which provides as follows.

401. (1) The Chief Electoral Officer shall amend the registry of parties by replacing the names of the merging parties with the name of the merged party if	401. (1) Le directeur général des élections substitue, dans le registre des partis, le nom du parti issu de la fusion à ceux des partis fusionnants :
(a) the application for the merger was not made in the period referred to in subsection 400(1); and	*a)* si la demande de fusion n'est pas présentée pendant la période mentionnée au paragraphe 400(1);
(b) the Chief Electoral Officer is satisfied that	*b)* s'il est convaincu que, à la fois :
(i) the merged party is eligible for registration as a political party under this Act, and	(i) le parti issu de la fusion est admissible à l'enregistrement sous le régime de la présente loi,
(ii) the merging parties have discharged their obligations under this Act, including their obligations to report on their financial transactions and their election expenses and to maintain valid and up-to-date information concerning	(ii) les partis fusionnants ont assumé les obligations que leur impose la présente loi, notamment en matière de reddition de compte sur leurs opérations financières et sur leurs dépenses électorales et de mise à jour des renseignements qui

their registration. concernent leur enregistrement.

[73] In order to answer the question raised, Justice Décary wrote (at para. 2):

> … the Court must determine whether the Chief Electoral Officer was required to verify the content and accuracy of the documents submitted to him, whether he was required to grant party members who oppose the merger application the right to express their view, and whether he had a legal obligation to wait thirty days before allowing such an application.

[74] Despite the fact that section 401 makes the CEOC's duty to amend the registry of parties conditional on his being satisfied of certain matters, the CEOC's role as "the guardian of democracy" (at para. 19) would likely be endangered, and "the most absolute political neutrality" (at para. 21) of the office threatened, if the CEOC could go beyond the documents provided in connection with a political party's merger with another and the resulting creation of a new party. Party mergers are apt to raise highly contentious, partisan issues best resolved in the political process and in the court of public opinion. To require the CEOC to probe into internal party disputes of this kind could well drag the CEOC into an arena where his or her neutrality is brought into question, and the office thereby endangered.

[75] In our view, however, to interpret the CEOC's powers as including the power to look beyond the documents submitted by candidates and registered political parties in their electoral campaign returns cannot plausibly be said to compromise democracy. Questioning the propriety of an election expense is a routine matter, and is very different from probing the often highly politically charged circumstances of the merger of political parties.

[76] Second, the provisions of the Act dealing with the registration of a party following a merger contain nothing equivalent to subsections 451(2.1) and (2.2), which, it will be recalled, require the provision of documentary evidence to support the statement of election expenses contained in an electoral campaign return, and authorize the CEOC to require additional documents.

(vi) Conclusion

[77] The Respondents' interpretation of subsection 465(1) would weaken compliance with the limits set by Parliament on the amount of money that candidates may spend on their election and can recover by way of reimbursement from public funds. Abuses could well proliferate, and the statutory objective of promoting a healthy democracy through levelling the electoral playing field undermined.

[78] Consequently, when interpreted by reference to its text and context, and the statutory objectives, subsection 465(1) authorizes the CEOC to satisfy himself that the documents submitted evidence the election expenses claimed before issuing the certificate permitting the Receiver General to reimburse them. In order to satisfy the statutory reporting requirements it is not enough for a candidate to submit the documents described in the Act; the documents must also demonstrate to the CEOC's satisfaction that the costs allegedly incurred qualified as election expenses for the purpose of the Act. The requirements imposed by the Act to report election expenses to the CEOC are thus substantive and not merely formal in nature.

Issue 2: Was there sufficient material before the CEOC on which he could reasonably decline to state that he was satisfied that the Respondents had incurred a portion of the cost of the RMB advertisements which they claimed as election expenses?

(i) Standard of review

[79] On the basis of our interpretation of the Act, the CEOC's duty to provide a certificate is conditional upon his being satisfied that candidates have submitted the documents required and that the costs claimed in their electoral campaign returns as reimbursable election expenses were duly incurred in accordance with the Act. The question for the Court in this appeal is whether the CEOC committed a reviewable error when, on the basis of the documentary evidence before him, he refused to state that he was satisfied that the Respondents had incurred the costs of the RMB advertisements that they claimed as election expenses. We emphasize that it was for the CEOC, not the Court, to be satisfied on this matter.

[80] Whether the CEOC is "satisfied" has a subjective aspect. However, if the CEOC states that he is not satisfied that a candidate has incurred a cost claimed as an election expense, the decision must be reasonable in light of the material available to him when he made the decision. Whether that material was sufficient in this case to support his conclusion is a question of inextricably mixed fact and law. We see no basis for departing from the presumption that reasonableness is the standard of review applicable to such questions: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 53.

