SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Liberal Party v. Chief Electoral Officer*, 2024 NSSC 172

Date: 20240613
Docket: 526658
Registry: Halifax

Between:

Nova Scotia Liberal Party

v.

Chief Electoral Officer

JUDICIAL REVIEW DECISION

Judge:	The Honourable Justice Joshua Arnold
Heard:	February 21, 2024, in Halifax, Nova Scotia
Final Written Submissions:	June 10, 2024
Counsel:	Nasha Nijhawan, for the Applicant Scott R. Campbell and Jennifer Taylor, for the Respondent

Overview

[1] This is an application for judicial review of a decision of the Chief Electoral Officer (the "CEO"), exercising authority under the *Elections Act*, S.N.S. 2011, c. 5. The application is brought under Civil Procedure Rule 7.

[2] During the 2023 by-election in East Preston, the CEO ordered the Liberal Party candidate, Carlo Simmons, to stop distributing campaign advertising material referencing a potential construction and demolition waste processing facility, or dump. The material alleged that the facility would "harm this riding" and that the Minister of the Environment had "ignored my letter despite the potential impacts this dump will have on residents." The candidate ignored the CEO's purported order, which subsequently became public. Several days before the election, the CEO announced that she was referring the matter to the police for investigation. The Liberal candidate did not win the election. After the election, on September 8, 2023, the CEO discontinued the investigation. The Liberal Party filed a notice for judicial review on September 11, 2023.

[3] The CEO says the matter is moot, and in the alternative, says her decision is reasonable. I will determine the matter notwithstanding the alleged mootness, and I conclude that the CEO's decision was unreasonable.

Background

[4] The facts are relatively straightforward, despite the "spin" put on them by both parties. The Applicant, the Liberal Party, is a registered political party under the *Elections Act*, S.N.S. 2011, c. 5. The Liberal Party endorsed a candidate in a by-election to be held in Preston, Nova Scotia on August 8, 2023. The Respondent, the CEO, is responsible for the administration of the *Elections Act*.

[5] On July 28, 2023, the Progressive Conservative Party complained to the CEO alleging that certain campaign advertising materials being used by the Liberal Party in the Preston by-election campaign violated s. 307 of the *Elections Act*, which makes it an offence to knowingly make, distribute, or publish "a false statement of fact about a candidate's character or conduct for the purpose of influencing the election" during an election.

[6] The materials in question related to the government's alleged failure to prevent the location of a waste facility in Preston. For example, one sign read: "Dump the Dump. Houston's Conservatives have done nothing to stop this dump."

Literature distributed to households in the riding stated that the Liberal Party's candidate had written to the Minister requesting a province-wide moratorium on waste sites until the government reviewed the public consultation process and the regulatory framework, but received no reply.

[7] Sometime between July 28 and July 31, 2023, without consulting the Liberal Party or the candidate, the CEO decided that the impugned campaign materials constituted statements about "a candidate's character or conduct" within the meaning of s. 307 of the *Elections Act*.

[8] On July 31, 2023, the Assistant Chief Electoral Officer, notified the Liberal Party by e-mail of the P.C. Party's complaint that "the content of the sign and the door knockers are not factual", referenced s. 307 of the *Elections Act*, and stated that "[t]he CEO has considered the fact that the signs do not refer to the PC candidate's campaign (Twila Grosse), but rather the Houston Government, and has decided that through association can have a potential negative impact on Twila Grosse's campaign." The Assistant CEO went on to ask the Liberal Party to "provide documentation that backs up the claims" in the impugned materials by supporting the assertions that the government was "actively considering an application for a dump to become operational" in the Preston riding and that the candidate's letter "has been ignored and no response has been provided."

[9] The Liberal Party responded by letter the same day. The Liberal Party denied making a representation that there was an active application to the Department of Environment and Climate Change regarding a facility in Preston. Rather, the campaign materials related to repeated requests "for a specific policy action ...: an immediate moratorium on the development of all C&D processing facilities until a thorough review of the process is undertaken." The Liberal Party maintained that it was factually correct to say that the candidate had not received a response from the Minister, only from a departmental staffer. The Minister had not spoken to the candidate, and the staff response did not address the request for a moratorium on waste facilities.

[10] On August 1, 2023, the CEO wrote to the Liberal Party regarding the P.C. Party's July 28 complaint, which the CEO summarized as an allegation under s. 307 of the *Elections Act* that the ads intentionally misled the public "by fabricating an issue that currently does not exist"; that the ads promoted "the inference that there is an ongoing issue with a dump ... which the PC government can currently address"; and that s. 307 was also contravened by the "statement that the Minister

... ignored the Liberal Candidate's letter, but that a response was provided by the Department on July 10, 2023..." The CEO informed the Liberal Party that its July 31 response did "not reflect the facts of this matter..." Specifically, the CEO stated, the Department had "no active application for consideration of solid waste management facility approval for the Preston community. This matter remains with the municipality." Further, respecting the lack of response from the Minister to the candidate's letter, the CEO stated, "[w]hile I appreciate a second letter was written on July 22, 2023, by the Liberal candidate, to which to date no response has been received, the fact remains that the Liberal candidate did receive a response to their first letter from the Department (written July 10, 2023, and received on July 18, 2023)."

