

Heed v. The Chief Electoral Officer of B.C., 2011 BCSC 1181 (CanLII)

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Heed v. The Chief Electoral Officer of B.C.*,
2011 BCSC 1181

Date: 20110831
Docket: 10-5096
Registry: Victoria

Between:

Kash Heed

Petitioner

And

The Chief Electoral Officer of B.C.

Respondent

Before: The Honourable Chief Justice Bauman

Reasons for Judgment

Counsel for the Petitioner:

G.K. Macintosh, Q.C.

D.E. Gruber

Counsel for the Respondent:

D.A. Farquhar, Q.C.

Place and Date of Hearing:

Kelowna, B.C.

July 12, 2011

Place and Date of Judgment:

Victoria, B.C.

August 31, 2011

[1] Kash Heed was elected to the Legislative Assembly of British Columbia in the general provincial election of May 2009. He enjoyed a slim plurality of 748 votes.

[2] After the election, concerns arose as to the accuracy of the Election Financing Report filed on Mr. Heed's behalf pursuant to the *Election Act*, R.S.B.C. 1996, c. 106 [EA].

[3] The concerns centered on the possibility that Mr. Heed incurred election expenses during the campaign period in excess of \$70,000 contrary to EA, s. 199(1)(b).

[4] This has led to the amended petition brought by Mr. Heed before this Court under EA, ss. 225 and 219.

[5] Mr. Heed seeks this relief:

- (1) an order permitting him to file a Supplementary Election Financing Report without paying a late filing fee; and
- (2) upon such a report being filed, an order relieving Mr. Heed from penalties under EA, s. 217.

[6] The Supplementary Election Financing Report which Mr. Heed proposes to file discloses that he incurred expenses "subject to limits during campaign period" of \$75,578.90. EA, s. 199(1)(b) limits those expenses to \$70,000.

[7] EA, s. 217(1) provides for two potential penalties in a case such as this:

217 (1) Unless relief is granted by a court under section 219, a candidate whose election expenses exceed the applicable election expenses limit is subject to the following penalties:

- (a) in the case of a candidate who is declared elected as a member of the Legislative Assembly, at the applicable time under subsection (3) the member ceases to hold office and the seat of the member becomes vacant;
- (b) in all cases, the candidate must pay to the chief electoral officer a penalty of double the amount by which the election expenses exceed the limit.

[8] The Chief Electoral Officer enjoys full standing on this application pursuant to EA, ss. 12(1)(d) and 219(4).

[9] The essential precondition to the granting of relief under EA, s. 225(5)(b) (extending the time for filing without payment of the late filing fee) and EA, s. 219(5)(a) (relief from the penalties for exceeding expense limits) is a finding by the Court that "in relation to the non-compliance, the financial agent and, if applicable, the candidate ... have acted in good faith".

[10] On this application, the Chief Electoral Officer does not oppose the extension of time for filing the Supplementary Report, nor does he oppose the granting of relief from the loss of office under s. 217(1)(a). However, as a matter of principle, the Chief Electoral Officer maintains that Mr. Heed should not be shielded from the penalty prescribed by EA, s. 217(1)(b).

[11] I turn to outline the facts in more detail.

[12] Mr. Heed was a novice candidate in the 2009 election. Prior to entering politics, he was a police officer and latterly, Chief Constable of the West Vancouver Police Department.

[13] Upon resolving to enter the campaign for the seat in the Vancouver-Fraserview riding, Mr. Heed appointed the former incumbent's Official Agent - Barinder S. Sall - as his principal campaign officer. He also appointed the following officials to his campaign:

- Satpal Johl - Financial Agent
- Ken A. Johnson - Deputy Financial Agent
- Robert Ikoma - Auditor

[14] The amended petition alleges that Mr. Heed "heavily relied on the expertise of the above-noted campaign staff to honestly and accurately perform their roles". The amended petition states:

The petitioner particularly relied on Mr. Sall to coordinate all aspects of the campaign including collecting donations and paying any campaign expenses.

[15] Mr. Heed apparently only met Mr. Johl, the Financial Agent, once, while door-knocking during the campaign. Mr. Johl had experience as a Financial Agent in a previous campaign.

[16] After the conclusion of the election, Mr. Johl prepared and filed an Election Financing Report in accordance with the provisions of the *EA*.

