COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***British Columbia Teachers' Federation v. British Columbia (Attorney General),*** 2009 BCCA 156

Date: 20090403
Docket: CA036992

Between:

**British Columbia Teachers' Federation,
Federation of Post-Secondary Educators of British Columbia,
British Columbia Division of the Canadian Union of Public Employees,
British Columbia Nurses' Union and Marcia Toms**

Respondents
(Plaintiffs)

And

Attorney General of British Columbia

Appellant
(Defendant)

And

Gloria Laurence and Wendy Weis

Respondents
(Defendants)

British Columbia Civil Liberties Association

Intervenor

Before: The Honourable Mr. Justice Lowry
(In Chambers)

Oral Reasons for Judgment

C.E. Jones K.A. Wolfe	Counsel for the Appellant
R.W. Grant	Counsel for the Respondents, G. Laurence and W. Weiss
J.J. Arvay, Q.C. E. Sigurdson	Counsel for the Respondent, BCTF
G.J. Baugh M.J. Prokosh	Counsel for the Respondent, CUPE
R. Holmes	Counsel for the Intervenor
Place and Date:	Vancouver, British Columbia 3 April 2009

[1] **LOWRY J.A.:** The Attorney General of British Columbia applies for a stay of the order of Mr. Justice Cole made 30 March 2009 until the hearing of the appeal of that order. In comprehensive reasons, indexed as 2009 BCSC 436, the judge held a newly enacted provision of legislation governing general elections in this province to be unconstitutional as contrary to the right to freedom of expression. Broadly stated, he held a restriction on advertising expenditures by election advertising sponsors, referred to as "third parties", during a period of 60 days prior to the commencement of the legislated 28-day campaign period was an infringement of expression that cannot be justified. The judge considered it cannot be justified because it goes beyond what is minimally required to address what the judge accepted to be the pressing and substantial objective of election fairness.

[2] The application is supported by the two individual defendants. It is opposed by the four plaintiff trade unions and the one individual plaintiff.

[3] The considerations that normally govern the exercise of discretion to order a stay are well established: the applicant must show there is merit in the appeal, irreparable harm will be suffered if the stay is refused, and, on balance, the inconvenience to the applicant of the stay being refused will be greater than to the respondent of the stay being granted: *Gill v. Darbar,* 2003 BCCA 3 at para. 7 (Chambers). Additionally, in constitutional cases, it is necessary to consider the interests of the public which, where compelling, may affect the balance of convenience: *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 344-345.

[4] The question then is whether, having regard for these considerations, the stay sought should be granted.

[5] The amendments to the *Election Act*, R.S.B.C. 1996, c. 106, imposing the 60-day restriction on expenditures by third parties, being ss. 228 and 235.1, came into force in May 2008. Restrictions were also imposed under ss. 198 and 199 which set limits on expenditures by political parties and candidates. Given the judge held the 60-day restriction on third parties to be invalid, third party expenditure is, at present, unrestricted before a campaign period begins, while the expenditure by parties and candidates in the same period remains restricted.

[6] The electorate in this province goes to the polls on 12 May 2009. The writs of election should be issued in 10 days time, on 14 April 2009, when the 28-day campaign period will commence to run, during which advertising expenditures will be limited for both third parties as well as for political parties and candidates. If a stay is granted, expenditures by third parties will be restricted to the limit the impugned legislation imposes on expenditures for the 28-day campaign period and the preceding 60-day period ($3,000 for any electoral district to a total of $150,000 overall). If a stay is not granted, the limit on third party expenditures will be the same but the restriction will only apply to expenditures in the campaign period. The limit on expenditures for political parties and candidates ($1.1 million and $70,000 in the pre-campaign period, and $4.4 million and $70,000 in the campaign period respectively) stand unaffected.

[7] It cannot be said the appeal is without merit, and nothing more need be said in that regard. Further, in a constitutional case the burden of establishing irreparable harm is reduced from what it otherwise would be (*RJR-MacDonald* at 346). But, in my view, the determining factor here is ultimately the balance of convenience having regard for the interest of the public.

[8] As matters stand, the effect of the order being appealed is to change the expenditure rules of this election well within the 60-day period the impugned sections of the legislation address. Indeed, all but 10 days have expired. The order has altered the legislative scheme so that it now limits expenditures for political parties and candidates but not for third parties prior to the commencement of the campaign period. The Legislature has been adjourned until after the election so there appears to be no real prospect of any legislative measures being taken to alter the situation.

