Court of Queen's Bench of Alberta

Citation: Heather v Elections Calgary, 2022 ABQB 32

Date: 20220113
Docket: 2101 14209
Registry: Calgary

Between:

Larry R Heather, Benjamin Shepherd and Carolina (Carla) Evers

Applicants/Plaintiffs

- and -

Elections Calgary, City of Calgary Clerk's Department, Postmedia Calgary, Calgarians for a Progressive Future PAC and Jyoti Gondek Mayoral Campaign

Respondents/Defendants

Reasons for Judgment
of the
Honourable Mr. Justice N.E. Devlin

I. Introduction

[1] Larry Heather and Carolina Evers [the "Applicants"] seek leave to challenge the legality of the 2021 Calgary municipal election [the "Election"], and the validity of the victory of the Mayor and several councillors, as well as to prosecute Calgarians for a Progressive Future PAC ["PAC"] and the named media respondents for the election offence of "undue influence".

[2] Under section 127 of the *Local Authorities Election Act*, RSA 2000, c L-21 [the "*LAEA*"], leave is required for this application to go forward. This, in turn, requires the Applicants to show reasonable grounds to believe that the Election was unlawfully conducted or tainted by election offences.

[3] For the reasons that follow, the test for leave is not met and the application is dismissed.

II. Procedural History

[4] The application was filed on November 23, 2021 The matter came before the Court in morning chambers on January 4, 2022. The Applicants explained that they were unable to secure an earlier date when filing. As discussed below, this is outside the limitation period specified by section 127 of the *LAEA*.

[5] Given the urgency of determining issues related to the Election, I opted to hear the matter in full, rather than defer it to a special chambers date. In a hearing lasting almost two hours, the entirety of the Applicants' grounds for leave were argued, together with certain preliminary objections to the proceeding.

III. Nature of the Application

[6] The Applicants raise six "grounds of objection" to the Election. In brief, they allege that:

(i) Calgary's municipal election bylaw fails to conform with section 84(2.4) of the *LAEA*: City of Calgary, by-law No 35M2018, *Elections By-law* (25 June 2018) [the "Election Bylaw"];

(ii) the Election was conducted using electronic voting machines produced by certain manufacturers without an independent third-party audit, and that the nature of the Mayor's victory makes the results suspect;

(iii) Calgary City Council failed to direct the production and release of a verified voters list, and that Elections Calgary is only audited by the City Auditor's Office, which is a conflict of interest;

(iv) the use of 38 advance polls amounted to "an election within an election" and made effective scrutineering and detection of duplicate voting impossible,;

(v) PAC's spending power was enough to "flatten the fund-raising efforts of every other municipal campaign", amounting to "undue influence", and that PAC's relationship with the Jyoti Gondek mayoral campaign "merits closer scrutiny"; and

(vi) media polling and poll-reporting constituted "undue influence" and a "contrivance", under section 117 of the *LAEA*, as it had the effect of robbing voters of their freedom of choice by imprinting them with preferred candidates.

[7] The Applicants seek leave in the form of a "Fiat", under section 127 of the *LAEA*, to bring an application for *quo warranto*, challenging the outcome of the Election, trying the allegations of undue influence, and overturning the election of Mayor Gondek and other unspecified councillors said to have benefited from the undue influence of PAC and the media.

IV. The Relevant Legislative Framework

[8] Municipal elections in Alberta are governed by the *LAEA*. Part 5 of the legislation deals with controverted elections. It begins by creating two provincial offences: bribery and undue influence, the latter of which is constituted in the following terms:

> **Undue influence**
>
> 117 A person commits the offence of undue influence who
>
> (a) directly or indirectly by himself or herself or by any other person on his or her behalf,
>
> (i) makes use of or threatens to make use of any force, violence or restraint,
>
> (ii) inflicts or threatens the infliction personally or by or through any other person of any injury, damage, harm or loss, or
>
> (iii) in any manner practises intimidation, on or against any person in order to induce or compel any person to vote or refrain from voting, or to vote for or against a particular candidate, bylaw or question, at an election, or on account of an elector having voted or refrained from voting at an election, or
>
> (b) by abduction, duress or any fraudulent device or contrivance
>
> (i) impedes, prevents or otherwise interferes with the free exercise of the franchise of an elector, or
>
> (ii) compels, induces or prevails on an elector to give or refrain from giving the elector's vote, or to vote for or against a candidate, bylaw or question, at an election.