[17] The chronology thereafter is set out in the affidavit of Nola Western, Assistant Chief Electoral Officer (Funding and Disclosure):

3. On August 7, 2009, Elections BC received the election financing report for Kash Heed, dated July 31, 2009, from his financial agent, Satpal Johl.

4. Elections BC staff member, Vanessa Tull in September and October of 2009 was in contact with Satpal Johl concerning some minor issues that required clarification with respect to the election financing report as well as asking for additional information which was then obtained with the understanding that Ms. Tull would make the necessary amendments to the election financing report which were then to be sent to Mr. Johl.

5. The foregoing is consistent with Elections BC's practices regarding election financing reports which is to work with the financial agent to clarify or correct reports as necessary.

6. In May of 2009, Elections BC became aware of pamphlets that had been delivered as election advertising during the April/May provincial election campaign which did not meet the requirements of the *Election Act* in that they did not identify the sponsor as required by Section 231 of the *Act*.

7. On November 26, 2009, Elections BC was advised by the Royal Canadian Mounted Police that they verily believed that the pamphlets had been prepared by Kash Heed's campaign and that his election expenses limit had been exceeded because the value of the pamphlets had not been included in the election financing report.

8. On February 9, 2010, then Chief Electoral Officer, Harry Neufeld, after speaking with the RCMP decided that an audit of the financial records of the Kash Heed campaign should be conducted in accordance with Section 276 of the *Election Act* to determine if all election expenses were reported in the election financing report.

9. On February 9, 2010, Elections BC instructed Rosanne Terhart of Blair Mackay Mynett Valuations, Inc. to conduct an audit of the Kash Heed election financing report.

10. On June 3, 2010, Elections BC received a report from the auditor indicating that the total campaign period election expenses for the Kash Heed campaign were \$74,135.70 which was in excess

of the legislated spending limit of \$70,000.00.

11. On June 15, 2010, Elections BC wrote to Satpal Johl advising that the results of the audit conducted by Blair Mackay Mynett Valuations, Inc. indicated the election financing report did not report all election expenses or political contributions and that, pursuant to Section 212 of the *Election Act*, a supplementary report had to be filed within thirty days of the financial agent's receipt of the letter. This letter was copied to Kash Heed.

[18] Mr. Johl had by that time retained counsel, as had Mr. Heed. Various extensions to the deadline for filing the Supplementary Election Financing Report were granted by the Chief Electoral Officer. By early August 2010, the RCMP had delivered to Mr. Johl various campaign documents seized from the auditors, Blair Mackay Mynett Valuations, Inc.

[19] I return to the chronology set out in Mr. Heed's Affidavit #2:

2. On or about April 6, 2010, I became aware that I was under investigation by the RCMP. Among the charges being considered was a charge under s. 266 of the *Election Act*, which, if approved, would have alleged that I had violated the provision by reason of the fact that my election financing report was false or misleading.

3. As noted in my Affidavit #1, on May 3, 2010, then Special Prosecutor Terrence Robertson, Q.C., reached a charge approval decision in which he determined that there was nothing to show that I had any personal knowledge that the Election Financing Report was false, and furthermore, that given the facts that gave rise to the obstruction charges against Barinder Sall and Dinesh Khanna and the charge of falsification of a document against Barinder Sall, there was no substantial likelihood I would be convicted because even with the exercise of reasonable diligence, I could not have known about the conduct of Barinder Sall and Dinesh Khanna.

4. However, Mr. Robertson, Q.C., did approve a charge against my financial agent, Satpal Johl. As set out in page 42 of the Exhibits to my Affidavit #1, Mr. Johl was charged with failing to ensure that all election expenses were properly recorded for the purpose of the *Election Act* in contravention of s. 177(2)(a) of the *Election Act*, and contrary to s. (1)(b) of the *Election Act*.

5. As referred to in paragraph 27 of my Affidavit #1, following the charge approval decision, Mr. Robertson, Q.C., stepped aside because of a possible conflict of interest. He was replaced as Special Prosecutor by Peter Wilson, Q.C. Mr. Wilson, Q.C., was responsible for reviewing the charge approval decisions reached by Mr. Robertson, Q.C.

6. Following the appointment of Mr. Wilson, Q.C., the RCMP continued its investigation including with respect to a possible charge that I had violated s. 266 of the *Election Act* by virtue of the filing of a false or misleading election financing report.

