Court of Queen's Bench of Alberta

Citation: Szuchewycz v Canada (Attorney General), 2017 ABQB 645

Date: 20171025
Docket: 1503 17292
Registry: Edmonton

Between:

Kieran Szuchewycz

Applicant

- and -

Her Majesty In Right of Canada As Represented by the Attorney General of Canada

Respondent

Reasons for Decision
of the
Honourable Madam Justice A.B. Inglis

Introduction

[1] Mr. Kieran Szuchewycz [Applicant] contests the constitutionality of three sections of the *Canada Elections Act*, SC 2000, c 9 [*Act*], namely: sections 66(1) (e), (f), & (g) and 67(2) [Signature Requirement Provision]; 67(1), (3)(a), (b), & (c) [Witness Requirement Provision]; and 67(4)(a) [Deposit Requirement Provision], which specifically impose requirements upon candidates prior to being included on a ballot.

[2] The Applicant seeks declaratory relief that these provisions infringe s 3 of the *Canadian Charter of Rights and Freedoms* [*Charter*], which provides that: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein"; and that the infringements by the three candidacy

requirements do not constitute reasonable limits within the meaning of s 1 of the *Charter*, as can be demonstrably justified in a free and democratic society.

[3] For the reasons below, I agree with the Applicant regarding the Deposit Requirement Provision, and find a breach of s 3 of the *Charter* that is not saved by s 1.

Facts

[4] The Applicant, who at the time of filing his nomination application lived in Edmonton, Alberta, attempted to run as an independent candidate in the federal election of 2015 in the Calgary-Heritage electoral district.

[5] On October 5, 2015, the Applicant's nomination application was refused by the Returning Officer in the electoral district. Multiple reasons were given for the refusal including the Applicant's failure to provide: (i) information about his auditor; (ii) a letter of acceptance of an auditor; (iii) the signature of a witness to the candidate's oath; (iv) the signature of a person authorized to administer oaths; (v) a $1000 deposit; or (vi) original documents within two days of the close of nominations, required because his application was electronically submitted.

[6] The Applicant indicates in his affidavit evidence that he was able to meet the deposit requirement. However, he did not provide it in anticipation of being refused on other grounds, based on his conversation with the Returning Officer.

[7] The Attorney General of Canada [Respondent or Crown] acknowledges that the Returning Officer *incorrectly* informed the Applicant that, despite being able to file his documentation electronically, the witness to the Applicant's consent to candidacy would need to attend in person at the returning office in Calgary and swear to an oath in writing and in person.

Issues

[8] The issues raised in this application are:

> Issue 1: Do the provisions of sections 66(1) (e), (f), & (g) and 67(2); 67(1), (3)(a), (b), & (c); and 67(4)(a) of the *Act* infringe the rights and freedoms guaranteed by s 3 of the *Charter*?
>
> Issue 2: If the answer to Issue (1) is in the affirmative, does the infringement constitute a reasonable limit within the meaning of s 1 of the *Charter*?

Impugned Legislative Provisions

[9] The impugned provisions of the *Act* read:

> 66 (1) A nomination paper shall be in the prescribed form and include
>
> ...
>
> (e) for any electoral district except one listed in Schedule 3, the names, addresses and signatures, made in the presence of a witness, of at least 100 electors resident in the electoral district;

(f) for an electoral district listed in Schedule 3, the names, addresses and signatures, made in the presence of a witness, of at least 50 electors resident in the electoral district; and

(g) the name, address and signature of the witness to each signature made under paragraph (e) or (f).

...

67 (2) The witness shall use due diligence to ensure that the signatures referred to in paragraph 66(1)(e) or (f) were all made by electors resident in the electoral district.

[Signature Requirement Provision]

67 (1) The witness to the consent referred to in paragraph 66(1)(b) shall file the nomination paper with the Returning Officer in the electoral district in which the prospective candidate is seeking nomination at any time between the issue of the Notice of Election and the close of nominations.

...

(3) The witness shall, on filing the nomination paper, swear an oath in writing in the prescribed form before the Returning Officer stating that

(a) the witness knows the prospective candidate;

(b) the witness is qualified as an elector; and

(c) the prospective candidate signed the consent to the nomination in the presence of the witness.

[Witness Requirement Provision]

67 (4) The witness shall file with the Returning Officer, together with the nomination paper,

(a) a deposit of $1,000.