[9] The *LAEA* provides that these two provincial offences may be tried within the application for a prerogative remedy relating to an election, before the Court of Queen's Bench:

> **Oral evidence**
>
> 119 When on an application in the nature of a quo warranto a question is raised relating to whether the candidate, elector or other person has been guilty of bribery or undue influence, oral evidence shall be used to prove the offence, and evidence by affidavit may not be used to prove the offence.
>
> [emphasis added]

[10] Two distinct remedial provisions then follow. The first of these is specific to candidates found guilty of bribery or undue influence, and disqualifies the guilty party from the office which they are shown to have improperly obtained. The second imposes penal sanctions for individuals found guilty of either of these offences. The remedial provisions read as follows:

Forfeiture of seat

120 A candidate elected at an election who is found guilty, on the hearing of an application in the nature of a quo warranto, of bribery or of using undue influence

(a) forfeits the elected office, and

(b) is ineligible to be nominated as a candidate until after 2 general elections have taken place following the candidate's conviction.

Penalty for bribery or undue influence

121(1) A person adjudged guilty of bribery or undue influence is liable to a fine of not more than $5000 or to imprisonment for not more than 2 years or to both a fine and imprisonment and the fine must be paid to the local jurisdiction on behalf of which the election was conducted.

(2) The judge shall direct that, in default of payment of the penalty within the time fixed by the judge, the person adjudged guilty of bribery or undue influence be imprisoned for the period the judge directs, not exceeding 30 days, or until the penalty is sooner paid.

(3) If the person adjudged guilty of bribery or undue influence fails to pay the penalty within the time fixed by the judge, the judge shall issue a warrant for the person's arrest and imprisonment.

[emphasis added]

[11] Forfeiture of office under section 120 and a penal sanction under section 121 are not mutually exclusive. Importantly, however, the fact that jail, and fines enforceable by mandatory jail in default, may be imposed on any party shown to have committed bribery or undue influence, make these penal sanctions to which the full panoply of constitutionally mandated criminal process protections apply: ***R v Wholesale Travel Group Inc***, [1991] 3 SCR 154at paras 64-65; ***R v Wigglesworth***, [1987] 2 SCR 541.

[12] The *LAEA* then goes on to create a strict limitation period for these election-related offences:

Limitation of action

124 No proceedings against a person for bribery or undue influence may be commenced after 6 weeks from the election day in respect of which the offence is alleged to have been committed.

[emphasis added]

[13] The Court of Queen's Bench is given jurisdiction to try matters involving the validity of elections. Standing to bring an application under Part 5 of the *LAEA*, is given to individuals eligible to vote in the impugned election, other candidates, and the municipal authority itself.

Trial of an election

> 126(1) If the validity of an election of a member of an elected authority or the member's right to hold the seat is contested, or if the validity of a vote on a bylaw or question is contested, the issue may be tried by the Court.
>
> (2) The issue may be raised before the Court by
>
> (a) a candidate at the election,
>
> (a.1) the elected authority,
>
> (b) any elector
>
> (i) if the right to sit is by acclamation, or
>
> (ii) if the right to sit is contested on the grounds that a member of the elected authority is ineligible, disqualified or has forfeited the member's seat since the member's election,
>
> or
>
> (c) an elector who gave or tendered the elector's vote at the election.