[81] It was common ground between the parties to this appeal that, in determining whether the CEOC's decision is reasonable, we must consider whether the reasons given in his letter to the Respondents, dated April 23, 2007, and in his letter to the Interim Executive Director of the Party, Ms Kehoe, dated April 25, 2007, provide a transparent and intelligible justification for his decision. In addition, we must determine whether the decision itself is within the range of possible outcomes which are rationally defensible on the basis of the law and the material before the CEOC.

(ii) Judicial review record

[82] Judicial reviews of administrative decisions are normally conducted on the basis of the record before the decision-maker. This case is no exception, despite the informal nature of the administrative process by which the CEOC made his decision, and the absence of a formal record of the evidence on which he relied.

[83] In these circumstances, the Court may rely on the affidavits sworn for the purpose of the application for judicial review as evidence of the material available to the CEOC when he made his decision, and to provide some relevant factual background. However, in determining whether the CEOC's decision was reasonable, the Court may not take into account material that came into existence after April 25, 2007, or was otherwise not available to him when he declined to state that he was satisfied that the cost of the RMB could legitimately be claimed as election expenses of the candidates.

(iii) Administrative record: material before the CEOC

[84] There was no significant disagreement between the parties about the material that was available to the CEOC when he made the decision under review. His letter of April 23, 2007, to the Respondents stated that he was not satisfied that the documents submitted established the claimed election expense,

> [h]aving reviewed the supporting documents evidencing this expense and taking into account the circumstances in which the amount in question was invoiced to and paid for by the campaign.

[85] The heart of the dispute is whether all the circumstances and the supporting documents before the CEOC were sufficient to provide a reasonable basis for his refusal to state that he was satisfied that the Respondents had incurred the cost of the RMB advertising. To the extent that it is relevant, the Respondents, as claimants for a statutory benefit, namely the certificate needed for the reimbursement of election expenses, had the burden of satisfying the CEOC that their claim was justified.

[86] The following are the principal items of documentary evidence, arranged by topic, that were available to the CEOC when he wrote the decision letters of April 23 and 25, 2007, and which the Court may therefore consider in determining the reasonableness of his decision.

[87] **The in-and-out transactions**

a. ***administrative instructions from Party officials sent by e-mail to candidates on the mechanics of the in-and-out transactions*** **(Appeal Book, vol. VII, pp. 1922-25)**

1. The fund will invoice the official agent for the candidate for the media buy and forward by email/fax a copy of the invoice to the official agent. To be done by Ottawa office.

2. Simultaneously, the official agent will complete the bank wire instruction template, sign the form and fax the completed and signed form to Hanh Tran in the Finance department of the Conservative Fund of Canada at [we have deleted the number]. The fund will insert the invoice # and amount, if not already done by the official agent, and fax the bank wire instructions to the fax number of the bank where the official agent maintains the candidate's bank account. **To be done by official agent**.

3. The fund will prepare a bank wire transferring money from the Fund's bank account into the Candidate's bank account from the information received in Step 2. To be done by Ottawa office.

4. Hanh will transfer the monies into the candidate's account on a specific day and will then fax the bank wire to the candidate's bank to have them transfer the monies into the fund's bank account to pay the invoice on the same day. To be done by Ottawa office.

   Note that no monies will be transferred from the Fund to the Candidate to pay for this invoice until the Fund has received a signed and completed bank wire instruction form from the official agent. Also note that the payment must be made to the supplier on Jan. 2, 2006, therefore it is necessary to have this exchange of monies completed by that date as well.

   [bold in original]

One of the e-mails to a candidate (Appeal Book, vol. VII, p. 1924) further explained:

> The invoice for each candidate will be in the same amount as indicated in my preceding email. The transfer will be in the same amount. Therefore, as agreed there will be no net cost or cash flow impact. The paid invoice can be included in paid election expenses subject to the 60% rebate that the candidate gets to keep.

b. ***summaries of the logs kept by Elections Canada auditors of their contacts with candidates and their official agents***

(i) Candidate Contact Log Summary for Elizabeth M. Pagtakhan (district of Vancouver East), October 20, 2006 (Appeal Book, vol. VI, p. 1778)

Elections Canada auditor Rani Naoufal asked if the candidate's official agent could provide more information about an invoice for $29,999.70 from the Conservative Party that was recorded in the candidate's return. In response, the official agent told the auditor:

> I think we contributed to TV national advertising. There was no way we can spend our limit so we were asked by the party if we can help contribute.