[Deposit Requirement Provision]

Discussion

[10] For the purpose of my analysis, the first issue relates to whether the impugned sections of the *CEA* infringe s 3 of the *Charter* – i.e. Infringement. The second issue relates to whether the infringements, if any, are justifiable under s 1 of the *Charter* – i.e. Justification.

[11] I will now turn to address the issues separately.

Issue 1: Do the provisions of sections 66(1) (e), (f), & (g) and 67(2); 67(1), (3)(a), (b), & (c); and 67(4)(a) of the *Canada Elections Act* infringe the rights and freedoms guaranteed by s 3 of the *Charter*?

Applicant's Position

[12] The Applicant argues that s 3 of the *Charter*, as well as previous Supreme Court of Canada decisions interpreting the provision, explicitly confirm that the right to stand for election is a *Charter* right. He argues that the fundamental purpose of s 3 is to ensure that all citizens (whether or not they are members of the political elite) have access to full participation in Canada's democracy. He says that sections 66(1) (e), (f), & (g) and 67(2); 67(1), (3)(a), (b), & (c); and 67(4)(a) of the *Act*, restrict citizens from standing for election, and infringe upon that right.

[13] The Applicant contends the impugned requirements effectively create a popularity test, an extensive administrative requirement, and a wealth test respectively. He argues that providing such requirements for citizens to exercise their *Charter* rights is unconstitutional. He submits there are many individuals, particularly the poor and marginalized, for whom the requirements represent a significant burden, effectively deterring them from standing for election.

Signature Requirement Provision

[14] The Applicant argues that the signature requirement imposes a significant administrative burden for potential candidates which restricts the ability to exercise their s 3 rights. He notes that even for a candidate who is able to meet the signature requirement, the time and money spent overcoming the restriction infringe on the candidate's ability to use those resources on, and thus impeding, their campaign.

[15] Referencing the Affidavit of Miss Kim, deposed on behalf of the Respondent, which indicates that the requirement to obtain 100 signatures is meant to prevent unpopular candidates from standing for election, the Applicant counters that the signature requirement is an attempt to aggregate political preferences.

[16] He relies on the Supreme Court of Canada's decision in ***Figueroa v Canada***, 2003 SCC 37 at paras 52-53, [2003] 1 SCR 912 [***Figueroa SCC***]. In that case, taxation rules that differed between candidates (depending on party size and affiliation) were alleged to be a *Charter* infringement. At paragraphs 52-54:

> The effect of the restriction on the right to issue tax receipts for donations received outside the election period is that parties that have satisfied the 50-candidate threshold are able to raise more funds than they would otherwise be able to raise.... [T]he effect of the threshold is that political parties that have satisfied the threshold requirement have more resources at their disposal for the purpose of communicating their ideas and opinions to the general public. The flip side of the coin is that it is even more difficult for a party that has not satisfied the 50-candidate threshold to publicize its own ideas and views....
>
> This, in turn, diminishes the capacity of the individual members and supporters of such parties to play a meaningful role in the electoral process. ....

[17] Based on these statements from the Supreme Court, the Applicant submits that it is not a constitutionally valid objective to prevent "unpopular" candidates from running. It is improper, he argues, to attempt to determine the popularity of a candidate prior to election day, or have any requirements that rely on a minimum level of support prior to being declared a candidate

[18] The Applicant contends that it is "ludicrous" to suggest that by simply having more candidates run, the voters' attentions will be bombarded by too many different political platforms and messages, such that the integrity of the electoral system will be threatened.

Witness Requirement Provision

[19] The Applicant was informed that his nomination documents must be provided to the Returning Officer and the witness who is required to swear an oath on the prospective nominee's behalf must do so in person at that time. He did not follow those directions. Nonetheless, he alleges that the Witness Requirement Provision, as he understands it, also breaches his *Charter*, s 3 rights.

[20] The Applicant acknowledges, however, that s 73 of the *Act* allows him to bypass the in-person oath requirement. That section provides for electronic submission, and reads:

> 73 (1) A prospective candidate may send his or her nomination paper and the statement and instrument referred to in paragraphs 67(4)(b) and (c), respectively, by electronic means. In order for the nomination to be valid, the Returning Officer must receive the deposit referred to in paragraph 67(4)(a) and copies in electronic form of the nomination paper, statement and instrument by the close of nominations. The original documents must be received by the Returning Officer not later than 48 hours after the close of nominations.

Deposit Requirement Provision

[21] The Applicant provides affidavit evidence of his income information in recent years to the Court. He notes that he is married and has a child. His family of three lived on approximately $2000 per month. While he indicates that he *could* have made the $1000 deposit for the term of the election, it was a significant challenge for him and his family.