[11] Finally, the CEO's August 1, 2023, letter declared the content of the relevant campaign materials to be "misleading and inaccurate" and "ordered" the Liberal Party to remove all signs by midnight on August 3. The Liberal Party was also "ordered" to "cease distribution of any door knockers, flyers, or other materials related to this matter." Failing to comply with "this order" would result in a finding that the Liberal Party's campaign was "in breach of section 307 of the *Elections Act*" and the CEO would "begin proceedings for a Compliance Agreement."

[12] On August 1, 2023, the CEO also wrote to the P.C. Party, advising that she had asked the Liberal Party for evidence to back up the content of the materials, and that "I do not feel that they are properly representing the facts of this matter." The CEO concluded by saying that if the Liberal Party did not "comply with my order, they will be deemed in breach of section 307 of the *Elections Act*."

[13] The Liberal Party responded to the CEO's purported order the next day, August 2, 2023, refusing to remove the signage and literature. The Liberal Party advanced various arguments about the importance of the issue to the community and again denied making false statements. The Liberal Party additionally submitted that the *Elections Act* was not intended to give the CEO the authority to adjudicate debates about issues between candidates: "Candidates and electors are free to comment on activity or inactivity of any government. It is not for Elections Nova Scotia to determine the government is not obligated to address an issue unless it receives a formal application or that a matter 'remains with the municipality'. These explanatory statements can be and should be made by the Progressive Conservative party in the political arena." Finally, the Liberal Party asserted that the CEO's order to remove campaign materials infringed the right to freedom of expression under the *Charter of Rights and Freedoms*, and repeated that debate

over political issues "is not what was intended under section 307 of the *Elections Act*."

[14] The CEO responded to the Liberal Party on August 3, 2023. The CEO referred to s. 294 of the *Elections Act*, under which "if I find there has been a breach of the *Elections Act*, I may initiate a compliance agreement process." However, the CEO wrote, as the Liberal Party and its candidate had "emphatically stated a refusal to comply or to discontinue their distribution of these false statements, I will not pursue that option." Instead, the CEO wrote, "I am initiating a formal investigation under Section 287 of the *Elections Act* and engaging the services of the Provincial RCMP to assist me", with potential outcome of "a referral of the matter to the Director of Public Prosecutions." The CEO acknowledged that the possibility of a new waste facility was "of serious concern" to the Liberal Party's candidate and the community, that "increases, not decreases" the importance of Elections Nova Scotia "taking the legislative actions required to ensure that all election campaign messaging on the matter is accurate and truly reflective of the facts." Finally, the CEO wrote, "my office will be issuing a public statement regarding the initiation of this formal investigation."

[15] The Liberal Party responded immediately, denying that s. 291 of the *Elections Act* gave the CEO the authority to make a public statement about an investigation until it was concluded, and even then, only if it was in the public interest. The Liberal Party also argued that it was "clearly contrary to the public interest" for the CEO to announce a police investigation into a candidate and a party days before an election. The Liberal Party also queried the CEO's announcement of a decision to engage the RCMP and to conduct an "investigation", having already found the campaign materials to be false and to be in breach of s. 307.

[16] The CEO issued a press release on August 3, 2023. It stated:

> Chief Electoral Officer (CEO) Dorothy Rice issued an Order to the Nova Scotia Liberal Party on August 1, 2023. That Order required the Liberal Party and their candidate for the Preston electoral district by-election, Carlo Simmons, to, by 12 am August 3, 2023, remove all signs and cease distribution of any campaign materials which do not accurately reflect the facts involving a potential C&D processing facility in the Preston community.
>
> Under Section 294 of the *Elections Act*, if the CEO finds there has been a breach of the Act, they may initiate a compliance agreement process. The Liberal Party

> and Carlo Simmons have refused to comply or to discontinue their distribution of these false statements, therefore, the CEO will not pursue that option.
>
> A decision has been made to initiate a formal investigation under Section 287 of the *Elections Act* and Elections Nova Scotia has reached out to engage the services of the Provincial RCMP to assist in this process.
>
> […]
>
> This course of action may lead to a referral of the matter to the Director of Public Prosecutions.
>
> As a non-partisan election management body, Elections Nova Scotia, under the direction of the CEO must take the legislative actions required to ensure that all election campaign messaging is accurate and truly reflective of the facts.
>
> Elections Nova Scotia and the CEO will not comment on this matter further during the formal investigation. The findings will be released publicly when the investigation concludes. [emphasis added]

[17] There was further correspondence on August 4, 2023, which concluded with a letter to the Liberal Party in which the CEO stated that "there has been no prohibition on the candidates' speaking about the C&D facility. There has been an order not to misrepresent the facts."

[18] The by-election was held on August 8, 2023. On September 8, 2023, the CEO advised the Liberal Party that the investigation had been discontinued. The CEO wrote, *inter alia*:

> Following further consideration of the original complaints, responses from you, along with all supporting documentation provided by both you and the complainant, I have decided to discontinue the investigation, and I have advised the RCMP of this decision. The formal investigation under Section 287 of the *Elections Act* will not proceed and no further action will be taken by this office. ENS will be releasing a public statement to conclude this matter...
>
> In the coming weeks, ENS will be publishing a by-election report which will include recommendations for legislative change regarding the regulation of election advertising. Additionally, this issue has been discussed with the Election Commission, and they will have an opportunity to consider, review and provide feedback on potential legislative changes.

[19] Elections Nova Scotia issued a public statement to a similar effect on September 8, 2023, and the Assistant CEO advised the RCMP accordingly. The Liberal Party filed its notice for judicial review on Monday, September 11, 2023.