(ii) Candidate Contact Log Summary for Jean Landry (district of Richmond-Arthabaska), December 4, 2006 (Appeal Book, vol. VI, p. 1784)

Jean Landry is recorded as having called about the letter he received asking for more details of the $26,000 advertising media buy costs, and to have said that neither he nor his official agent had the required documents, since everything was done by the Party's HQ. He mentioned twice that this was purely an "in-and-out" transaction; that he got the transfer in at 11:00 am and at 11:45 a.m. the transfer out took place.

(iii) Candidate Contact Log Summary for Kenneth Brownridge, official agent for Dick Harris (district of Cariboo-Prince George, January 16, 2007) (Appeal Book, vol. VI, p. 1794)

The log indicates that Mr Harris stated that the campaign did not pay for the media buy because it was national advertising. He understood that all ridings were invoiced for it, but he did not understand why details were needed for an in-and-out transaction related to national advertising.

(c) ***invoices***

(i) Invoices, dated December 23, 2005, from the Party to the campaigns of Dan Mailer (Appeal Book, vol. V, p. 1597) and Robert Campbell (Appeal Book, vol. VI, p. 1804)

Each invoice was addressed to the candidates' campaigns, for the attention of the Respondents. Each invoice stated: "2005-2006 candidate share of media advertisement. Candidate share of media advertisement purchased as agreed to for the 2005-2006 election." The amount of the invoice for the Robert Campbell campaign "before taxes" was $3,947.07, and for the Dan

Mailer campaign, “before taxes” was $9,999.15. No taxes were added. The amounts were payable to the Conservative Fund Canada.

> (ii) Invoice from the Party’s advertising agent, RMI, dated January 1, 2006, to the districts of London-Fanshawe (Dan Mailer) (Appeal Book, vol. IX, p. 2752) and Dartmouth-Cole Harbour (Robert Campbell) (Appeal Book, vol. VI, p. 1817), redacted from a global invoice listing all the districts participating in the “regional media buy” (Appeal Book, vol. VIII, p. 2632)

The invoices are headed, “The Official Agents for Conservative Party Candidates”, and addressed to “#1720-130 Albert Street, Ottawa, attn. Susan Kehoe.” This is the address of the Conservative Party of Canada. Opposite “Dartmouth/Cole Harbour” is the printed figure 3,688.85, and in handwriting “+GST = 3,947.07”, the amount of the invoice received by the campaign from the Party.

(d) ***evidence of payment of invoices***

> (i) Payment by Mr Callaghan (noted on wire transfer instructions) (Appeal Book, vol. VI, p. 1805);
>
> (ii) Payment by Mr Pallett (noted on invoice from Party) (Appeal Book, vol. V, p. 1597).

[88] **Regional media buy program**

(a) ***letter, dated January 15, 2007, from Michael Donison (Executive Director, Conservative Party of Canada) to Manon Hamel (Acting Director, Political Finance and Audit, Elections Canada), “Re: Media Buy and Associated Production costs for the Candidates’ Media Buy Program”, sent in response to a request for a copy of the contract between RMI, the media agent, and either the Party or the candidates participating in the RMB*** **(Appeal Book, vol. VI, pp. 1830-31)**

> […] (T)here is no single contractual document between the registered party or the candidates and the supplier that speaks to the arrangements of the regional media buy … However, in the interest of fully co-operating with the EC and the official agents to get the inquiries satisfied, I am providing you a letter from Mr. Andrew Kumpf, Vice President of Retail Media [RMI] that details the

> contractual obligations between it and the Conservative Party and the participating candidates for the media buys for this election. (at p. 1830)

(b) ***letter, dated January 15, 2007, from Andrew Kumpf (an officer of RMI) to Manon Hamel, "Re: Relationship between RMI and the Conservative Party of Canada"*(Appeal Book, vol. VI, pp. 1832)**

The letter made the following points:

- RMI was the supplier/agency of record for ten media buys made by the Party and the official agents for the participating candidates and that "we mutually entered into an agreement to provide media buys";

- Advertising buys for the national party were segregated from advertising buys for participating candidates. Retail Media was advised of the Conservative candidates who were interested in participating in additional regional media buys;

- Appropriate invoices reflecting goods and services rendered by RMI were separately issued to participating candidates and to the Party;

- Appropriate regional markets were identified for all participating candidates and specific media buys purchased in those markets; and

- Appropriate tag lines were used in all advertisements identifying on whose behalf the advertisements were authorized.