[14] The party seeking to contest an election is not granted an immediate right to a substantive hearing. They must first seek leave from the Court, in the form of a Fiat, by showing reasonable grounds to believe that the election was invalid, in whole or part. The Court of Appeal summarized this requirement in ***Leung v Smith***, 2002 ABCA 233 at para 2 ["***Smith***"] as follows:

> The *Local Authorities Election Act* requires that one wishing to challenge an election get leave to do so by Notice of Motion for *quo warranto*. That leave application must be in front of a judge within six weeks of the election, and the judge must approve recognizances. The Notice of Motion must then be endorsed by the judge.

[15] Section 127 of the *LAEA*, the key provision permitting commencement of a challenge to an election, defines the procedure for seeking leave as follows:

> **Fiat for application**
>
> 127(1) For the purposes of this section and sections 128 to 138, "respondent" means the party against whom an application is made.
>
> (2) If within 6 weeks after an election the person raising an issue shows by affidavit to a judge reasonable grounds
>
> (a) for supposing that the election was not legal or was not conducted according to law,
>
> (b) for supposing that an unsuccessful candidate was not eligible for nomination and that the results of the election would have been different had that candidate not run,
>
> (c) for contesting the validity of the election of a member of the elected authority, or

> (d) for contesting the validity of the result of a vote on a bylaw or question,
>
> the judge may grant a fiat authorizing the person raising the issue, on entering into a sufficient recognizance as provided by subsection (4), to apply for judicial review for an order in the nature of a quo warranto to determine the matter.
>
> ...
>
> [emphasis added]

[16] This procedure has a distinctly antiquated flavour. "*Quo warranto*" is a Latin expression meaning "by what warrant?". Historically, it is a prerogative writ requiring the person to whom it is directed to show what authority they have for exercising some right, power, or office they claim to hold: ***Heather v Nenshi,*** 2019 ABCA 116 (leave to appeal dismissed, 2019 CanLII 94471) at para 2 ["***Nenshi***"]. "Fiat" simply means the endorsed permission of the Court. "Recognizance" refers to a deposit of money by the applicant, in a now-nominal sum, presumably as security for costs.

[17] The requirements for the initial application are further specified in section 128 of the *LAEA*:

> **Application requirements**
>
> 128(1) An application may either state
>
> (a) the return day of the application, being not fewer than 7 clear days after the day of the service of it, or
>
> (b) that the application will be made on the 8th day after the day of service of the copy of the application.
>
> (2) The person raising the issue shall in the person's application set out the person's name in full, the person's place of residence and the interest, as a candidate, elector or otherwise, that the person has in the election and shall also state specifically under distinct heads
>
> (a) all the grounds of objection to the validity of the election complained against,
>
> (b) if the person raising the issue claims that the person or any other person or persons should have been declared elected, the grounds in favour of the validity of the election of the person raising the issue or of the other person or persons,
>
> (c) the grounds of forfeiture or disqualification of the respondent,
>
> (d) if the person raising the issue claims that the result of the voting on the bylaw should be reversed, the grounds in support of that contention, and
>
> (e) if the person raising the issue makes any other claim, the grounds in support of that claim.

[18] The Applicants followed this procedure. They are now at the stage where the Court must consider whether to permit them (ie: grant a Fiat) to take their complaint to a full evidentiary hearing.

V. Preliminary Objections

[19] The Respondents raise two preliminary procedural concerns which they argue should result in the application being dismissed.

a. Lateness

[20] The application was filed on November 23, 2021, well within the six-week limitation. However, the matter was not brought before the Court until January 4, 2022. The Respondents assert that this falls outside the strict six-week limitation period prescribed by section 127 of the *LAEA*.

[21] In this case, the application was filed in time, but was made returnable outside the six-week window. This satisfies the section 124 requirement to "commence" a proceeding alleging undue influence within six-weeks of the impugned election. However, section 127 requires the Applicants to not only apply, but to make their showing of reasonable grounds within the same period. That has not happened.

[22] The *LAEA* limitation period aims to bring prompt finality to electoral disputes, so that the local authority in question may commence governing without doubts as to its legitimacy. There is neither inherent nor statutory authority to extend this limitations period. In ***Smith*** at para 5, the Court of Appeal dismissed an application under section 127 as a nullity because it was made returnable in the eighth week after the contested election.