Issues

[20] The issues in the case are:

(1) Is the matter moot?

(2) If so, should the court nevertheless exercise the discretion to proceed with the judicial review?

(3) If the court proceeds with the judicial review, was the CEO's decision unreasonable?

(4) Did the CEO's decision proportionately balance *Charter* rights and values?

(5) If the CEO's decision was unreasonable, what is the remedy?

Mootness

[21] The CEO says that because there is no longer a "live controversy", the matter is moot. According to the CEO, the controversy essentially arose from the decision to initiate an investigation, as communicated to the Liberal Party on August 3, 2023. The investigation was discontinued on September 8. As such, the CEO submits, the matter is moot, and in fact was already moot when the notice for judicial review was filed on September 11, 2023.

[22] In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, Sopinka J. explained the doctrine of mootness for the unanimous court at p. 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly, if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to

> depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant. [Emphasis added.]

[23] Justice Sopinka went on to discuss the courts' discretion to render a decision when a case fails to meet the "live controversy" test at pp. 358-359:

> The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context. This was one of the factors which played a role in the exercise of this Court's discretion in *Vic Restaurant Inc. v. City of Montreal, supra*. The restaurant, for which a renewal of permits to sell liquor and operate a restaurant was sought, had been sold and therefore no mandamus for a licence could be given. Nevertheless, there were prosecutions outstanding against the appellant for violation of the municipal by-law which was the subject of the legal challenge. Determination of the validity of this by-law was a collateral consequence which provided the appellant with a necessary interest which otherwise would have been lacking. [Emphasis added.]

[24] As the CEO points out, the live controversy had arguably disappeared by the time the Liberal Party filed this application, in that the investigation had been discontinued. Additionally, the CEO allegedly lacks a "a litigious or partisan" interest in the proceeding, being the decision-making authority and an independent officer of the House of Assembly. Despite having filed a brief alleging mootness, and addressing the merits, counsel says the CEO is taking a non-adversarial position and will "facilitate the process of the court ... to answer questions that the

court might have." Nevertheless, the CEO's brief and, to a much lesser extent, her counsel's oral submissions, provide a degree of adversarial or partisan comment.

[25] Justice Sopinka discussed the second rationale on which the mootness doctrine is based, the concern for judicial economy, at pp. 360-361 of *Borowski*:

> ... It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants... The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.
>
> The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. …
>
> Similarly, an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, supra*. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case that was moot. Accordingly, this Court exercised its discretion to hear the case. … The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.
>
> There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. …
>
> [Emphasis added]

[26] The third underlying rationale for the mootness doctrine, the need for the court to demonstrate a measure of awareness of its proper lawmaking function, was described by Sopinka J. at pp. 362-363:

> ... The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting

> the rights of the parties may be viewed as intruding into the role of the legislative branch…
>
> In my opinion, it is also one of the three basic purposes of the mootness doctrine in Canada and a most important factor in this case. I generally agree with the following statement in P. Macklem and E. Gertner: "Re Skapinker and Mootness Doctrine" (1984), 6 *Sup. Ct. L. Rev.* 369, at p. 373:
>
> > The latter function of the mootness doctrine -- political flexibility -- can be understood as the added degree of flexibility, in an allegedly moot dispute, in the law-making function of the Court. The mootness doctrine permits the Court not to hear a case on the ground that there no longer exists a dispute between the parties, notwithstanding the fact that it is of the opinion that it is a matter of public importance. Though related to the factor of judicial economy, insofar as it implies a determination of whether deciding the case will lead to unnecessary precedent, political flexibility enables the Court to be sensitive to its role within the Canadian constitutional framework, and at the same time reflects the degree to which the Court can control the development of the law.
>
> I prefer, however, not to use the term "political flexibility" in order to avoid confusion with the political questions doctrine. In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.

[27] Justice Sopinka concluded, at p. 363, that in considering whether to exercise its discretion to hear a moot appeal, the court "should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa."

[28] The Liberal Party says the matter is not moot. It suggests four issues which it submits are still "live" ones: the meaning and application of s. 307; the limits of the CEO's authority to make orders to remove campaign materials; the requirement for the CEO to proportionately balance *Charter* rights; and the CEO's authority to announce an RCMP investigation during a campaign.

[29] It is true that the CEO discontinued her investigation before the notice for judicial review was filed, thus arguably disposing of the tangible and concrete dispute, framed narrowly. However, controversy regarding the decision, or decisions, of the CEO is still very much alive. As noted in *Borowski*, the fact that the tangible and concrete dispute might no longer be alive does not necessarily end the matter. The CEO says it is "speculative that the same problems encountered in

the by-election will arise during the next election." I disagree. The interpretation of the CEO's powers under s. 307 of the *Elections Act* will be pertinent to every future election, particularly now that a precedent for its use has been set.

[30] In *Engel v. Alberta (Executive Council)*, 2019 ABQB 490, affirmed, 2020 ABCA 462, leave to appeal denied, [2021] S.C.C.A. No. 47, *Mitchell v. Jackman*, 2016 CanLiii 43267, 2016 NLTD(G) 132, *Kissel v. Rockey View (County)*, 2020 ABQB 406, *Knox v. Conservative Party of Canada*, 2007 ABCA 295, leave to appeal denied, [2007] S.C.C.A. No. 567, and *Good v. Canada*, 2016 FC 1272, courts found that live controversies still existed after the precipitating events had passed, in the context of the interpretation of election-related legislation, the conduct of politicians, or controversies within or between political parties.