(c) ***package of documents, dated December 2005, sent by the Party to participating candidates* (Appeal Book, vol. VI, pp. 1803-28)**

- A copy of the time schedule for both the television and radio advertisements (where applicable). This document, prepared by RMI and forwarded to the Conservative Party, detailed the targeted market, the date and time of the advertisements, and the advertisements placed;

- Reference material from RMI indicating candidates whose ridings benefited from advertising in a specific market;

- A copy of the invoice from RMI for the candidate's campaign media buy;

- Bank wire instructions from each campaign in which the official agent for the candidate authorized the payment of the Fund invoice received by the candidate; and,

- A copy of the advertisement obtained from RMI, together with the tag line used.

(d) ***letter from Susan J. Kehoe (Interim Executive Director, Conservative Party of Canada) to Marc Mayrand (CEOC), dated April 11, 2007*** **(Appeal Book, vol. VII, p. 1929)**

> A review of the documentation indicates that the organization of the RMBs took place during the weeks of December 6 and 12, 2005. At that time, i.e., at the outset of the election, the individual campaign commitment levels were determined. The final schedule of ads to be covered as part of the RMBs was provided by the media supplier by Monday, December 19, 2005. In other words, the RMB was entirely structured at the outset of the campaign as supported by documentation submitted – it was certainly not a retroactive allocation of costs.

[89] **Cost allocation of RMB**

(a) ***allocation of costs spreadsheet*** **(Appeal Book, vol. VI, pp. 1834-36)**

This was prepared by Elections Canada officials from the information provided by the official agents. It gave examples of candidates in the same region who participated in the media buy program, but claimed significantly different amounts of expenses for advertising that was broadcast the same number of times in each of their electoral districts. No supporting documentation was provided to the CEOC to explain these discrepancies.

(b) ***letter from Ann O'Grady (Chief Financial Officer, Conservative Fund Canada) to Manon Hamel, dated March 6, 2007*** **(Appeal Book, vol. VII, pp. 1917-18), which stated (at p. 1917):**

> There can be no precise, mathematical linkage between the broadcast 'footprint' of an ad and the allocation of costs to the participating local campaigns. Suffice it to say, as your own figures show, the participating local campaigns each paid a meaningful (i.e., more than nominal) portion of the costs of the ads, and all participating campaigns had at least some meaningful broadcast of the ads in their districts.

(c) ***letter from Susan J. Kehoe to Marc Mayrand, dated April 11, 2007*** **(Appeal Book, vol. VII, pp. 1927-30)**

This letter explains the differences in the financial commitments among similarly situated campaigns, and states (at p. 1929):

> … the basis of allocation used was essentially the candidate's relative commitment to the group buy. Simply stated, the greater the overall commitment, the larger the possible ad buy, the greater the overall benefit.

[90] **Contextual factors** The following factors were also known to the CEOC at the time that he made the decision under review.

(a) ***Party spending limit***

The Party was unable to purchase much more advertising when it contacted candidates' campaigns to ask whether they were willing to make a commitment to contribute to the RMB, because it was close to its statutory spending limit: affidavit of Janice Vézina, Associate Deputy CEOC, dated January 14, 2008 (Appeal Book, vol. V, p. 1449).

(b) ***scale of the in-and-out transactions***

68 candidates across Canada agreed to participate in the RMB, although one pulled out at the last minute. He did not include the cost of the RMB as election expenses in his electoral campaign return; however, the Party included it in its election expenses. The total cost of the RMB for the participating Conservative candidates' campaigns was approximately $1.2 million; the production costs were $121,000: letter from Ann O'Grady to Manon Hamel, dated Dec. 15, 2006 (Appeal Book, vol. VI, pp. 1800-01).

(c) ***content of advertisements***

The content of the advertising was national and did not focus on the candidates who claimed their share of the cost as an election expense, or on local issues. The advertisements did, however, carry tag lines identifying them with the local candidates.

(iv) Analysis

[91] In our opinion, the information detailed above amply supports the reasonableness of the CEOC's refusal to state that he was satisfied that the cost of the RMB had been incurred by the candidates in accordance with the Act. Whether the evidence might have enabled the CEOC reasonably to conclude that the costs had been duly incurred by the candidates is irrelevant in this application for judicial review of the exercise of the power entrusted by Parliament to him.