[22] He also notes that the deposit, while refundable, might well be money needed for a prospective candidate during the election to further support a campaign. He notes that the Electoral Campaign Returns for independent candidates for the 2011 Federal Election reveal that election expenses for most such candidates were less than $5000, and sometimes even less than $1000. This fact, he alleges, demonstrates how the deposit can represent a large portion of the funds a candidate may have available to run their campaign.

[23] The Applicant submits that while the deposit requirement is allegedly an attempt to deter frivolous candidates, it may well deter non-frivolous candidates who are not affluent. And neither, he maintains, would the deposit deter frivolous candidates that are affluent.

[24] Finally, the Applicant notes that s 3 of the *Charter* confers a right that is of "special importance," as it is not one of the sections that are enumerated in s 33(1) of the *Charter* that permits legislative override. Section 33(1) reads: "Parliament or the legislature of a province may

expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in s 2 or sections 7 to 15 of this *Charter*."

Respondent's Position

[25] The Respondent submits that not every administrative requirement for electoral candidacy violates s 3 of the *Charter*. For instance, in ***Harvey v New Brunswick (Attorney General)***, [1996] 2 SCR 876, 137 DLR (4th) 142, the Supreme Court found an infringement of s 3 that was ultimately preserved by the application of s 1 of the *Charter*.

[26] The Supreme Court warned against an overbroad approach that finds that *any* restriction is automatically a violation, while cautioning, "[t]hat is not to say that there can never be limitations or qualifications on the right to stand for election that do not violate s 3 of the *Charter*": ***Harvey*** at para 31.

Signature Requirement Provision

[27] The Respondent indicates that signature requirement had been enacted as an initial test for public support for the proposed candidate.

[28] It notes that the Applicant was able to acquire the required number of signatures, pursuant to s 66(1) of the *Act*. The Crown observes that the Applicant's evidence identified some inconvenience and expense – primarily because he lived in Edmonton, but wished to run in Calgary. Nevertheless, the Crown indicates, there was no actual barrier to the Applicant's right to participate as a candidate.

[29] The Respondent emphasizes that the objective of the signature requirement is to deter frivolous candidates. Prospective candidates are required to show their willingness to engage with voters and provide information, as well as show that they have some degree of support. As such, the signature requirement acts as an appropriate filter for identifying candidates who are serious enough and able to engage as candidates, prior to filing their nomination documents.

[30] The Respondent further notes that a report commissioned by the federal government recommended a higher signature requirement, and the current requirement is less than half, evidencing that the 100 signatures is within a reasonable range of options to achieve the objective. The signature requirement was recommended to increase to 250 in most districts, 100 in rural districts, however, the *Act* changed the signature requirement to 100 and 50 respectively – (Canada, Royal Commission on Electoral Reform and Party Financing – *Reforming Electoral Democracy*, vol 1 (Ottawa: Communication Group, 1991) (Chair: Pierre Lortie)) [Lortie Report].

Witness Requirement Provision

[31] The Respondent notes that the Applicant could have relied on s 73 of the *Act*, which provides for electronic submission, and the subsequent submission of original documents.

[32] The Respondent argues that the entire scheme of impugned legislation must be considered when a *Charter* violation is alleged. In the present case, the Respondent submits, the

Act, as a whole, does not have the effect complained of by the Applicant; notwithstanding the incorrect information provided to him by the Returning Officer. In this regard, the Respondent notes that the Applicant was provided with the correct information on the nomination application.

Deposit Requirement Provision

[33] The Respondent provides an outline of the deposit requirement beginning in 1874, alleging its goal was to deter frivolous candidates. It notes that the deposit requirement was recommended to be fully refundable by the Lortie Report. However, Parliament responded by setting the deposit to be half refundable, and the other half held unless the candidate received 15% of the votes in their district. In 2000, the *Act* was further amended to make the deposit fully refundable. Lowering the amount was considered but not enacted.

[34] The Lortie Report considered the purpose and efficacy of the deposit requirement, finding that the obligation was not an unreasonable condition on candidacy. Specifically, it concluded that "[c]andidates should be required to demonstrate that they are serious": Lortie Report, at 87. The Respondent submits that, obviously, the Lortie Report made recommendations that were accepted by Parliament.