[31] In the circumstances of this case, while the immediate tangible and concrete dispute between the parties has arguably ended, I conclude that the interpretation and application of s. 307 of the *Elections Act* remains a live issue. The CEO announced an expansive interpretation of the section, permitting her to determine whether political statements made in a campaign are true or not, and to order them not to "misrepresent the facts." In my view, this represents an ongoing live controversy, given that the Liberal Party will inevitably participate in future election campaigns over which the CEO has declared such authority.

[32] Even if there is no live controversy due to the withdrawal of the order, I am satisfied that hearing this matter is not a waste of judicial resources. This is a recurring issue of brief duration which is likely to evade review, given that it is unlikely that a judicial review application could ever come before the court within the span of a campaign. I also find this to be a matter of public importance whose resolution is in the public interest. The expenditure of judicial resources is minimal; the parties filed short briefs and a record, and the hearing lasted less than two hours. I am mindful of the boundaries of the court's lawmaking function, but I do not believe reviewing the CEO's interpretation of s. 307 constitutes a departure from that role.

Standard of Review

[33] There appears to be no dispute that the standard of review is reasonableness. As the majority described it in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 SCR 653, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard

requires that a reviewing court defer to such a decision" (para. 85). The majority cited *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, for the proposition that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47, cited in *Vavilov* at para. 86). *Vavilov* also confirms that "some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning" (para. 86) and that "a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome" (para. 87).

Interpretation of s. 307 of the *Elections Act*

[34] The basic principle of statutory interpretation is well established. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, Iacobucci J. said, for the court:

> 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament...

[35] The court will also rely on the relevant interpretation legislation. In Nova Scotia, the *Interpretation Act*, R.S.N.S. 1989, c. 235, states, at s. 9(5):

> (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;

> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[36] Sections 287 and 307 of the *Elections Act* state:

> **287** **(1)** The Chief Electoral Officer may, on the Chief Electoral Officer's own initiative, or at the request of another person, conduct an investigation into any matter that might constitute an offence under this Act.
>
> **(2)** The Chief Electoral Officer may engage the services of any person necessary to assist with the duties of the Chief Electoral Officer pursuant to this Part.
>
> **...**
>
> **307** Every person is guilty of an offence who, during an election, knowingly makes, distributes or publishes a false statement of fact about a candidate's character or conduct for the purpose of influencing the election.

[37] In ordering the Liberal candidate to undertake certain actions by way of s. 287, due to an alleged violation of s. 307, the CEO had to first interpret s. 307 and determine if that section was violated.

[38] There are cases from the United Kingdom considering provisions similar to s. 307. In *Cooper v. Evans and Taylor*, [2023] EWHC 2655 (KB), the court refused injunctive relief to prohibit certain campaign materials distributed by the Labour Party in a by-election. The authority for the requested injunction was s. 106(3) of the *Representation of the People Act 1983*:

> **106 False statements as to candidates**
>
> (1) A person who, or any director of any body or association corporate which
>
> (a) before or during an election,
>
> (b) for the purpose of affecting the return of any candidate at the election,
>
> makes or publishes any <u>false statement of fact in relation to the candidate's personal character or conduct</u> shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, that statement to be true. [Emphasis added.]

[39] This provision differs from s. 307 of the Nova Scotia *Elections Act*, in that s. 106 includes the word “personal”, whereas the Nova Scotia provision does not. Additionally, s. 106 permits liability for false statements made negligently (*Woolas v. Parliamentary Election Court*, 2010 EWHC 3169, at para. 84), while the Nova Scotia provision includes the word “knowingly”, suggesting that the false statement must be intentional.

[40] The court in *Cooper* identified “seven ingredients” for injunctive relief under the section, at para. 7:

> a) The defendants make or publish a statement;
> b) The statement relates to a candidate;
> c) It must be a statement of fact;
> d) The statement must be *prima facie* false;
> e) The statement is made in relation to the claimant’s personal character or conduct;
> f) The statement is made for the purpose of affecting the election;
> g) The statement is made before or during the election.

[41] On the distinction between statements that relate to a candidate’s personal character and conduct, rather than political views or conduct in office, the High Court referred to *Woolas*, which involved a judicial review of an Elections Court decision. The reviewing court provided examples of statements that can be considered personal to a candidate’s character, and those that cannot. Statements relating to a candidate’s family, religion, sexual conduct, business, or finances would generally be considered personal; statements about a candidate’s political position – such as an allegation that the candidate is a hypocrite for taking a particular position – would not. Statements about conduct in office could relate to personal character if, for example, it was alleged that the candidate committed a criminal office while in office (paras. 112-114). In *Woolas*, Lord Justice Thomas, for the court, stated:

> 64. ... The Election Court concluded at paragraphs 31-35 that a false statement of fact might relate to the personal character of a candidate, even though it also related to his public or political character, conduct or position. A statement in relation to a candidate's political position could do so, if the false statement related directly to the personal character or conduct in the sense of amounting to an attack on his "honour, veracity or purity". The

last words were taken from a passage in the judgment of Gibson J in *North Louth* at page 163:

> "A politician for his public conduct may be criticised, held up to obloquy: for that the statute gives no redress; but when the man beneath the politician has his honour, veracity and purity assailed, he is entitled to demand that his constituents shall not be poisoned against him by false statements containing such unfounded imputations."