[92] As a preliminary point, we are of the view that, in determining whether he was satisfied that the election expenses claimed by a particular candidate for the RMB advertising met the statutory criteria for reimbursement, the CEOC was not legally required to confine his consideration to the material relating solely to that candidate. Since each candidate was participating in a scheme that was devised and orchestrated by the Party, it was reasonable for the CEOC to take into consideration the totality of the material before him relating to the scheme, and to determine the weight to be given to the different items in respect of particular candidates. Indeed, given the centralized nature of the scheme, it would have been unreasonable for the CEOC not to have taken into consideration the broader context, and to have confined himself to material relating solely to the particular candidate whose election expenses were under consideration.

[93] A key concern of the CEOC was the failure of the candidates to submit documentary evidence of the existence or terms of a contract with RMI under which the advertisements were purchased by the candidates directly, or by the Party as the agent of the participating candidates. Indeed, the Party conceded that no contractual document between RMI and the candidates or the Party existed. This is particularly significant because, except for the candidate and the official agent, no one may incur an expense on behalf of a campaign without the written consent of the official agent. It was not clear from the material before the CEOC whether the Party was supposed to have acted as the candidates' agent in purchasing the advertising, or the candidates contracted directly with RMI.

[94] The other material available to the CEO was not sufficient to satisfy him that, despite the absence of documentary evidence of the existence of a contract, the election expenses claimed by the Respondents in respect of the RMB represented costs that they had actually incurred to purchase the advertising.

[95] The Respondents rely on the invoices issued by the Party and RMI to the candidates, and the subsequent payments made, through the in-and-out transactions, by the candidates to the Party, which had already paid RMI for the advertisements. They say that these provide clear evidence that the candidates had incurred the cost of the RMB advertising in their electoral districts. We do not agree.

[96] While it may normally be inferred from the payment of an invoice that the payment was made to discharge a legal obligation when parties are operating at arm's length, this was not the situation here. The interests of the Party and the candidates participating in the in-and-out transactions were closely aligned.

[97] Further, the invoices themselves were not unequivocal: they do not state that they are for the cost of advertising purchased by or on behalf of the candidates. The invoice from the Party is headed "Candidate share of media advertisement purchased as agreed to for the 2005-2006 election", while the RMI invoice refers simply to "January 2006 Media Expenditure". RMI produced a single invoice for candidates outside Québec, listing on one page all the participating electoral districts, with the amount owing opposite each. Each candidate received a copy of this page with all this information removed, except for the name of his or her district and the amount owing.

[98] It is also relevant in this regard that the nature of the "commitments" previously made by the candidates to contribute to the advertisements is unclear. The evidence is at least as consistent with a promise to contribute to the cost incurred by the Party in engaging RMI to arrange for the broadcasting of the advertisements, as with an agreement by the participating candidates' campaigns to purchase advertisements from RMI directly or through the agency of the Party.

[99] Similarly, the fact that some candidates and official agents had little understanding of the scheme was also reasonably regarded by the CEOC as casting doubt on whether they had agreed to

purchase advertising, rather than to contribute all or some of the unused portion of their spending limits to the Party's own advertising costs.

[100] Also relevant to the CEOC's conclusion was the fact that the allocation of the costs of the advertisements bore no relation to the value of the benefit received by individual candidates from them, but was based on how much room they had in their spending limit. Amounts of contributions were adjusted to ensure that spending limits were not exceeded.

[101] Further, production costs were allocated only to candidates in Québec. Interestingly, production costs seem to have been removed from the amount invoiced to one candidate in Québec, Mr Bernier, in order to keep his allotted share of the advertising cost within his spending limit.

[102] The CEOC could reasonably regard the bases on which the costs of the RMB were allocated as indicative more of a cost-shifting arrangement than an agreement by the participating candidates to purchase advertisements from RMI, either directly or through the Party.

[103] Two contextual factors also support the reasonableness of the CEOC's decision. First, the advertisements themselves were national in nature, had no connection with local issues, and did not feature the candidates. The tag line stating that they had been authorized by the official agent of the participating candidate was the only indication that the viewer or listener would have that the advertisement was connected to the local campaign. Second, when the Party asked candidates to

participate in the RMB, it was close to its permitted spending limit, a consideration that would make attractive a scheme to shift to candidates the cost of additional advertising with national themes.

[104] Hence, on the basis of this material, it was reasonable for the CEOC to decline to state that the candidates' payments in response to the invoices satisfied him that they were thereby discharging a liability to pay for the advertisements broadcast in their districts.

[105] The Respondents relied heavily on a letter written by Mr Kumpf of RMI to Ms Hamel of Elections Canada, dated January 15, 2007, confirming that RMI was the "supplier/agency of record" for the media buys by the Party and the official agents for participating Conservative candidates and that "we mutually entered into an agreement to provide media buys." This letter suggests that the candidates were parties to an agreement to purchase and that by paying the invoices candidates were thereby discharging an obligation to purchase advertising from RMI.