[23] Mr. Heather orally advised the Court during the hearing that January 4, 2022 was the first date offered to the Applicants by the filing counter at the Court when they attended to file their application in November, five weeks after the Election.

[24] The application considered in ***Smith*** suffered other procedural defects that make it somewhat distinct. That decision, therefore, does not compel me to dismiss the present application if the late return date was in fact the product of a misunderstanding by the Court clerks as to the nature and urgency of the application. I would not prejudice the Applicants for a delay caused by Court Administration. Therefore, in other circumstances, I would have invited affidavit evidence to resolve why the matter is returning well outside the statutorily prescribed six-week window. However, given my conclusion on the merits of the application, it is unnecessary to consider the issue further in this case.

[25] It must be stressed, however, that the *LAEA* places the onus on the applicant not merely to file, but to *show grounds* within the six-week limitation period. Time is of the essence in determining the legitimacy of elections. The limitation in section 127 is not flexible. Future applicants bear the onus to do everything they can to get these matters before the Court as soon as possible and, at the latest, within the specified time.

b. Should this Matter have Proceeded Against PAC and the Media by way of Information Rather than an Application Under Section 127?

[26] PAC argues that since it is being accused of an offense under section 121, and has no interest in election-specific remedies, the action against it and the media respondents should have been commenced by criminal proceedings on Information, rather than by way of this originating action under section 127 of the *LAEA*.

[27] In my view, section 119 is fatal to this argument. While the private prosecution of provincial offences through a judicial review process is unusual within our legal regime, that appears to be exactly what section 119 contemplates. The question of whether a charge for contravening section 117 *could* be commenced on Information before the Provincial Court is for another day. For present purposes, it is sufficient to apply section 119 literally. It states that an allegation of bribery or undue influence may be determined in a *viva voce* hearing "on an application in the nature of quo warranto". A prerogative writ such as *quo warranto* is within the exclusive jurisdiction of this Court, and the *LAEA* defines "Court" in section 1(i) as the Court of Queen's Bench.

[28] Moreover, there are compelling practical reasons for proceeding before this Court under section 127, even if prosecution of the offences created by Part 5 of the *LAEA* could take place on Information in the Provincial Court. Specifically, the *raison d'être* of this part of the *LAEA* is to expeditiously review, and either confirm or invalidate, a controverted election. The Provincial Court has no jurisdiction to grant remedies in relation to municipal elections. Therefore, a successful prosecution of a *LAEA* offence before that Court would require a further proceeding before the Queen's Bench to impact the outcome of the election. This duplication of proceedings, and the accompanying delay, would be highly counterproductive.

[29] Moreover, the laying of a private Information in the Provincial Court is subject to the pré-enquête procedure in section 507.1(1) of the *Criminal Code*, per section 3 of the *Provincial Offences Procedure Act*, RSA 2000, c P-34. Within this procedure, the Attorney-General has the unfettered right to take to carriage of a proposed prosecution and stay it if they wish: see ***R v McHale***, 2010 ONCA 361. Part 5 of the *LAEA*, on the other hand, provides an unqualified right to individual citizens to pursue their election grievances without potential interference by state actors. It would make little sense for the *LAEA* to permit individuals to pursue election complaints, including those alleging bribery or undue influence, only for this Court to defer them to a process where the case may be stayed at the discretion of the Attorney-General.

[30] Furthermore, the standard to compel a substantive hearing is the same under section 127 of the *LAEA*, as in the laying of a private Information: namely, the demonstration of reasonable grounds to believe the offence has been committed. Therefore, the granting of leave satisfies the same procedural safeguards ensured by the pré-enquête process.