…

87. In our view what is clearly established in relation to the meaning of "a statement of fact in relation to the candidate's personal character or conduct" by the cases can be summarised as follows:

i) No court has laid down a general definition

ii) A distinction must be drawn between a false statement of fact which relates to the personal character or conduct of the candidate and a false statement which relates to the political or public position, character or conduct of the candidate. In giving the judgment in *Cockermouth,* Darling J said:

> "I think the Act says that there is a great distinction to be drawn between a false statement of fact, which affects the personal character or conduct of the candidate, and a false statement of fact which deals with the political position or reputation or action of the candidate. If that were not kept in mind this statute would simply have prohibited at election times all sorts of criticism which was not strictly true, relating to the political behaviour and opinions of the candidate. That is why it carefully provides that the false statement must relate to the personal character and conduct...

...

iv) Some statements may without much argument be said to relate to the personal character or conduct...

...

vi) It is clear from *Cockermouth* that one cannot simply imply from a statement attacking the political position of a candidate that the statement also reflects on his personal character - i.e. he was supporting the Queen's enemies. [Emphasis added.]

[42] The court in *Woolas* held that the authorities did not "justify the adoption by the Election Court of the construction of s. 106 that a false statement can at the same time relate both to a candidate's public and personal character" (para. 109). Statements suggesting the contrary, such as that in *Fairbairn v. Scottish National*

Party [1979] SC 393, did "no more than to make clear that the statement made must relate directly to the personal character or conduct of the candidate. Finally we consider that the better course is to use the statutory language and not to continue to use terms such as "honour" or "purity"" (para. 109). The court continued:

> 110. In our view, the starting point for the construction of s.106 must be the distinction which it is plain from the statutory language that Parliament intended to draw between statements as to the political conduct or character or position of a candidate and statements as to his personal character or conduct. It was as self evident in 1895 as it is today, given the practical experience of politics in a democracy, that unfounded allegations will be made about the political position of candidates in an election. The statutory language makes it clear that Parliament plainly did not intend the 1895 Act to apply to such statements; it trusted the good sense of the electorate to discount them. However statements as to the personal character of a candidate were seen to be quite different. The good sense of the electorate would be unable to discern whether such statements which might be highly damaging were untrue; a remedy under the ordinary law in the middle of an election would be difficult to obtain...
>
> 111. In our judgment, as Parliament clearly intended that such a distinction be made, a court has to make that distinction and decide whether the statement is one as to the personal character or conduct or a statement as to the political position or character of the candidate. It cannot be both.
>
> 112. Statements about a candidate which relate, for example, to his family, religion, sexual conduct, business or finances are generally likely to relate to the personal character of a candidate. In our view, it is of central importance to have regard to the difference between statements of that kind and statements about a candidate which relate to his political position but which may carry a implication which, if not made in the context of a statement as to a political position, impugn the personal character of the candidate.
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> 113. For example, a statement made simply about a candidate's conduct as a businessman might imply he is a hypocrite (as in Bayley v Edmonds or Sunderland). As his conduct as a businessman relates to his personal conduct, such a statement is within s.l06, subject to possible issues of proportionality under Article 10 to be determined in relation to the seriousness of the allegation. However, a statement about a candidate's political position may well imply that he is a hypocrite or untrustworthy because of the political position he is taking. That is not a statement in relation to his personal character or conduct. It is a statement about his political position though it might cast an imputation on his personal character. We do not consider that Parliament intended that such statements fall within s.l06, particularly bearing in mind the fact that criminal liability attaches for statements made

> negligently. It would be difficult to see how the ordinary cut and thrust of political debate could properly be carried on if such were the width of the prohibition. In any event it would also be difficult to reconcile such a broad construction with the balance that Article 10 mandates be achieved. [Emphasis added.]

[43] The court was bound to consider Article 10 of the Human Rights Convention – which guaranteed freedom of expression – in considering whether there was a breach of s. 106 of the *Elections Act*. The court cited *Bowman v United Kingdom* (1998) 26 EHHR 1, where the Strasbourg Court stated that "[f]ree elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system... The two rights are inter-related and operate to reinforce each other... For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely" (*Bowman* at para. 42, cited in *Woolas* at para. 89). Lord Justice Thomas continued:

> 114. However, a statement about a political position can go beyond being a statement about his political position and become a statement that is a statement about the personal character or conduct of a candidate. A clear illustration is to accuse a candidate of corruption, even if that corruption involves the conduct of a public or political office. What is being said about the candidate is not a statement in respect of the conduct of a public office, but a statement that he is personally dishonest and committing a crime. The statement is not to be characterised as one about his political position, but one in relation to his personal character.

[44] The court rejected the submission that s. 106 should be treated as "applying to a candidate as an individual as distinct from a statement about a political party or a group" and that "the distinction between personal and political might be viewed as illusory; it was therefore better to consider s. 106 as referring to statements which directly related to the individual candidate for whom the electorate was asked to vote" (para. 116). In rejecting this submission, Lord Justice Thomas distinguished between "between a statement relating to the personal character or conduct and a statement as to the political character, conduct or position of a candidate for the reasons we have set out" (para. 116). He added:

> 116 ... The difficulty that has arisen ... is the confusion, originating in the language of the North Louth decision (such as references to the man "beneath the politician" and his "honour" and "purity"), that a statement can at the same time be both as to personal and political character or conduct. Once it is clear that a court must choose as to which it is, as we believe it can and as the facts of this case illustrate, then the difficulties are illusory. To take the example in Fairbairn, criticism of Fairbairn for not opening his constituency post would have been personal on the construction put

> forward by Miss Mountfield, but on the correct analysis as applied by Lord Ross it was a criticism of him in his political conduct.