7. Following the commencement of the investigation into me, I became aware through my counsel that both my official agent, Barinder Sall, and my financial agent, Satpal Johl, had each retained their own lawyers. Mr. Sall was represented by Richard Peck, Q.C., and Mr. Johl was represented by George Cadman, Q.C.

8. Based on my years of experience as a police officer, I recognized that it would be imprudent for me to have any personal contact with either Mr. Sall or Mr. Johl during an active investigation. Although I was confident I had done nothing wrong, I wanted to be careful to avoid any appearance of collusion. For this reason, all communications from April 2010 onward between me and Mr. Sall or Mr. Johl were conducted through counsel.

9. Although I was relieved that I had not been charged when Mr. Robertson, Q.C., reached his

charge approval decision on May 3, 2010, I was surprised and disappointed by the approval of charges against Mr. Sall and Mr. Johl. When I had appointed Mr. Sall to manage my campaign, I understood him to be a person of integrity and experience in the running of election campaigns. While the charges against him remain unproven, I was shocked and dismayed to learn that a Special Prosecutor considered there was a substantial likelihood that he would be convicted of them.

10. While I did not personally know Mr. Johl, he had been introduced to my campaign through Mr. Sall and through my deputy financial agent, Ken Johnson, both of whom had confidence in Mr. Johl. I was therefore similarly shocked and dismayed by Mr. Robertson, Q.C.'s conclusion that there was a substantial likelihood of a conviction of an *Election Act* offence against Mr. Johl.

11. As discussed in my Affidavit #1, and in the Western Affidavit, I did receive copies of correspondence between the Office of the Chief Electoral Officer and Mr. Johl or Mr. Johl's counsel, Mr. Cadman, Q.C. I did not receive the other material provided to Mr. Johl referred to in the Western Affidavit.

12. Given my experience as a police officer, I recognized that Mr. Johl was in a very difficult position. He had been charged with failing to ensure that all election expenses had properly been recorded in the Election Financing Report. If he filed a Supplementary Election Financing Report, as demanded by the Chief Electoral Officer, that might be taken as an admission of guilt in respect of the charge he was facing. It therefore did not surprise me to learn from my counsel, David Gruber, that through discussions Mr. Gruber had with Mr. Cadman, Q.C., he learned that Mr. Johl's position was that Mr. Johl had no information upon which he could determine that a Supplementary Election Financing Report was required.

13. Because the RCMP investigation into me was ongoing after the appointment of Peter Wilson, Q.C., as Special Prosecutor, I was also in a difficult position. If Mr. Wilson, Q.C., were to approve a charge against me under s. 266 of the *Election Act*, my defence would be that I did not know that the Election Financing Report that had been filed on my behalf was false or misleading and that with the exercise of reasonable diligence, I could not have known it was false or misleading.

14. Nevertheless, following receipt of the Western Affidavit, my counsel requested copies of the Blair Mackay Mynett forensic audit reports that are referred to in the Western Affidavit. Copies of those reports were received in February 2011. A copy of the Blair Mackay Mynett report of April 28, 2010, is attached and marked as Exhibit "A" to this my Affidavit. A copy of the Blair Mackay Mynett report of June 3, 2010, is attached and marked as Exhibit "B" to this my Affidavit.

15. These reports further reinforced my surprise in that they appear to validate the conclusion that Mr. Sall, whom I earnestly wished still to believe was a person of high integrity, may have engaged in deceitful behaviour to subvert safeguards against overspending in the *Election Act*. Indeed, it is indicated in the reports that he involved my brother Jerry in part of this conduct. I had determined from my brother Jerry that the statements regarding solicitation of supposed third party election sponsorships from persons who intended to support the campaign were accurate. My brother Jerry was advised by Mr. Sall that such a practice was normal and above board, and had believed Mr. Sall.

16. Following my review of the Blair Mackay Mynett reports and in light of the information from my brother Jerry, I determined to engage my own forensic accountant to advise me as to what steps I should take. At this stage, Mr. Johl was still facing a charge under the *Election Act*, so it was likely that if I determined a Supplementary Election Financing Report should be filed, I would have to replace Mr. Johl as my financial agent.

17. On April 8, 2011, Mr. Wilson, Q.C., issued his decisions with respect to charge approval. Mr. Wilson, Q.C., concluded that Mr. Robertson, Q.C., had been correct in declining to approve charges

against me. The media statement issued in connection with that statement is attached and marked as Exhibit "C" to this my Affidavit. As set out therein, Mr. Wilson, Q.C., concluded that "There is no reliable, independent evidence proving that Mr. Heed knew of, or could with reasonable diligence have learned of, any unreported election expenses".