[31] Finally, election complaints are matters of the utmost time sensitivity, as confirmed by the provisions of Part 5. The summary conviction trial process is notoriously slower than what is required to adjudicate election disputes in a timely manner. Leaving this Court waiting for the result of a Provincial Offences prosecution, the outcome of which could potentially void an election, makes no sense when the governing scheme in the *LAEA* grants this Court the jurisdiction to pre-screen, hear, and adjudicate allegations that election offences have been committed.

[32] Therefore, assuming the Provincial Court has jurisdiction to try the two offences created by Part 5 of the *LAEA*, this procedure should not be favoured when offences under sections 116 and 117 are alleged as part of an application for *quo warranto* under section 127.

[33] The Applicants commenced their proceeding as against PAC and the media respondents in time, and by the correct procedural route. PAC's preliminary objection to the manner in which they have been brought into this proceeding is dismissed.

VI. The Fiat Application

[34] The Applicants jointly swore an affidavit in support of their application for leave, as permitted under *Rule* 13.24 of the *Alberta Rules of Court*, Alta Reg 124/2010. This is the evidence on which they must satisfy the reasonable grounds threshold.

a. The Reasonable Grounds Standard

[35] Section 127 places a burden of proof on applicants to show *reasonable grounds* that an election was conducted unlawfully, or that the election of certain individual candidates was the result of bribery, undue influence, or other impropriety. This standard is well known in law. "Reasonable grounds" is the point at which "credibly-based probability replaces suspicion": ***Hunter et al v Southam Inc***, [1984] 2 SCR 145 at 167. Proof to this standard requires less than a *prima facie* case or a showing on a balance of probabilities. It does, however, require more than mere suspicion, and connotes a degree of *probability*, as opposed to mere possibility. "[R]easonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information": ***Mugesera v Canada (Minister of Citizenship and Immigration)***, 2005 SCC 40 at para 114. Determining whether that standard has been met involves "a practical, non-technical, and common-sense assessment of the totality of the circumstances": ***R v Ballendine***, 2011 BCCA 221 at para 53.

b. Ground of Objection #1: Failure to Comply with Section 84(2.4) of the *LAEA*

[36] The Applicants begin by demonstrating a shortcoming in the Election Bylaw. Namely, section 84 of the *LAEA* creates mandatory provisions that *must* be included in any municipal election bylaw that permits the use of electronic voting machines.

> **Alternative voting equipment**
>
> 84(1) An elected authority may by bylaw provide for the taking of the votes of electors by means of voting machines, vote recorders or automated voting systems.
>
> ...
>
> (2.4) If the bylaw referred to in subsection (1) prescribes directions for the use of tabulators, the bylaw must require that the equipment must not be part of or connected to an electronic network, except that the equipment may be securely connected to a network after the close of polls for the purpose of transmitting information to the local jurisdiction.
>
> ...
>
> [emphasis added]

[37] There is no obvious language to this effect in the Election Bylaw. When pressed, counsel for the City of Calgary fairly conceded that it does not meet the dictates of section 84(2.4). Counsel for the Mayor suggested that section 3 of the Election Bylaw functionally satisfies this statutory requirement. That provision deals with discrepancies between the Election Bylaw and the *LAEA*, providing that:

> **Application**
>
> 3(1) This bylaw applies to all elections in the City of Calgary that are governed by the *Act*.
>
> (2) If there is any conflict between a provision of this Bylaw and a provision of
>
> (i) the *Act;*
>
> ...
>
> the latter prevails.

[38] Section 3 of the Election Bylaw does not assist the Respondents. This is not a case of conflict between the two instruments. Rather, the statute creates a mandatory requirement that every election bylaw contain specific language governing the network connectivity of vote counting machines. The Election Bylaw does not contain this language. That is not a conflict with the *LAEA*, but rather a failure to do what the statute requires. I am satisfied that the Applicants have demonstrated that the Election Bylaw fails to comply with section 84(2.4) of the *LAEA.*

[39] That finding, however, is not coextensive with reasonable grounds to believe that the Election was unlawful. Section 127 does not authorize challenges to election validity on the basis of a defect in the relevant bylaw, but rather requires a proffer of evidence that the impugned election was *conducted* unlawfully.