[45] With respect to the allegation that the candidate had reneged on a promise to live in the constituency, the court in *Woolas* said, "whether a candidate lives or does not live in the constituency is not a matter relating to his personal character or conduct, but to his political position. A statement that the candidate has reneged on his promise to live there does ... cast an imputation on the candidate's trustworthiness, as the Election Court held, but it is in respect of his trustworthiness in relation to a political position" (para. 117). To apply s. 106 to such a statement "would have a significant inhibiting effect on ordinary political debate, as candidates, particular those who have been MPs, are sometimes criticized for going back on promises on a political issue. This is particularly important as s. 106 does not only prohibit untrue statements that are dishonestly made, but untrue statements that are carelessly made" (para. 106). The court expanded on the dangers of an overly expansive view of the scope of the section:

> 118. To take into account the fact that candidates are not infrequently said by their opponents to have reneged on promises made about a political matter, the Election Court sought to draw a distinction ... between promises by a politician he could not carry out because of changes in political circumstances and the promise to live in a constituency which was within his personal control. An enquiry into the reasons why a politician has not carried out a promise relating to a political matter cannot safely be dissected in this way. To do so, would moreover, take judges into the heart of political issues in a way that could not have been intended by Parliament. Take by way of example a statement about a candidate reneging on a policy in relation to subsidised education or housing which was the subject of a promise which had been made by a pledge or by signature to a petition prior to an earlier election that was not carried out. Is an enquiry to be made as to why he reneged? Would breach of the promise because of disobedience to a party whip be within his control? Would changing his mind because he saw political advantage to his party be within his control? Would the prospect of losing ministerial office be in his control? Some would say that to make such statement falsely related to the personal character of the candidate, as it reflected on his personal trustworthiness, as none of the examples given would in fact excuse the breach of his promise to the electorate.

[46] The complaining candidate in *Woolas* had also challenged statements alleging that he was supported by "extremists" (paras. 72-79). The reviewing court said:

> 121. However when it was asserted in The Examiner that those whose votes were being wooed by Mr Watkins were those who were not simply extremists but those

> who advocated extreme violence, in particular against Mr Woolas, it plainly suggested, as the Election Court found, that Mr Watkins was willing to condone threats of violence in pursuit of political advantage. It was not then a statement about the type of support he was wooing, but a statement that he was willing to condone threats of violence. That farther statement took the statement from being a statement as to Mr Watkins' political position to a statement about his personal character - that he condoned criminal conduct. It is not simply an implied statement in relation to a political matter, but a statement that goes to his personal character as a man who condones extreme violence.
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> 122. Similarly where the statement in Labour Rose went on to say Mr Watkins had not rejected the endorsement of him by those who advocated violence and was refusing to condemn their threats of violence, this was again a statement that Mr Watkins was a man whose personal character was such that he refused to condemn threats of violence. In the same way as the statement in The Examiner it ceased to be a statement about the political support he was wooing, and became a statement about his personal character as a man who refused to condemn threats of violence. [emphasis added]

[47] The court in *Woolas* allowed the judicial review in part, but upheld "the findings of an illegal practice in relation to the other two matters, which could not "be impugned on our view as to the law" (para. 126).

[48] In *Cooper v. Evans*, [2023] EWHC 2555 (KB), the main issue was whether a statement about the candidate related to personal character or conduct (para. 15). The statement in question alleged a "dodgy" deal between the claimant and another politician by which the claimant would stand aside and receive a "£29,000 taxpayer funder payoff" (para. 5). Jay J. held that the claimant had established by affidavit "that no deal of any sort, "dodgy" or otherwise, was made between the two of them" (para. 8). The claimant said the allegation "self-evidently relates to his personal character and conduct, and not to any political ideas or policy positions for which he stands" (para. 21). Referring to *Woolas*, the court held that this was too narrow a reading of the provision:

> 22. I may readily agree with Mr Callus that the advert contained no statements, averments or allegations as to the claimant's political ideas or policy positions, but in my judgment that is too narrow a formulation. The question is whether the advert contains an allegation about the claimant's political position which includes his present and future political intentions. The advert was clearly saying that the claimant's political aspirations in relation to the constituency of Tamworth was short-term only. It is quite true that the advert was also saying that the claimant was untrustworthy and/or had been less than open and frank with the

> electorate. However, that was "because of the political position he [was] taking" (see paragraph 113 of *Woolas*); or, put another way, this was a statement about the claimant that related to his political position but carried an implication which, if not made in the context of a statement as to a political position, impugned his personal character (see paragraph 112 of *Woolas*). This implication in the context of the present case was insufficient to render the statement or allegation as relating to his personal character.
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> 23. Paragraph 114 of *Woolas* is also highly instructive. In that paragraph the Divisional Court gave what they called a clear illustration of a case that crosses the line from the political to the personal. An accusation of corruption, a criminal offence of course, is a paradigm example. Although the political context remains relevant background, the egregious nature of the conduct brings the personal character of the individual clearly into the frame. The same approach, albeit in an altogether different context, applies to terrorist violence which was the subject matter of the *Woolas* case itself. That conduct is so obviously wrong that it would be an abuse of language and common sense to call it "political".
>
> 24. The advert in the present case did not allege corruption. Taken at its highest it alleged that the claimant was prepared to accept the taxpayer-funded payoff as the price for making way for Mr Hughes. That in my judgment must be seen in its proper context. As the advert itself correctly pointed out, MPs who stand down or are dismissed by the electorate receive this payoff as of right. These circumstances cannot begin to be compared with the acceptance of a bribe or the sort of grossly reprehensible conduct that the Divisional Court surely had in mind in paragraph 114 of *Woolas*.
>
> 25. The real sting of the article is that it was alleging that the claimant and Mr Hughes had come to an arrangement of dubious merit that served to conceal the claimant's short-term aspirations from the electorate of Tamworth. My overall evaluation is that this sting as I am describing it falls on the political rather than the personal side of the dichotomous line identified by the Divisional Court of paragraph 111 of its judgment in *Woolas*.