[106] However, Mr Kumpf's letter was written a year after the arrangements had been made for the RMB. By this time, the CEOC had already indicated his concerns about the propriety of the election expenses claimed by candidates with respect to the RMB. The timing of the letter may reasonably have been regarded by the CEOC as reducing its probative value. In light of this and the other material before him, this letter does not, in our view, render the CEOC's decision unreasonable. The question is whether there was material before the CEOC on which he could reasonably have based his decision, not whether he made the correct or even the better decision.

Conclusions

[107] The CEOC was authorized to satisfy himself that election expenses claimed by the Respondents represented costs that they had incurred in accordance with the Act. His decision not to include in the certificate as election expenses the payments made to the Party by the Respondents with respect to the RMB involved a question of mixed fact and law, and is reviewable on a standard of reasonableness.

[108] The CEOC's decision was reasonable because his brief reasons provide a transparent and intelligible justification for his refusal to state that he was satisfied that the Respondents had incurred the costs of the RMB. In addition, the CEOC's decision falls within the range of possible outcomes and is rationally defensible on the basis of both the law and the material before him.

[109] For these reasons, the CEOC's appeal will be allowed with costs, and the Respondents' application for judicial review dismissed.

III RESPONDENTS' CROSS-APPEAL

Introduction

[110] The Respondent Callaghan's cross-appeal relates to the allocation of expenses among campaigns that agreed to participate jointly in a program of television or radio advertisements to be broadcast in each campaign's riding. The CEOC found a number of situations in which candidates participating in a pooled media buy claimed significantly different amounts.

[111] The Respondent Callaghan participated in such a pooled media buy program. In the case of the pooled television advertisements, all participating candidates were identified in the tag line of the advertisements. In the case of the pooled radio advertisements, the advertisements were rotated so that each participating candidate was mentioned an equal number of times. However, the participating campaigns claimed different amounts as the expense incurred as a result of their participation in the media buy. For example, in the case of the pooled television advertisements Mr. Callaghan's candidate participated in, the same advertisement ran in 7 ridings. Mr Callaghan reported the expense in the amount of $1,092.65, while another participant reported an expense of $3,277.95 and yet another candidate reported an expense of $10,989.33 (Appeal Book, vol. IX, p. 2737).

[112] The Party confirmed to the CEOC that there was "no precise mathematical linkage between the broadcast footprint of an ad and the allocation of costs to the participating local campaign" (Appeal Book, vol. I, p. 295). The amount allocated to a candidate was based upon the amount the candidate was willing and able to contribute. Willingness and ability reflected the amount available under each participating candidate's spending limit.

Statutory Provisions

[113] The following provisions of the Act are relevant to the issues raised on the cross-appeal relating to non-monetary contributions and the requirement to report election expenses at their commercial value.

[114] To maintain the integrity of spending limits, the term "election expense" is defined to include non-monetary contributions (see section 407 of the Act, quoted at paragraph 42 above). A "non-monetary contribution" is defined in section 2 of the Act to mean:

"non-monetary contribution" means the commercial value of a service, other than volunteer labour, or of property or of the use of property or money to the extent that they are provided without charge or at less than their commercial value.	« contribution non monétaire » La valeur commerciale d'un service, sauf d'un travail bénévole, ou de biens ou de l'usage de biens ou d'argent, s'ils sont fournis sans frais ou à un prix inférieur à leur valeur commerciale.

[115] As explained at paragraph 17 above, the commercial value of non-monetary contributions must be reported in a candidate's electoral campaign return and is included when calculating a candidate's spending limit. "Commercial value" is defined in section 2 of the Act in the following way:

"commercial value", in relation to property or a service, means the lowest amount charged at the time that it was provided for the same kind and quantity of property or service or for the same usage of property or money, by	« valeur commerciale » En ce qui concerne la fourniture de biens ou de services ou l'usage de biens ou d'argent, le prix le plus bas exigé pour une même quantité de biens ou de services de la même nature ou pour le même usage de biens ou d'argent, au moment de leur fourniture, par :
(*a*) the person who provided it, if the person is in the business of providing that property or service; or	*a*) leur fournisseur, dans le cas où il exploite une entreprise qui les fournit;
(*b*) another person who provides that property or service on a commercial basis in the area where it was provided, if the person who provided the property or service is not in that business.	*b*) une autre personne qui les fournit sur une échelle commerciale dans la région où ils ont été fournis, dans le cas où leur fournisseur n'exploite pas une telle entreprise.