[40] Sections 84(1) and 84(2.1)(b) of the *LAEA* permit municipal bylaws to provide for the use of voting machines and automated voting systems, including the tabulators complained of by the Applicants. The core requirement is that the use of such systems "follow the provisions of [the *LAEA*] as nearly as possible": section 84(2.2). My review of the Election Bylaw indicates that it complies with this requirement. Detailed post-voting procedures are laid out in section 17 of the Election Bylaw, and tabulators are explicitly referenced therein. If these post-voting procedures were complied with, and the tabulators were not connected to an electronic network, except as specified in section 84(2.4) of the *LAEA*, the Election was lawfully conducted.

[41] Critically, the Applicants do not suggest that they have evidence that anything occurred in the Election contrary to the terms of the Election Bylaw, or contrary to the missing term it ought to have contained. They are able to demonstrate only a legislative lacuna in the Election Bylaw itself, but cannot show any actual misconduct. I conclude that this dooms their application for a fiat on their first ground of objection.

[42] Section 127 requires an initial showing of reasonable grounds to believe that an irregularity or illegality *has* occurred. The affidavit evidence of the applicants does not do this in respect of the problem they have identified with the Election Bylaw and its compliance with section 84(2.4). There is no doubt that this section of the *LAEA* both requires that election bylaws contain the prescribed language and substantively that tabulators not be connected to networks

prior to the close of voting, and then only for the purposes of securely transmitting ballot-count data. If evidence were offered suggesting that the prohibited type of connection took place, leave would be granted for a full evidentiary hearing.

[43] That, however, is not the case. Rather, the applicants point to the drafting problem with Election Bylaw and argue that this warrants an inquiry by the Court to audit the conduct of the election in this regard. That is not what section 127 permits. In the absence of evidence that an actual impropriety took place in the conduct of the election, leave cannot be granted. This is neither a discretionary nor equitable decision. Absent that evidence, the Court has no authority to launch any sort of proceeding probing the conduct of an election.

c. Ground of Objection #2: Use of Voting Machines

[44] The Applicants' second complaint is that the City of Calgary used, for the first time, voting machines manufactured by a company known as "ESS", and that there was "no independent third party to auditing[sic] the operation and effect of these machines on the Calgary election."

[45] In support of this complaint, the Applicants offer a series of printouts from the Internet, from websites of unknown reliability, that make certain assertions regarding corporate entities and election practices in other jurisdictions. These materials fall far short of showing reasonable grounds to believe anything improper took place with the City of Calgary's voting equipment.

d. Ground of Objection #3: Lack of a Verified Voters List

[46] The Applicants' third complaint is that Calgary City Council refused to order the production and release of a verified voters list. Mr. Heather argued that it is "a conflict of interest" for City Council to determine whether this list is produced, and suggested that there is no way to check for multiple votes at advance polls in the absence of such a list.

[47] This complaint suffers two flaws. First, section 49 of the *LAEA* permits, but does not mandate, the production of such a list. City Council was well within its statutory rights to not produce it. Second, the Applicants, again, do not offer evidence that any voting irregularities took place. That is what section 127 requires.

[48] The Applicants' further freestanding assertion that it is a conflict of interest for the City Auditor to be the auditors of Elections Calgary similarly does not provide evidence that the Election suffered a defect. The requirement for evidence showing reasonable grounds to believe that an election irregularity occurred has not been satisfied in respect of this complaint.

e. Ground of Objection #4: Use of Advance Polls

[49] The Applicants argue that the use of 38 advance polls made "it impossible for candidate-appointed Scrutineers to observe the voting". They argue that "known abuses have occurred in the 2020 USA federal election and the inequity of lesser-known candidates reaching the voters during the official campaign is cut in half." They argue that this "amounts to an election within an election, and unaccountable contrivance of Undue Influence. And at a massive expense to the taxpayer" [sic].