[35] In ***Figueroa SCC***, the impugned provision related to a *non-refundable* deposit. That requirement, the Respondent notes, has now changed to a fully refundable deposit. At para 36, the Supreme Court confirmed that limits to candidacy are *not* automatically violations of s 3 of the *Charter*. The Supreme Court wrote:

> [T]he use of such phrases reflects that the purpose of s 3 is not to protect the right of each citizen to play an unlimited role in the electoral process, but to protect the right of each citizen to play a meaningful role in the electoral process; the mere fact that the legislation departs from absolute voter equality or restricts the capacity of a citizen to participate in the electoral process is an insufficient basis on which to conclude that it interferes with the right of each citizen to play a meaningful role in the electoral process. But if the legislation does, in fact, interfere with the capacity of each citizen to play a meaningful role in the electoral process, it is inconsistent with s 3.

[36] The issue of deposit requirement was also considered in ***de Jong v Attorney General of Ontario*** (2007), 88 OR (3d) 335 at para 42, 2007 CarswellOnt 6781 (Ont Sup Ct), where Perell J of the Ontario Superior Court of Justice noted that, "in order to contravene s 3 of the *Charter*, legislation must appreciably interfere with the capacity of a citizen to play a meaningful role in the electoral process."

[37] The Respondent argues that, relying on these precedents the impugned Deposit Requirement Provision of the *Act* do not violate s 3 of the *Charter*.

[38] Ultimately the Respondent argues that to find a breach of s 3 of the *Charter*, the Applicant must show that the impugned Deposit Requirement Provision interferes with his ability to play a meaningful role in the electoral process, not that candidates are barred from an unlimited role.

[39] The Respondent submits that the Applicant has not established that the $1000 deposit had an actual impact on his ability to qualify as a candidate.

Analysis *re* Infringement

[40] The Applicant bears the onus of establishing all elements of a *Charter* infringement, and must provide a factual foundation capable of supporting the allegations of a *Charter* breach: ***Mackay v Manitoba***, [1989] 2 SCR 357 at paras 8-11, 61 DLR (4th) 385; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto, Ont: Thomson Reuters Canada Ltd, 2016) at 38-37 [Hogg, *Constitutional Law of Canada*].

[41] I agree with the Respondent that not just any limit will automatically result in an infringement. The *Charter* guarantees meaningful, not unlimited, participation in the electoral process.

Signature Requirement Provision

[42] In general, I observe that government reports and court findings have found the signature requirement of the *Act* to be consistent with the provisions of s 3 of the *Charter*.

[43] For example, the Lortie Report was relied upon as evidence of the analysis and goal-setting conducted by the government regarding electoral reform. It is my understanding that one of the main reasons the Lortie Report was commissioned was as a response to multiple *Charter* challenges to election legislation. It provides significant reasoning to support the requirement of obtaining signatures from electors, prior to obtaining certification as candidates.

[44] Similarly, in ***de Jong*** at paras 33, 70-73, Perell J indicated that:

> [33] ...[T]hese signature requirements do not interfere and indeed are consistent with the informational component of s 3 of the *Charter*.
> ....
>
> [70] About [signatures], the Lortie Commission had the following to say at p. 87 of its Report:
>
> > ... The public interest in setting conditions on candidacy is twofold. First, there is a legitimate public interest in the integrity and effectiveness [of] electoral competition. Candidates should be required to demonstrate that they are serious.... Nomination by voters, rather than self-nomination, is meant to demonstrate public support....
>
> [71] The requirement of obtaining signatures to accompany the nominating papers may serve purposes other than being a measure of seriousness because it goes some distance in demonstrating that a candidate's political message is one that a segment of the electorate wishes to have expressed, but the candidate's willingness to exert the effort required to obtain the signatures is also a measure of his or her seriousness as a candidate.... Indeed, the requirement of obtaining

> signatures is a way of communicating the candidate's or his or her party's political message.
>
> [72] As already noted above, all ten provinces have signature requirements and Manitoba and Québec rely only on signatures as their means of restricting the number of candidates....[T]he evidence establishes that the signature requirement is a more effective and a more desirable means of achieving the government's objective of deterring frivolous candidates.

[45] I agree with these observations and comments, which align with the *Charter*'s guarantee of a *meaningful*, but not *unlimited* participation in the electoral process.

[46] The integrity of the electoral process must include a way to filter frivolous candidates that are not otherwise willing or planning to participate fully in the electoral process. The signature requirement is not a test of support prior to election necessarily (although it may have that effect), but a relatively minor test of the potential candidate's ability or willingness to be an actual candidate.