18. Mr. Wilson, Q.C., also concluded on the basis of further evidence that had been gathered by the RCMP that the previously approved charge against Mr. Johl should be stayed and no further charges laid against him. In light of the charges approved against Mr. Sall of obstructing an Election Official under the *Election Act* by telling a false story contrary to s. 265(1)(e) of the *Election Act* and paying an election expense, advertising, other than through a financial agent contrary to s. 193(4) and 263 of the *Election Act*, it appears to me that Mr. Wilson, Q.C., must have concluded that Mr. Johl had acted properly and with reasonable diligence, and was not to blame for the alleged conduct of Mr. Sall.

[20] Thereafter, Mr. Heed concluded that it was appropriate to file a Supplementary Election Financing Report to reflect the findings in the Blair Mackay Mynett report. Mr. Heed deposes:

While the charges against Mr. Sall are still pending and remain unproven, it appears to me prudent to ensure that all expenses that may have been incurred by my campaign are declared.

[21] Mr. Johl also filed an affidavit on this application. For his part, he deposes:

5. Shortly after I accepted the appointment, I met with both Ken Johnson and Sall and provided clear verbal instruction as to the procedures which needed to be followed, particularly with respect to authorization of expenses. I made it clear that, as financial agent, all expenses for the campaign needed to be authorized and paid for by and through me. I told everybody I dealt with on the campaign, including Mr. Johnson and Sall that anything that had to be paid or anything that was an expense, I had to see it and approve and pay it. There were to be no exceptions.

...

8. Throughout the course of the campaign, I was clear with Sall and others working on the campaign, and kept reminding them, that any expenses had to go through me. I was absolutely clear with them that if any expenses were incurred, they needed to be authorized and paid for by me as Financial Agent out of the campaign account.

[22] Mr. Johl deposes that he did not authorize or have any knowledge of the expenses which exceeded the spending limit.

[23] I would make two basic observations about the statutory scheme as it relates to granting relief from the potential penalties noted above. The parties concurred with these conclusions.

[24] First, a finding that the Financial Agent and the the candidate "have acted in good faith" does not then require the Court to grant relief under *EA*, ss. 219(5)(a) and 225(5)(b). The Court still enjoys a discretion (of course, to be exercised judicially) to grant the requested relief.

[25] Second, that discretion may be exercised in favour of relief from one or more of the penalties, that is, relief from the penalties is not an all-or-nothing exercise.

[26] I conclude, on the whole of the evidence, but in particular on the basis of Mr. Wilson's report, that Mr. Heed and Mr. Johl have acted in good faith in these matters. I accept the Chief Electoral Officer's view that justice will be served if the Court grants the requested relief under *EA*, s. 225(5)(b) and *EA*, s. 217(1)(a).

[27] However, I decline to grant relief from the penalty prescribed by *EA*, s. 217(1)(b) - a penalty of double the amount by which the election expenses exceed the limit.

[28] I agree with the Chief Electoral Officer that these applications must be carefully scrutinized by the Court. The integrity of an election to such high public office must be guarded with assiduity. Nothing must be *pro forma* in the Court's treatment of such applications.

[29] I also agree with the Chief Electoral Officer that in the circumstances here, granting relief from the s. 217(1)(b) penalty would run counter to the need to impose some responsibility on the candidate for the conduct of his campaign and the actions of those whom he chose to run it. Regardless of Mr. Heed's inexperience in campaigning and his personal good faith in the conduct of his campaign, that campaign has apparently seen a serious breach of a critical provision in the *Act*. Responsibility for the conduct of the campaign rests ultimately with the candidate. Section 199(1)(b) talks of a limit for expenses "incurred by a candidate"; s. 209(1) requires a Financial Agent to file the Election Financing Report "on behalf of the candidate". In this case, at least, it is necessary to bring home to the candidate responsibility for the mistakes made, without his knowledge, but on his behalf. That can be done in a measured way by granting the relief I have noted, but declining to do so in the case of the penalty under s. 217(1)(b).

[30] There will be orders accordingly. Mr. Heed will bear the costs of this application.

"The Honourable Chief Justice Bauman"