CITATION: PC Ontario Fund v. Essensa, 2011 ONSC 2641
DIVISIONAL COURT FILE NO.: 352/09
DATE: 20110427

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

J. WILSON, SWINTON AND LEDERER JJ.

BETWEEN:	)	
	)	
PC ONTARIO FUND and PROGRESSIVE CONSERVATIVE PARTY OF ONTARIO	)	*W. Thomas Barlow*, for the Applicants
	)	
Applicants	)	
	)	
– and –	)	
	)	
GREG ESSENSA, CHIEF ELECTORAL OFFICER	)	*John B. Laskin* and *Afshan Ali*, for the Respondent
	)	
Respondent	)	*Paul Cavalluzzo* and *Shaun O'Brien,* for the Working Families Coalition (Canada) Inc. (Intervenor)
	)	
	)	*Jack B. Siegel* and *Melanie I. Francis,* for Laura Miller, on behalf of Members of the Ontario Liberal Policy (Intervenor)
	)	
	)	**HEARD at Toronto:** April 27, 2011

SWINTON J. (ORALLY)

Overview

[1] This application for judicial review has been brought by the PC Ontario Fund and the Progressive Conservative Party of Ontario ("the applicants") to challenge what they say are decisions of the Chief Electoral Officer of Ontario, Greg Essensa ("the CEO") dated April 15,

2009. His decisions were in response to a complaint made by the Progressive Conservative Party of Ontario ("PCPO") in relation to suspected contraventions of the *Election Finances Act*, R.S.O. 1990, c. E.7 ("the *EFA*"). The application also challenges the CEO's determination that there was no apparent contravention of the Act by the intervenor, the Working Families Coalition Canada Inc. ("WFC") during the 2003 and 2007 provincial election campaigns. Finally, it challenges the 2007 registration of the WFC as a third party under the *EFA*.

Factual Background

[2] In a complaint dated August 23, 2007, the PCPO forwarded a number of allegations to the CEO claiming that the WFC was an "agent" of the Ontario Liberal Party ("OLP") in respect of political advertising expenses that were incurred. Therefore, it suggested that the WFC advertising expenses constituted contributions to the OLP under s. 22 of the *EFA* and should be regarded as campaign expenses by the OLP subject to the limits imposed by s. 38 of the Act. The PCPO requested that the CEO initiate an investigation into linkages between the WFC and the OLP to determine whether the relevant provisions of the *EFA* had been contravened.

[3] The CEO is an officer of the Legislative Assembly, appointed by the Lieutenant-Governor in Council on the address of the Assembly. The CEO is responsible for the administration of the *Election Act*, R.S.O. 1990, c. E.8 and the *EFA*. Pursuant to s. 2(1)(g) of the *EFA*, the CEO shall "report to the Attorney General any apparent contravention of this Act…"

[4] The CEO retained senior legal counsel and a forensic accountant to carry out an investigation of the complaint. After conducting interviews and examining documents, the

investigators prepared a written report for the CEO, which contained a summary of the relevant documents collected and the interviews, as well as their analysis of the relevant statutory provisions.

[5] In particular, the investigators considered the interpretation of ss. 22(1) and 38(1) of the *EFA*. Section 22(1) provides:

> Political advertising constitutes a contribution for the purposes of this Act if,
>
> (a) it promotes a registered party or the election of a registered candidate;
>
> (b) it is provided or arranged for by a person, corporation or trade union with the knowledge and consent of the party or candidate; and
>
> (c) its value as determined under section 21 is more than $100.

[6] Section 38(1) provides:

> 38(1) The total campaign expenses incurred by a registered party and any person, corporation, trade union, unincorporated association or organization acting on behalf of the party during a campaign period shall not exceed the amount determined by multiplying the applicable amount by,
>
> (a) in relation to a general election, the number of electors in the electoral districts in which there is an official candidate of that party; and
>
> (b) in relation to a by-election in an electoral district, the number of electors in that electoral district.

[7] The CEO received and reviewed the investigators' report and read the PCPO's complaint letter again. He concluded that he did not have reasonable grounds to believe that WFC's advertising was created or disseminated with the "knowledge and consent of" or "on behalf of" any party or candidate. He concluded that there was no apparent contravention of ss. 22 and 38

of the *EFA*, and, therefore, he determined that he would not report the matter to the Attorney General.

[8] On April 15, 2009, the CEO informed the PCPO that he would not be referring the matter to the Attorney General.

[9] On June 26, 2009, the applicants filed this application for judicial review.

The Preliminary Issues

[10] At the outset of this hearing, the Court asked counsel to address three preliminary issues: first, whether the CEO's determinations relating to the complaint and the investigation are subject to judicial review; second, whether the application is moot with respect to the decision to register WFC as a third party during the 2007 election campaign; and third, whether the documents reviewed by the investigators and the transcripts of interviews should be admitted as evidence on this application, as requested by the applicants.

The Availability of Judicial Review

[11] The respondent and the intervenors challenged the jurisdiction of this Court to grant judicial review of the CEO's determinations with respect to the complaint.

[12] Subsection 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 ("*JRPA*") limits the availability of judicial review. It reads:

> On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order

> grant any relief that the applicant would be entitled to in any one or more of the following:
>
> 1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
>
> 2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

[13] Neither of the conditions in s. 2(1) is met in relation to the CEO's disposition of the PCPO's complaint.

[14] Neither mandamus nor certiorari is available. Mandamus is an extraordinary remedy, which should be granted only when a public official has refused to perform a statutory obligation. There was no obligation in the *EFA* to deal with the complaint. Moreover, mandamus cannot ordinarily compel the exercise of a discretion (see *Parkdale Residents Association v. City of Toronto* (2009), 257 O.A.C. 191 (Div. Ct.) at paras. 18-19).