[47] In my view, the signature requirement is not a significant restriction upon a citizen's ability to *meaningfully* participate as a candidate. The Applicant himself showed through his evidence that by spending two days in a riding that he did not live in – or show any particular connection to – he was able to significantly exceed the required threshold. I could not find any evidence that this requirement, in any way, affected his ability to run as a candidate. Nor am I persuaded that it would prevent an otherwise willing and able citizen in general to participate as a candidate.

[48] Consequently, the impugned Signature Requirement Provision of the *Act* does *not* breach s 3 of the *Charter*.

Witness Requirement Provision

[49] The requirement that a witness to a prospective candidate's oath should attend physically or in person at the Returning Office co-exists with the provision of s 73 of the *Act*, which permits the electronic filing of nomination papers. The Applicant acknowledges his awareness of this alternative method of filing a nomination application.

[50] Although the Returning Officer, in this instance, misinformed the Applicant that his witness was required to be personally present at the Returning Office in Calgary, that error is insufficient to discount both the provision of s 73 of the *Act* and the express instructions included with each nomination application that the "Oath of Witness to Consent of Candidate of the Nomination Paper [does] not have to be completed when the Nomination Paper is sent by electronic means."

[51] I agree with the Respondent that the Witness Requirement Provision is not a significant restriction upon a potential candidate's ability to *meaningfully* participate as a candidate. The evidence before me does not in any way demonstrate that this witness requirement infringed on the Applicant's (or any individual's) ability to run as a candidate. Nor do I find it would affect any candidate in general from so participating.

[52] In the result, I find that the Witness Requirement Provision of the *Act* does *not* breach s 3 of the *Charter*.

Deposit Requirement Provision

[53] The deposit requirement is one that has been frequently challenged. Both ***De Jong*** and ***Figueroa*** found breaches of s 3 rights created by deposit requirements.

[54] In ***Figueroa SCC*** at para 33, the majority of the Supreme Court observed that:

> Where the impugned legislation is inconsistent with the express language of s 3, it is unnecessary to consider the broader social or political context in order to determine whether the legislation interferes with the right of each citizen to play a meaningful role in the electoral process.

[55] I understand that failing to comply with the impugned Deposit Requirement Provision in the present matter will result in denial of one's application to be a candidate.

[56] It is pertinent to draw on the statements of Molloy J, of the Ontario Court of Justice (General Division), in ***Figueroa v Canada (Attorney General)*** (1999), 43 OR (3d) 728 at para 16, 170 DLR (4th) 647, varied 137 OAC 252 (Ont CA), rev'd 2003 SCC 37, where she said that:

> Quite simply, a right is limited if one must pay $1000.00 before one can exercise it.... It is clear that $1000.00 is not a trifling sum of money. Indeed, the possibility of losing $500.00 was specifically intended by Parliament to act as a deterrent to those candidates who might otherwise be inclined to neglect their reporting responsibilities under the *Act*. For purposes of the analysis under s 3, it is not necessary for me to inquire beyond that. The requirement of paying $1000.00 is a disadvantage and therefore a limitation on the s 3 right. I therefore find that this provision of the *Act* violates s 3 of the *Charter*.

[57] I agree. As such, in my view, the impugned Deposit Requirement Provision, *prima facie*, imposes limits and disadvantage on some potential candidates.

[58] Further, I disagree with the Respondent's argument in the present case that the Applicant has not established that the $1000 deposit requirement had an actual impact on his ability to qualify as a candidate. The Applicant appeared to this Court as an intelligent, educated and motivated individual who conveyed the impression that he would be an excellent candidate for any election, I am satisfied that his affidavit evidence described his income and accounted for his financial responsibilities. While he admitted that he could have produced the money to make the deposit, he indicated through his evidence that it would have resulted in a significant difficulty, ultimately then limiting his ability to finance a campaign.

[59] I agree that the potential to prevent a serious and impressive candidate from running in an election, due to the financial pressure a $1000 deposit could create, is a real risk of the requirement. In my opinion, the impugned Deposit Requirement Provision would infringe many individuals' – including the Applicant's – ability to communicate their messages to the public, and participate meaningfully in the electoral process as a candidate: ***de Jong*** at para 22.

[60] Accordingly, I find that the Deposit Requirement Provision of the *Act* constitutes a *measurably* significant restriction on the right to play a meaningful role in the electoral process, and as such, breaches s 3 of the *Charter*.

Issue 2: If the answer to Issue (1) is in the affirmative, does the infringement constitute a reasonable limit within the meaning of s 1 of the *Charter*?