[49] Neither party was able to provide a case in which a Canadian court interpreted a provision similar to s. 307, lacking the qualifier "personal."

[50] The campaign materials relied on for the purpose of this application do not name a candidate. Because of this, on their face the campaign materials in question would not engage s. 307. I appreciate that in the Assistant CEO's e-mail of July 31, 2023, she stated that the CEO was of the view that although the materials only referred to the government, the "association" could "have a

potential negative impact on Twila Grosse's campaign." The CEO has pointed to no authority that would read "candidate" to include a party or government with which the candidate is associated. Nor did the CEO rely on this reasoning in subsequent correspondence or in the August 3, 2023, letter. In that letter, and in the press release issued the same day, the CEO described her mandate as ensuring that "all election campaign messaging on the matter is accurate and truly reflective of the facts." This goes far beyond any reasonable construction of the language of s. 307. Whatever the phrase "a false statement of fact about a candidate's character or conduct" means, I am satisfied that it must relate to the candidate. By no reasonable construction could it mean "any statement about campaign issues, whether or not it relates to a specific candidate."

[51] This is sufficient reason on its own to find the decision to be unreasonable. I will, however, nevertheless consider the broader construction of the section, particularly the words "character or conduct."

[52] The predecessor provision to s. 307, s. 201 of the *Elections Act*, R.S.N.S. 1989, c. 140, provided that "[e]very one is guilty of an offence who knowingly makes or publishes a false statement concerning the personal character or conduct of a candidate" (emphasis added). While the omission of the word "personal" in the current *Elections Act* could imply an intention to alter the scope of the provision, I am not convinced that this is the case. In my view, had the legislature intended to expand the scope of the CEO's power to regulate campaign speech, the language change would have been more extensive. Retaining the words "character" and "conduct" outweigh the significance of omitting "personal."

[53] The *Elections Act* does not define "character" or "conduct." *The Encyclopedic Dictionary of Canadian Law* provides the following definition of "character", derived in part from *R. v. Sands* (1915), 25 C.C.C. 120 (Man. C.A.): "The mental and moral qualities distinctive to an individual. Relevant considerations include the disposition, acts, relations to others, and mode of life of an individual" (Kevin P. McGuinness, *The Encyclopedic Dictionary of Canadian Law*, vol. 1 (Toronto: LexisNexis, 2021) at pp. C/142-143. The same source provides the following primary definition of "conduct", among others: "The manner in which a person behaves, especially on an important occasion or in a particular context" (p. C/360).

[54] In my view, if the legislature had intended to expand the scope of s. 307 to the regulation of truth of all statements about issues in election campaigns, the new language would have made this clear.

[55] I agree with the Liberal Party that a plain reading of s. 307 indicates that the provision is engaged when, during an election, a person knowingly makes a false statement of fact about a candidate's *personal* character or conduct for the purpose of influencing the election. As the English caselaw suggests, that has been the historical focus of provisions of this kind. I am not convinced that the omission of the word "personal" indicates the contrary. I do not accept that the legislature could have intended this provision to grant the court a broad supervisory power over *political* speech, false or otherwise, as the CEO's process and decision in this case both suggest. Nor could any reasonable construction of s. 307 suggest such an open-ended mandate.

The CEO's authority to make orders to remove campaign materials

[56] The CEO ordered the Liberal Party and the candidate to take down the "dump the dump" signs and to cease distributing related campaign material. Section 287 permits the CEO to "conduct an investigation" in relation to a possible violation of the *Elections Act*, and to "engage the services of any person necessary to assist" in carrying out that duty (ss. 287(1) and (2), respectively). Nothing in the section authorizes the CEO to order that material be removed. Where she "believes that it is in the public interest to make public the outcome of an investigation" the CEO may "make public the outcome of an investigation ... on a public website and by such other means as the Chief Electoral Officer considers appropriate, and may include in the information provided the name of the person and the nature of the matter investigated" (s. 291(1)). The CEO may refer a matter to the Director of Public Prosecutions, who may commence a prosecution for an offence under the act with the consent of the CEO (ss. 292(1) and (2)). The CEO may also "enter into a compliance agreement, for the purpose of ensuring compliance with this Act, with a person whom the Chief Electoral Officer believes on reasonable grounds has committed, is about to commit or is likely to commit an act or omission that could constitute an offence under this Act" (s. 294(2)). Finally, and perhaps most importantly, the CEO may seek an injunction requiring a person to "refrain from committing any act that it appears to the judge is contrary to this Act" and to "do any act that it appears to the judge is required by this Act" (ss. 285(1), (2)). Nowhere in the investigation and enforcement provisions is there language which

suggests that the CEO has the unilateral power to make orders for compliance in the event of an alleged violation of the *Elections Act*.