[15] Certiorari is also not available. An order in the nature of certiorari may be granted if a public body has the power to decide any matter affecting the rights, interests, property, privileges or the liberty of any person (see *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602 at 628).

[16] The PCPO had no right to have an investigation conducted. The CEO has no statutory duty either to receive or to investigate complaints under the *EFA*. The manner in which the CEO deals with a complaint is entirely a matter for his discretion. His determinations affect no rights. Nor did the CEO's disposition of the complaint affect any of the PCPO's rights, interests, property or privileges. This is all the more the case where the CEO's determination that there

was no apparent contravention to report did not preclude the PCPO from requesting an investigation by the Attorney General or commencing a private prosecution (understanding that the CEO's consent would be required under s. 53(1) of the *EFA*). Moreover, registration of the WFC as a third party did not preclude the application of the anti-avoidance mechanisms in s. 22 or 38 of the *EFA.*

[17] The applicants argue that s. 2(1)(d) of the *EFA* imposes an obligation on the CEO to investigate complaints. That provision reads:

> The Chief Electoral Officer, in addition to his or her other powers and duties under this Act and the Election Act, shall,
> …
>
> (d) conduct periodic investigations and examinations of the financial affairs and records of registered parties, registered constituency associations, registered candidates, registered leadership contestants and registered third parties in relation to election campaigns…

[18] We disagree with the applicants' argument. This provision confers a power on the CEO to conduct periodic investigations of the financial affairs and records of designated parties, which is in the nature of an audit function. The *EFA* provides no procedure obliging the CEO to investigate or respond to a complaint. This is in contrast to the *Canada Elections Act*, S.C. 2000, c. 9, which, in ss. 509-510, establishes the Commissioner of Canada Elections, whose duty it is to ensure the federal Act is complied with and enforced, and requires the Commissioner to make inquiries when a matter is referred to him or her.

[19] The present application is in sharp contrast with the cases to which we were referred by the applicants. The federal legislative scheme at issue in the decision of *Stevens v. Conservative*

Party of Canada, [2005] F.C.J. No. 1890 (C.A.) imposed a specific duty on the federal Chief Electoral Officer to amend the registry to reflect the merger of political parties in certain circumstances. Moreover, Mr. Stevens was a member of a registered political party objecting to the approval of its merger with another party.

[20] In *Rae v. Canada (Chief Electoral Officer),* [2008] F.C.J. No. 305 (T.D.) and *Callaghan v. Canada (Chief Electoral Officer),* [2010] F.C.J. No. 18 (T.D.), rev'd [2011] F.C.J. No. 199 (C.A.), discretionary decisions of the federal CEO operated against the specific financial interests of the applicants and were subject to judicial review.

[21] The applicants here submitted that the CEO's determinations concerning the complaint involved the exercise of a statutory power and, therefore, judicial review is available under s. 2(1)2 of the *JRPA*. We disagree.

[22] For s. 2(1)2 to apply, there must be an exercise, refusal to exercise or proposed or purported exercise of a "statutory power". That term is defined in s. 1:

> "statutory power" means a power or right conferred by or under a statute,
>
> (a) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,
>
> (b) to exercise a statutory power of decision,
>
> (c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,
>
> (d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party…

[23] "Statutory power of decision", referred to in paragraph (b) above, is defined in s. 1 as well:

> "statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
>
> (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,
>
> and includes the powers of an inferior court.

[24] On their face, none of paragraphs (a), (c) or (d) of the definition of "statutory power" can apply here. The CEO was not making any regulation, rule, by-law or order within paragraph (a). He did not require any person or party to do or refrain from doing any act or thing within paragraph (c), and he did not do any act or thing that would, but for the power or right, be a breach of the legal rights of any person or party within paragraph (d).

[25] Nor is this a statutory power of decision under paragraph (b). Pursuant to s. 2(1)(g) of the *EFA*, the CEO is required to report an apparent contravention to the Attorney General. The CEO's determinations had, and could have had, no bearing on the PCPO's legal rights, powers, privileges, immunities, duties or liabilities. Nor did they affect the eligibility of the PCPO for any benefit (see *Jacko v. Ontario (Chief Coroner)* (2008), 306 D.L.R. (4th) 126 (Ont. Div. Ct.) at paras. 9-21; *Dolan v. Ontario (Civilian Commission on Police Services)*, 2011 ONSC 1376 (Div. Ct.) at paras. 88-97).

The Issue of Mootness

[26] Assuming that the decision to register the WFC in 2007 as a third party is the exercise of a statutory power of decision and subject to judicial review, the application is, nevertheless, moot with respect to that issue, as the registration was effective only for the 2007 provincial election. The WFC will be required to file a fresh application to register for the next election campaign, and the CEO will be required to issue a decision on this fresh application in light of the criteria set out in s. 37.5 of the *EFA* and based on the information provided in the application.

[27] We would not exercise our discretion to hear this aspect of the application despite its mootness, as a court should not engage in the abstract interpretation of legislative provisions. As the Supreme Court of Canada stated in *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342 at para. 40:

> The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. 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.

Conclusion

[28] For these reasons, the application for judicial review is dismissed.

[29] Given our determination that judicial review is not available, we would also dismiss the applicants' motion seeking to admit further evidence.

J. WILSON J.

[30] Costs are fixed in the amount of $15,000, inclusive of HST and disbursements, payable by the applicants to the respondent.

SWINTON J.

J. WILSON J.

LEDERER J.

Date of Reasons for Judgment: April 27, 2011
Date of Release: May 18, 2011

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Respondent

ORAL REASONS FOR JUDGMENT

SWINTON J.

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