[50] Once again, the nature of the Applicants' complaint is that irregularities with the Election were harder to detect due to the manner in which in which the Election was conducted, rather

than that such irregularities actually occurred. In Mr. Heather's submission, this facet of the Election "should be looked into by the court because of the *possibility* of problems." [emphasis added] This objection does not meet the threshold requirement for showing reasonable grounds to believe that any irregularity or illegality took place. This Court is not empowered under Part 5 of the *LAEA* to mandate public inquiries or audits of elections.

[51] The reference to debunked suggestions that the 2020 American federal election was in some way irregular also does not assist the Applicants on this point.

f. Grounds of Objection #5 & #6: Actions of PAC and the Media

[52] The Applicants allege that PAC and a number of local newspapers may have contravened section 117 of the *LAEA* by wielding undue influence over the electorate. Their arguments are perhaps best related verbatim:

> Ground of Objection #5: We believe both Undue Influence by Intimidation and the use of a deceptive Contrivances can be proven, and that irregularities should be examined in the case of third-party advertisers and their relationships with particular campaigns of candidates for municipal office. In particular the relationship between Jyoti Gondek Mayoral Campaign and Calgarians for a Progressive Future PAC merits close scrutiny. The city employee related five union backed PAC recorded income in the 2020 year of some 1.7 million dollars. This potential political advertising power of was enough to flatten the fund-raising efforts of every other municipal campaign in the city. This has never been allowed to happen before [sic]. [emphasis added]
>
> ...
>
> Ground of Objection #6: The scheme of Media election polling, psychologically robbing the electors of free of choice by the artificial elimination of considering other possible candidates on the ballot. To quote the relevant portions, Partisan Election Advertising is forbidden in the vicinity of the polling station. But if the media has been successful in imprinting a preferred choice of candidates already in the minds of the voting public before they enter the poll, then this sort of propaganda technique echo chamber should be counted as a form of Undue Influence by the use of a Contrivance [sic].

[53] The Applicants argue that the manner in which PAC and the media participated in the electoral process should be viewed as potentially running afoul of the prohibition against undue influence in section 117 of the *LAEA*. This submission fails both on the burden of proof and on the substantive meaning of undue influence.

(i) Failure to Establish Reasonable Grounds

[54] The affidavit filed in support of the application does not establish reasonable grounds to believe that an offence under section 117 of the *LAEA* was committed. Consistent with their candid approach, the Applicants advised the Court that they were not in possession of evidence that PAC had contravened the terms of its permitted election involvement in any way. Rather, Mr. Heather told the Court that "we can't know that until they submit their documents." While there may be arguable merit to oversight of large-scale financial involvement in elections by third party groups, that is not the purpose or concern of Part 5 of the *LAEA*.

[55] In essence, the Applicants seek a broad judicial inquiry into the conduct of the Election, in the hope that it will uncover improprieties and provoke comment on whether the manner in which the election was conducted served the broader public interest. This is not what Part 5 of the *LAEA* permits. Rather, it directs this Court to examine whether a credible probability of prohibited conduct has been established on the affidavit evidence before it. On the record before me, it has not.

(ii) The Conduct Complained of Would not be Undue Influence in any Event

[56] Section 117 of the *LAEA* must be interpreted in context, in a manner most consistent with its purposes, and consonant with the specific words and concepts in the section: ***National Bank of Greece (Canada) v Katsikonouris***, [1990] 2 SCR 1029 at para 93; ***Rizzo & Rizzo Shoes Ltd (Re),*** [1998] 1 SCR 27 at para 21.

[57] The concepts of "undue influence" and "contrivance" in that section, travel in the company of "bribery", which is made an offence by section 116 of the *LAEA*. Together, these prohibited activities arrive at a penal consequence of imprisonment for a period of up to two years. The key concepts of undue influence are described by the use of words and phrases such as threats to "make use of any force, violence or restraint", the infliction of "injury, damage, harm, or loss", and the practice of "intimidation", or "abduction, duress, or any fraudulent device or contrivance". The entirety of this context leads to the conclusion that "undue influence" is properly understood as narrowly encompassing near-criminal behaviour, of significant moral turpitude, that seeks to coercively overbear the free will of electors.