[61] Given my conclusion that neither the Signature Requirement Provision of the *Act* nor the Witness Requirement Provision of the *Act* breaches s 3 of the *Charter*, the outstanding inquiry is whether or not the Respondent can justify the infringement created by the Deposit Requirement Provision of the *Act*, which I have found to constitute a breach of this s 3 right.

Applicant's Position

[62] The Applicant argues that the *Charter* breach created by the impugned Deposit Requirement Provision of the *Act* cannot be reasonably or demonstrably justified. He relies on the decision of the Supreme Court in ***R v Oakes***, [1986] 1 SCR 103, 26 DLR (4th) 200, and asks this Court to apply the two-part inquiry prescribed in the case, wherein the government bears the burden of proving that the infringement is nonetheless valid under s 1 of the *Charter*.

[63] The Applicant argues that the alleged objective of the Deposit Requirement Provision of the *Act*, which is to deter frivolous candidates, is not a constitutionally valid one. He then posits multiple questions that might potentially define frivolity, but indicates that there currently is no clear definition. As well, there is insufficient evidence to show how a particular kind of candidate would impair the integrity of the electoral process. He argues that there are no real-world examples of frivolous candidates threatening the integrity of the electoral system. By way of illustration, the Applicant cites the Rhinoceros Party and their deliberately non-serious political messaging. He notes that the Party presented 27 candidates in the most recent federal election, and apparently caused no harm to the integrity of electoral process. In effect, he submits, a test of seriousness of intention should not limit whether a citizen exercises their fundamental *Charter* rights: ***Sauvé v Canada (Chief Electoral Officer)***, 2002 SCC 68 at paras 43-44, [2002] 3 SCR 519.

[64] Even if the objective of deterring frivolous candidates is a pressing and substantial one, the Applicant maintains that the deposit requirement cannot be said to be rationally connected to that objective. The requirement is over-inclusive – in the sense that serious candidates with limited financial means will be deterred; and the requirement is also under-inclusive – given that frivolous candidates with sufficient financial means will not be deterred from running.

[65] The Applicant submits that the deposit of $1000 does not guarantee compliance with the remaining rules of the *Act* that relate to finances. He argues that providing the required $1000 deposit is only a test of a potential candidate's ability to deposit $1000, not a test of the candidate's intention or ability to follow the law regarding tax receipts for donations or any other requirement. In this context, the Applicant submits that given specific provisions in the *Act* that provides for significant punishment for noncompliance – including fines that are far more than the thousand dollars – the Respondent's position that the deposit requirement is also there to

motivate compliance with the *Act* is unsustainable. Accordingly, the Applicant argues, this alleged objective of the deposit requirement is not rationally connected to the goal of protecting the integrity of the electoral finance regime.

[66] Finally, the Applicant submits that there are alternative legislative means available that would significantly less impair the rights of the potential candidate than the impugned Deposit Requirement Provision of the *Act*. As such, the deleterious effects are outweighed by any benefit that the impugned deposit provision might achieve.

Respondent's Position

[67] The Respondent relies on the Lortie Report that emphasized the deposit requirement met the primary pressing and substantial objective to encourage the candidates' compliance with the *Act*, and requiring potential candidates to take the elections process seriously. Thus, the requirement deters non-serious candidates.

[68] The Respondent also outlines several previous cases that have considered the deposit requirement. Specifically, the Crown relies on ***Shebib v Canada***, 2016 FC 539. In the case, when the plaintiff (Shebib) presented himself to the returning officer for the federal electoral district of Victoria in British Columbia, he "was accompanied by an 'agent' but did not have an auditor as required to be appointed, nor did he have the names, addresses and signatures of at least 100 persons entitled to vote in the riding, nor did he pay or offer to pay a deposit of $1000 or any other amount" as required by the federal legislation: ***Ibid*** at para 4. Consequently, Shebib's nominating papers were refused.

[69] One of the reliefs sought by the plaintiffs in ***Shebib*** was for:

> [L]eave to challenge the *Canada Election Act* governing the 2015 election. The [Plaintiffs] have freedom of speech and no requirement for money can be made of them without compromising that freedom. The Plaintiffs believe that this election is false and that we were denied our constitutional rights and that our lives are now threatened by a governing system that has excluded us from our free say.