Decision of the Federal Court

[116] The Judge agreed with the CEOC that it was not appropriate to allocate within a given "pool" the costs of the RMB advertising by reference to the amount that participating candidates were willing and able to contribute as their share of the cost on the basis of the room left in their spending limits. To satisfy the requirement of paragraph 451(2)(*i*) of the Act that candidates state the commercial value of goods and services provided to them, there had to be a relationship between the benefit of the goods and services supplied, and the amount paid.

[117] In the case of the Respondent Pallett, his candidate's campaign was the only campaign to participate in the RMB in its geographic area. Thus, the Judge found that the amount claimed by Mr Pallett corresponded to the commercial value of the advertisements that ran in his riding.

[118] In the case of the Respondent Callaghan, the Judge found the unequal allocation of the broadcasting expenses among the various campaigns to be illogical and arbitrary. The Judge held that candidates in the pool benefited equally from the advertisements, because the advertisements were broadcast in each district an equal number of times. Consequently, it was rational that the cost should be divided equally among the participating candidates. Candidates who had contributed less than the amount of an equal share would have to declare as part of their election expenses a non-monetary contribution from the Party in the amount of their equal share of the cost, less the amount that they had actually contributed.

[119] This conclusion flowed from the fact that “non-monetary contributions” fall within the definition of “election expenses”. Hence, they must be included in the electoral campaign returns, and their commercial value counted in the calculation of whether a candidate exceeded her or his permitted spending limit. However, because non-monetary contributions to a candidate are not costs incurred by the candidate, they are not reimbursed by the Receiver General.

[120] For the Respondent Callaghan, this meant that his RMB expense had been reported in an amount below its commercial value. The Judge did not consider this to constitute a bar to the certification of the expense under section 465 of the Act because only the amount actually paid would lead to any reimbursement. However, with respect to the candidate’s electoral campaign return the Judge found that the “fair market value of the deemed election expenses” was the sum of the amounts paid by the campaign and a non-monetary contribution made by the Party. The amount of the non-monetary contribution was the difference between a reasonable share of the advertising costs and the amount paid by the campaign. The Judge calculated (at para. 238) the amount of the non-monetary contribution that Mr Callaghan had to declare in his electoral campaign return to be $2,894.51.

[121] The Respondent Callaghan cross-appeals from these findings.

Analysis

[122] We have found that it was reasonable for the CEOC to decline to state that he was satisfied that the Respondents had incurred the RMB costs that were claimed as election expenses. The

decision of the Federal Court is to be set aside and the application for judicial review dismissed. It follows from this that the substratum of the cross-appeal has been removed. That said, the cross-appeal was fully argued before us and in our respectful view the Judge erred in law by proceeding to exercise the powers of the CEOC to audit the Respondent Callaghan's electoral campaign return and to determine the commercial value of his participation in the RMB. We reach this conclusion for the following reasons.

[123] We begin by reviewing the process followed by the CEOC. By letter dated April 23, 2007, the CEOC advised the Respondent Callaghan that he was not satisfied that "the documentation submitted establishes the claimed election expense" relating to the RMB. The CEOC went on to advise that this expense would be excluded from the amount the CEOC would certify to the Receiver General of Canada, but the decision to exclude the expense "could be reassessed if you provide additional supporting documentation that satisfies me that the claimed expense was incurred by the campaign." The CEOC expanded on his concerns in his letter of April 25, 2007 to the Party where he observed the absence of correlation between the various campaigns' share of the costs for the advertisements and their commercial value with respect to those campaigns. He went on to recognize that there may be different ways of assessing the commercial value, but the commercial value must be reasonable and not based solely on each campaign's willingness and ability to pay a particular amount up to its permitted election expenses limit. However, as the CEOC was not satisfied that the expense was incurred by the campaign, he made no decision as to how the expense, if incurred by the campaign, should be allocated amongst the participating campaigns.

[124] It is, we believe, a matter of settled law that on an application for judicial review the Court normally has no power to substitute its view of the facts for that of the decision-maker, or to make independent findings of fact where the decision-maker made none. In *Rafuse v. Canada (Pension Appeals Board)*, 2002 FCA 31, 286 N.R. 385, this Court explained this principle in the following terms:

> 12 […] The determination of factual questions is within the exclusive jurisdiction of the Board and at the core of its expertise. In this case, because it misdirected itself in law on the test for deciding leave applications, the Board is yet to make the essentially factual determination required of it.
>
> 13 On an application for judicial review, the role of the Court with respect to a tribunal's findings of fact is strictly circumscribed. In the absence of an error of law in a tribunal's fact-finding process, or a breach of the duty of fairness, the Court may only quash a decision of a federal tribunal for factual error if the finding was perverse or capricious or made without regard to the material before the tribunal: *Federal Court Act*, paragraph 18.1(4)(*d*). <u>Hence, if, as a result of an error of law, a tribunal has omitted to make a relevant finding of fact, including a factual inference, the matter should normally be returned to the tribunal to enable it to complete its work</u>. Accordingly, in our opinion, the Judge would have erred in law if, having set aside the decision of the Board, she had remitted the matter with a direction that the Board grant Mr. Rafuse leave to appeal.
>
> 14 While the directions that the Court may issue when setting aside a tribunal's decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances: *Xie, supra*, at paragraph 18. Such will rarely be the case when the issue in dispute is essentially factual in nature (*Ali v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 73 (T.D.)), particularly when, as here, the tribunal has not made the relevant finding. [emphasis added]

[125] The question whether expenses have been reasonably allocated is essentially one of fact. Thus, since the CEOC had made no decision with respect to the reasonable allocation of pooled advertising expenses, the Federal Court erred in law by making its own calculation of the

commercial value of an advertising expense. Had the Court not erred in allowing the application for judicial review, this issue should have been returned to the CEOC for his determination.

[126] In our further view, it is no answer that the relief sought in the Federal Court was *mandamus*. Again, it is settled law that *mandamus* cannot be sought to compel the exercise of discretion in a particular way. Put another way, while *mandamus* may compel a decision-maker to consider a matter, it "does not dictate the result of such a process." See *Martinoff v. Canada*, [1994] 2 F.C. 33 at para. 10 (C.A.), and the authorities there cited. In our context, the Federal Court could require the CEOC to consider according to law the issue of the commercial value of the Respondent Callaghan's RMB advertising expense. It could not calculate the value itself.

[127] The Judge's error in making his own calculation of the commercial value of the advertisements is an independent ground for allowing the cross-appeal of the Respondent Callaghan.

[128] On the point of commercial value, the Respondent Callaghan argued forcefully that the notion of commercial value found in the Act applies only when goods or services are provided at a cost lower than the market value of the goods or services. The concept of commercial value is said not to extend to the allocation of election expenses pooled among several candidates, particularly in the context of television and radio advertisements where a broadcast area is unlikely to be geographically coextensive with the boundaries of a riding. Broadcast advertising is said to be

qualitatively different from other goods or services because advertisements broadcast in one riding may be viewed or listened to by constituents in neighbouring ridings.

[129] In our view, there are no hard and fast rules applicable to the proper allocation of pooled election expenses. Indeed, this was recognized by the CEOC in an example cited by the Respondent. In that case, where pooled advertising was placed in Chinese language newspapers in the Vancouver area during the 2005-2006 general election, expenses were allocated among campaigns based upon the level of Chinese language readership in each riding. This demonstrates that, given an appropriate basis in the relevant facts, pooled election expenses may carry different values in different ridings so that an unequal sharing of costs is appropriate.

[130] As the underlying application for judicial review will be dismissed, the issues arising from the audit of the Respondents' returns, and more particularly the decision not to certify their RMB expenses, remains before the CEOC because he has not yet required the Respondents to file corrected electoral campaign returns (as the CEOC may require under subsection 457(2) of the Act). It remains open, therefore, for the Respondent Callaghan to provide further information or submissions to the CEOC about the reasonableness of the amount he reported for his candidate's participation in the RMB. We agree, however, with the Judge and the CEOC that the amount reported for a candidate's share of a pooled advertising expense cannot be arbitrary, or based solely upon the available room under each candidate's spending limit, but must be reasonably related to the value of the benefits received.

Conclusion

[131] For these reasons, the cross-appeal will be allowed. As the substratum of the cross-appeal was removed by our disposition of the appeal, no costs will be awarded on the cross-appeal.

"John M. Evans"
J.A.

"Eleanor R. Dawson"
J.A.

"Johanne Trudel"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-63-10

(APPEAL FROM A DECISION OF THE HONOURABLE LUC MARTINEAU OF THE FEDERAL COURT DATED JANUARY 18, 2010, NO. T-838-07)

STYLE OF CAUSE:	The Chief Electoral Officer of Canada and L.G. (Gerry) Callaghan, in his capacity as official agent for Robert Campbell and David Pallett, in his capacity as official agent for Dan Mailer
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 23-24, 2010
REASONS FOR JUDGMENT BY:	EVANS, DAWSON, TRUDEL JJ.A.
DATED:	February 28, 2011

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