[58] In ***Nenshi***, the Court of Appeal rejected arguments by Mr. Heather that the concepts of "undue influence" and "contrivance" in section 117 should be given a broader interpretation. I find that the expansion sought by the Applicants to the meaning and scope of these terms to cover otherwise legal and conventionally accepted modes of political discourse in this case must also be rejected.

[59] The prohibition on undue influence in section 117 of the *LAEA* does not seek to place a cap on how successful an individual or entity's attempt at political persuasion may be, but rather limits influence by improper, even criminal, means. Influence is not "undue" within the meaning of section 117 simply because it is successful, arguably disproportionate, or even dominant.

[60] Section 117 does not seek to place a limit on the exercise of constitutionally protected free expression or freedom of the press. Rather, consistent with the guarantee of those fundamental rights, it seeks only to limit modes of influence which are inimical to free and open political discourse: ***Committee for the Commonwealth of Canada v Canada***, [1991] 1 SCR 139 at para 21. Swaying one's fellow citizens to a particular political view is not only allowed, it is core protected expressive activity: ***Harper v Canada (Attorney General)***, 2004 SCC 33 at para 47.

[61] As counsel for PAC pointed out, political advertising by third parties, before and during political campaigns, has long been an aspect of Canadian public life: see ***Lavigne v Ontario Public Service Employees Union***, [1991] 2 SCR 211. Part 8 of the *LAEA* newly regulates the participation of outside groups in local political campaigns. Axiomatically, influence exerted over an election through activity that fully conforms with the requirements and limitations imposed in Part 8 of the *LAEA*, cannot be "undue" and, therefore, an offence under Part 5 of the same statue.

[62] Similarly, the concept of "contrivance" must be read in the full context of section 117(b), which refers to "abduction, duress or any fraudulent device or contrivance". [emphasis added] A contrivance, for the purpose of section 117, is limited, therefore, to acts or instruments of fraud. It does not encompass any and all activities or devices which may influence or impact the outcome of an election, only those that do so in a wilfully wrong and near-criminal manner.

[63] Mr. Heather is right that the impact of "horserace" reporting, and a media penchant for election coverage predicated on polling results, on the health of our democratic system has been the subject of extensive academic and social commentary. That does not, however, bring these practices within the ambit of section 117 of the *LAEA*.

[64] The question of the role played by commercial media in election campaigns may be a fruitful topic for social and political debate. Again, however, the *LAEA* does not give this Court a mandate or jurisdiction to conduct an inquiry into this issue.

[65] There is no evidence before the Court capable of establishing, on reasonable grounds, that any of the named third parties engaged in illegal conduct during the Election.

VII. Conclusion

[66] For the reasons outlined above, the Applicants have failed to show, on reasonable grounds, that the Election was improperly conducted or that the election of any candidate was the product of unlawful activity. Leave to proceed with their application for *quo warranto* is accordingly denied.

[67] The parties may make written submissions on costs, not exceeding five pages, within 15 days of the release of these reasons. If such submissions are made, responses in writing, again not to exceed five pages, may be filed within 15 days.

[68] The Court is grateful to all parties for their concise and helpful submissions on this matter.

Heard on the 04th day of January, 2022.
Dated at the City of Calgary, Alberta this 13th day of January, 2022.

N.E. Devlin
J.C.Q.B.A.

Appearances:

Larry Heather and Carla Evers
Applicants appearing in person

No one appearing on behalf of the Applicant Benjamin Shepherd

Glenn Solomon QC
for Mayor Jyoti Gondek

Leanne Chahley
for Calgarians for a Progressive Future PAC

Jeff Watson and Colleen N. Sinclair
For the Elections Calgary and the City of Calgary Clerk's Department

No one appearing for the named media parties