[70] Hughes J, found that: (i)" the Plaintiffs have not specifically invoked the *Charter of Rights and Freedoms* in their Amended Statement of Claim"; (ii) the Plaintiffs [have] not pleaded that they have any particular individual beliefs or thoughts that they say would preclude them from complying with the requirements of the *Canada Elections Act*, nor have they pleaded that it is impossible for them to do so"; and (iii) the Plaintiffs have not pleaded that the limitations respecting an auditor, or payment of money [or] 100 signatures present unreasonable limitations nor is it self-evident that they do so": paras 21, 27, 29. Based on the reasoning that the plaintiffs in ***Shebib*** have not pled the material facts necessary to support a *Charter* argument, the Federal Court struck the plaintiffs' statement of claim, and concluded that, "to the extent that the Amended Statement of Claim can be understood to allege breach of *Charter* rights, it fails to set out a proper cause of action and must be struck out": ***Ibid*** at para 30.

[71] The Respondent notes prior cases have cited social science sources, and that ***de Jong*** and ***Figueroa*** both relied on this pressing and substantial objective. It draws the Court's attention to the fact that since ***Figueroa***, the deposit made by candidates is now fully refundable. This is a significant difference from the main focus of the decision by Molloy J – which was that the prospective candidate might well lose some of their deposit depending solely on the number of

votes received. In other words, since the deposit is now fully refundable, the Respondent argues that the impugned Deposit Requirement Provision minimally impairs the potential candidate's s 3 *Charter* right. In this context, the Respondent points to the Lortie Report, which indicated a lesser amount could not achieve the deterrent effect.

[72] Finally, the Respondent notes that the proportionality test, which was not satisfied by the government respondents in both ***de Jong*** and ***Figueroa***, should now be deemed met, given the revised refund provisions. The current deposit amount is "fully refundable and tied to the actual expense associated with enforcing compliance with reporting requirements."

Analysis *re* Justification

[73] In ***de Jong*** at para 53, Perell J succinctly articulated the analytical framework for justifying a *Charter* violation in the following words:

> Under the ***Oakes*** test, the government must establish that the objective or purpose of the impugned legislation is sufficiently "pressing and substantial" to warrant overriding the constitutionally protected right. If that first test is met, then the government must establish that the means adopted to achieve the legislative objective are proportional to that objective by showing that the means chosen to achieve the objective: (1) are rationally connected to the objective and not arbitrary, unfair or based on irrational considerations; (2) impair the guaranteed right as little as reasonably possible; and (3) achieve proportionality between the effects on the rights in question and the importance of the legislative objective, and in some cases between the deleterious and salutary effects of the measures themselves.

See also, Hogg, *Constitutional Law of Canada* at 38-37; ***Harvey*** at paras 30, 35.

[74] Foremost, I think it is critically important for me to distinguish the Federal Court's decision in ***Shebib***, which the Respondent relied on in its submissions. Unlike the situation in ***Shebib***, where the Court concluded that the plaintiffs did not plead the material facts necessary to support their *Charter* arguments, I am satisfied that the Applicant in the matter before me specifically invoked the *Charter* in his Originating Application and in addition filed affidavit evidence that indicates the facts as to how his financial circumstances would be impacted by the impugned Deposit Requirement Provision.

[75] That said, it has been fairly accepted that "the deposit provisions under the federal elections legislation addressed the pressing and substantial objectives of protecting: (1) the public purse for some expenses incurred in administering the election; and (2) the integrity of the electoral system through the deterrence of frivolous candidates": ***de Jong*** at para 54. The Lortie Commission that was constituted by the federal government to look into electoral reform also "recognized that the purpose of the deposit requirement was to deter frivolous candidates and to ensure that a candidate was serious and committed to the electoral process" *Ibid* at 57.

[76] In my opinion, ensuring the legitimacy of the electoral process is, on its face, a reasonable objective. The Supreme Court, in ***Figueroa SCC*** at para 72, confirmed that "preserving the integrity of the electoral process is a pressing and substantial concern in a free and democratic state."

[77] Thus, I conclude that regarding the impugned Deposit Requirement Provision of the *Act*, the first step of the ***Oakes*** test is met. The Respondent has satisfactorily demonstrated that s 67 (4) of the *Act* has a pressing and substantial objective of preserving the legitimacy of the electoral process.

[78] The next question then becomes: Is the impugned Deposit Requirement Provision of the *Act* rationally connected to its objective?

[79] To establish a rational connection to the stated objective, the Respondent identifies how the number of candidates increased when the deposit requirement was changed. However, that information does not identify in any way how many of those, if any, were frivolous candidates. In fact, it makes little sense to suggest that the deposit requirement achieves any filter other than for those that cannot part with $1000 for the duration of the election. Perhaps, the increase in candidates following the change that made deposits fully refundable simply made financially risk-averse candidates more willing to enter the fray. Further, it does little to help define "non-seriousness."