[9] The Attorney General contends there is then a harmful unfairness worked in favour of some third parties to the disadvantage of others in the political process such that the balance of convenience favours granting a stay. He maintains that is so for two reasons.

[10] The first, which is said to be the more serious, is that some third parties who have chosen to incur expenditures during the 60-day period will, if no stay is imposed, be entitled to incur $150,000 additional expenses in the 28-day campaign period, whereas they would otherwise be limited to spending only what they had not spent in the 60-day period to a total of $150,000. Others who have deferred

spending to the campaign period will not have the benefit of having made any expenditures before that period begins. It is said to follow there will be more expenditures incurred in the campaign period by some to the disadvantage of others if no stay is imposed.

[11] Given the order rendering the impugned legislation invalid was made 45 days after the 60-day period had commenced to run, it is argued, in support, the *status quo* is to be maintained. It is said the balance of convenience favours a stay in that if such is refused, some third parties will be unfairly advantaged, whereas if a stay is imposed, all participants will remain on the same footing in terms of planned expenditures as when the 60-day period began.

[12] The second reason the Attorney General advances focuses on the imbalance in spending restrictions in the 60-day period between third parties which, as a consequence of the order, have no expenditure restriction in that period and political parties and candidates which do have restrictions on the amount they can spend on advertising. He emphasises the judge recognized this as a harmful unfairness and apparently expected a legislative response which has not been forthcoming.

[13] The Attorney General says the judge's order serves to put the expression rights of a few "affluent" participants over the rights of all others in the process. A stay would not deprive the plaintiffs of their right to advertise but only limit the expenditure on advertising as contemplated by the legislation. There can, he says, be no great injustice in preserving the legislated limits for the next 10 days.

[14] However, the judgment is presumed to be correct and the successful plaintiffs are entitled to the fruits of the judgment obtained unless, having regard for the governing considerations, the interests of justice dictate otherwise.

[15] As the plaintiffs contend, if the order is stayed, their freedom of expression will be restricted in a manner that has been held to be unconstitutional. Their challenge to the legislation was to overcome the obstacle recently raised to the extent of their participation in the political process for this election. They have been successful, if only partially, given the time remaining.

[16] The plaintiff unions have adduced evidence of the expenditures they will, if permitted, make in the next ten days. I am told I should assume the affidavits disclose the full extent of all expenditures. Only three of them propose to do any advertising. The British Columbia Teachers' Federation has committed $275,000, which is non-refundable, to television advertising that will raise issues of concern to the Federation about public education in this province that can be expected to be similar to advertising of that kind it has undertaken from time to time and with which the people of the province will be familiar. The Canadian Union of Public Employees has committed $75,000, which is non-refundable, to newspaper advertising addressing issues relating to the provincial budget. The Attorney General accepts that, because these commitments were made in good faith, the advertising may be done. In applying for a stay, he does not seek to interfere with these commitments. In the next 10 days, the British Columbia Nurses' Union will spend some modest amounts on posters, leaflets, and newspaper advertising and is considering a

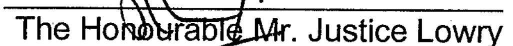
$60,000 expenditure for newspaper advertising specifically raising issues on the care of seniors.

[17] Despite the advantages and disadvantages that are said to result from the judge's order for third parties and other participants in the political process, I do not consider there to be a sound basis on which to conclude any additional advertising expenditure there may be in the campaign period or in the 10 days remaining until that period begins will be harmful to the extent of impairing the fairness of this election.

[18] The balance of convenience favours denying a stay and I see no compelling public interest in what third parties may now spend that alters the balance so much as to warrant a stay.

[19] Thus, although the appeal is not without merit, and even if there would be some measure of irreparable harm to the public interest the Attorney General represents should his appeal ultimately succeed, I conclude the balance of convenience so favours the plaintiffs as to put the stay which is sought out of reach. In my view, the interests of justice do not require denying the plaintiffs the benefit that remains to be taken out of their successful challenge to the impugned legislation and I am not disposed to exercising discretion in favour of granting a stay.

[20] The application is accordingly dismissed.



The Honourable Mr. Justice Lowry