[57] As such, the CEO could not reasonably interpret the *Elections Act* to authorize the order to remove the materials.

The authority to announce a police investigation during a campaign

[58] The Liberal Party further submits that the CEO's announcement of a police investigation was unreasonable. As the Liberal Party submits, the CEO had already declared that there had been a violation of the *Elections Act*, and purported to make an order suppressing the impugned materials, which was not within her powers. When the Liberal Party refused to comply, she did not pursue the options available under the *Elections Act*, such as a reference to the DPP, or an application to the court for an injunction. Instead, the CEO announced the initiation of an investigation under s. 287, including the engagement of RCMP assistance.

[59] As the Liberal Party points out, s. 291(1) of the *Elections Act* authorizes the CEO to "make public the outcome of an investigation" if she believes it is in the public interest. The *Elections Act*, then, expressly contemplates that the CEO may announce the outcome of an investigation, but not the commencement of one. I infer that this reflects a legislative intention to prevent investigations from affecting election campaigns, subject to the possibility that the public interest may call for an announcement of the outcome when the investigation is completed. The announcement by the CEO here, made less than a week before the election, in the face of a protest that the order was wrong in law, was, in my view, exactly the type of public statement the *Elections Act* seeks to avoid – one that risks impacting the campaign, but which is ultimately unjustified.

[60] In view of the record, there was no reasonable basis for the CEO to believe that she had the authority to make an announcement of the commencement of an investigation.

The requirement for the CEO to balance *Charter* rights

[61] As the record indicates, counsel for the Liberal Party raised the issue of the potential *Charter of Rights and Freedoms* implications of the CEO's process and decision, specifically referring to freedom of expression in its letter of August 2, 2023. There is no direct allegation of a s. 2(b) *Charter* breach, but I am mindful of *Doré v. Barreau du Québec*, 2012 SCC 12, and *Commission scolaire francophone*

des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment), 2023 SCC 31, which indicate that where an administrative decision engages *Charter* rights or values, the reviewing court must examine the reasoning process to determine whether the decision reflects a proportionate balancing of *Charter* rights and their underlying values.

[62] The court in *Commission scolaire* said, "[w]here a "decision maker gives precedence to the legislature's intention over *Charter* protections in order to achieve the statutory objectives, it must do so in a manner that is "proportionate to the resulting limitation on the *Charter* right"" (para. 69). A decision that has a "disproportionate impact" on *Charter* protections "can in no way show that the decision maker meaningfully considered these protections or that its reasoning reflects the significant impact that the decision may have... Such a decision is therefore unreasonable" (para. 69).

[63] Under *Doré* and *Commission scolaire* the reviewing court "must first determine whether the discretionary decision limits *Charter* protections. If this is the case, the reviewing court must then examine the decision maker's reasoning process to assess whether, given the relevant factual and legal constraints, the decision reflects a proportionate balancing of *Charter* rights or the values underlying them. If not, the decision is unreasonable" (*Commission scolaire* at para. 73).

[64] In this case, it is inescapable that a purported order imposing limits on political speech limits *Charter* rights. While the potential *Charter* impact was brought to the CEO's attention, there is no indication in the record of either the process or the decision that she considered *Charter* rights or values. As such, the decision is unreasonable for this reason.

Remedy

[65] If the application for judicial review is allowed, in her Notice the Liberal Party requests an order: (1) quashing the decision to initiate an investigation into the Nova Scotia Liberal Party under the *Elections Act*; (2) quashing the decision that the use of the campaign materials breached s. 307 of the *Elections Act*; (3) declaring that the CEO does not have the authority to order the removal of campaign materials during an election; and (4) declaring that s. 307 is to be strictly construed so as to comply with the *Charter of Rights and Freedoms*.

[66] During the hearing, counsel for the CEO suggested that "it may seem" that the declarations sought are "inconsistent with the scope of the issues that are outlined in the Notice for Judicial Review." Counsel argued that "the Supreme Court's posture of restraint – particularly when it relates to the decision that might come from or flow from a decision by this court should it conclude that the CEO's decision of August 3 is unreasonable ... might suggest that the appropriate remedy ... is to allow the judicial review on that basis, and to resist the temptation or the request to go further in the way of broad declaratory relief."

[67] While there is nothing left to quash, I am satisfied that the Liberal Party is entitled to declaratory relief as outlined in their brief of January 23, 2024, specifically, that s. 307 applies only to false statements about a candidate's personal character or conduct, that the CEO did not have authority to order the removal of campaign materials, and that the CEO did not have the authority to announce the commencement of a police investigation in these circumstances.

Conclusion

[68] In summary, the campaign materials relied on for the purpose of this application do not name a candidate, and do not reference a candidate's character or conduct, personal or otherwise. In my view, there was no reasonable basis for the CEO to believe otherwise, and therefore the process and the resulting decision were unreasonable.

[69] I am also satisfied that no reasonable construction of the words "character or conduct" in s. 307 could have captured the subject matter of the complaint here, as that section is intended to address false statements of a candidate's personal character or conduct.

[70] Furthermore, no reasonable interpretation of the CEO's investigation powers could lead to the conclusion that she had the power to order materials removed, or to announce the commencement of a police investigation in these circumstances.

[71] If the parties are unable to agree on costs, I will accept written submissions within 30 days of the date of this decision.

Arnold, J.