[80] Molloy J in ***Figueroa*** at para 38, indicated that there is a lack of rational connection between the imposition of a deposit requirement and the objective of ensuring that only serious candidates participate in elections. She opined that the idea that any rational connection exists between the two concepts "is based on the following illogical or incorrect premises," *inter alia*:

> 1. that the measure of whether a candidate is serious is whether he or she is prepared to lose [in the present case $1000.00]; (This is irrational because serious candidates may not be willing or able to pay [$1000.00] as the price of participation in the election whereas a frivolous candidate intent only upon getting publicity may, well be prepared to spend [$1000.00] towards that end.)
>
> 2. that a prospective candidate who would be deterred by losing [$1000.00] is not serious or does not have public support; (This is irrational because it equates seriousness with financial means. A welfare recipient is in a very different position from a millionaire when it comes to losing [$1000.00] and it is likely that the financial means of their respective supporters would also be different. As for public support, there is a difference between financial backing and public support. A deposit requirement measures only the former.)

[81] I agree with Molloy J's postulations and solid conclusion. Her reasoning, in my view, is consistent with the Applicant's argument that many non-frivolous candidates might be prevented from participating due to limited financial means, and a frivolous candidate might easily be able to meet the deposit requirement.

[82] In the result, I find that the Respondent has failed to show that the impugned Deposit Requirement Provision of the *Act* is rationally connected to the objective of ensuring that only serious candidates participate in elections. The Respondent did not meet its onus for this requirement of the s 1 analysis.

[83] Given my finding about the lack of rational connection to the stated objective, I need not consider the remainder of the proportionality requirements of the ***Oakes*** test.

[84] However, given the relatively unstable nature of judicial and academic commentaries on this stage of the proportionality test as it relates to the deposit requirement, I will proceed to examine the other stages of the ***Oakes*** test, in the event that my conclusion as to the absence of

rational connection is in error. (See, Michael A. Johnston, "Section 1 and the *Oakes* Test: A Critical Analysis" (2009) 26 Nat'l J Const L 85 at 100-103; ***de Jong*** at para 66).

[85] The inquiry then leads me to ask: Does the impugned Deposit Requirement Provision of the *Act* minimally impair the *Charter* right in question?

[86] Justice Molloy, in ***Figueroa*** at para 43, noted:

> If there is a legitimate need to limit participation in the electoral process only to serious candidates who have a measure of public support, alternative means are available which do not impose financial obstacles to discourage candidacy. One obvious example is the recommendation by the Lortie Commission that the nomination by, residents in the constituency be the measure of public support. Lortie proposed that "only those who do not meet their obligations under the *Act* should be penalized" and that "the deposit is not to deter frivolous candidates; this objective is achieved by requiring public endorsement for a nomination".

[87] This view was endorsed by Perell J in ***de Jong*** at para 71, where he said: [t]he requirement of obtaining signatures to accompany the nominating papers may serve purposes other than being a measure of seriousness [...] and this requirement minimally impairs, if it impairs at all, the ability of the candidate's party to communicate its message.

[88] The significance of these comments is that, given the possibility of using the signature requirement as alternative means (or measure) to attain the same objectives of deterring frivolous or non-serious candidates and preserving the integrity of the electoral process, the impugned Deposit Requirement Provision of the *Act* cannot be justified as a minimal impairment.

[89] Consequently, I find that the Respondent has failed to satisfy the minimal impairment element of the ***Oakes*** test.

[90] The last factor of the ***Oakes*** test, which is being considered in light of my earlier finding, asks whether or not the salutary benefits of the impugned Deposit Requirement Provision of the *Act* outweigh its deleterious effects?

[91] When the salutary benefits inherent in the objective of deterring non-serious candidates is juxtaposed with deleterious effect of depriving otherwise serious but financially challenged candidates from presenting or communicating their ideas and opinions to the general public by diverting funds that could be used to communicate a political message, then it is logical to conclude that there is a disconnect between effects and objective.

[92] In the result, I find that the Respondent has not met the proportionality requirement of the ***Oakes*** test

Disposition

[93] I conclude that only the Deposit Requirement Provision of the *Act* is in breach of the *Charter* right of each citizen to be eligible to participate meaningfully in the electoral process as a candidate.

[94] As such, I declare that s 67(4)(a) of the *Act* is of no force and effect.

Heard on the 28th day of June, 2017.
Dated at the City of Edmonton, Alberta this 25th day of October, 2017.

Justice A.B. Inglis
J.C.Q.B.A.

Appearances:

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