

Federal Court



Cour fédérale

Date: 20100118

Docket: T-838-07

Citation: 2010 FC 43

Ottawa, Ontario, January 18, 2010

**PRESENT:** The Honourable Mr. Justice Martineau

**BETWEEN:**

**L.G. CALLAGHAN IN HIS CAPACITY AS  
OFFICIAL AGENT FOR ROBERT CAMPBELL  
AND DAVID PALLET IN HIS CAPACITY AS  
OFFICIAL AGENT FOR DAN MAILER**

**Applicants**

**and**

**THE CHIEF ELECTORAL OFFICER  
OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Court is called upon to examine the role exercised by the Chief Electoral Officer (CEO), the named respondent in this application for judicial review, under Part 18 – Financial Administration of the *Canada Elections Act*, S.C. 2000, c. 9 (the Act). Of particular importance to this application are the provisions related to the reimbursement of election expenses claimed by candidates who have participated in a federal election.

[2] The 39th general election took place on January 23, 2006 (the 2006 election). On or around April 23, 2007, the respondent sent letters to a number of candidates of the Conservative Party of Canada (the Party) who participated in the 2006 election, informing them of his decision to refuse to certify certain advertising expenses which had been claimed as election expenses.

[3] The applicants act as official agents of two Conservative candidates, and were among the recipients of these refusal letters. As such, they challenge the legality of the CEO's decision to refuse to certify certain advertising expenses claimed by their particular campaigns (the impugned decisions). They request that the Court set aside these two decisions and force the respondent to deliver new certificates to the Receiver General of Canada (Receiver General) which include the claimed advertising expenses.

[4] While the Court does not endorse all of the arguments made by the applicants, the impugned decisions should be set aside and the matter referred back to the respondent with appropriate directions.

[5] In reaching the above conclusion, the Court has considered the totality of evidence filed by the parties in this proceeding, the representations made by counsel in their written material as well as at the five day hearing held November 23-27, 2009, and the additional documentation and submissions put forward by both parties after the hearing.

## I – LEGISLATIVE FRAMEWORK

[6] Prior to examining the facts relevant to the present application, it is necessary to highlight the purpose of the provisions found in Part 18 of the Act. These provisions deal with, and assist the Court in understanding, the election spending limits, the obligations incumbent on official agents and the basic principles that govern the reporting and reimbursement of expenses incurred by candidates in a federal election.

### A – SPENDING LIMITS

[7] In 1991, the Royal Commission on Electoral Reform and Party Financing (the Lortie Commission) underscored the importance of spending limits with regard to electoral fairness. Among other things, the Lortie Commission made a correlation between political communication, spending limits and voter behaviour. It was noted that political communication has a known effect on voters and that inequalities in the spending capacity of participants (i.e. candidates and/or registered parties) in an election would have a considerable impact on the outcome of the vote, since participants with greater resources would be able to communicate more frequently and with the assistance of different media (Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol. 1 (Ottawa: Communication Group, 1991) at pages 324 and 339 (Chair: Pierre Lortie)).

[8] Six years later, in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, the Supreme Court of Canada confirmed the importance of spending limits in the electoral context. At paragraphs 47 and 48, the Court noted that “spending limits are essential to ensure the primacy of the principle

of fairness in democratic elections” and that “[f]or spending limits to be fully effective, they must apply to all possible election expenses...”

[9] In 2004, Justice Bastarache, writing for the majority of the Supreme Court of Canada in *Harper v. Canada (Attorney General)*, 2004 SCC 33 at paragraphs 102 and 103 (*Harper*), remarked that “[t]he primary mechanism by which the state promotes equality in the political discourse is through the electoral financing regime” and “[i]f Canadians lack confidence in the electoral system, they will be discouraged from participating in a meaningful way in the electoral process”.

[10] At paragraph 62, Justice Bastarache mentions that Parliament has adopted “the egalitarian model of elections”, which seeks to create a “level playing field”; he notes in this regard:

62. [...] Thus, the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power. The state can equalize participation in the electoral process in two ways; see O. M. Fiss, *The Irony of Free Speech* (1996), at p. 4. First, the State can provide a voice to those who might otherwise not be heard. The Act does so by reimbursing candidates and political parties and by providing broadcast time to political parties. Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well. In Canada, electoral regulation has focussed on the latter by regulating electoral spending through comprehensive election finance provisions. These provisions seek to create a level playing field for those who wish to engage in the electoral discourse. This, in turn, enables voters to be better informed; no one voice is overwhelmed by another. In contrast, the libertarian model of elections favours an electoral process subject to as few restrictions as possible.

[11] Section 422 of the Act sets out the formula used to determine the maximum election expenses a registered party may incur during an election. Pursuant to section 423, no chief agent shall incur election expenses on behalf of a party which exceeds the party's spending limit.

[12] The formula used to determine the maximum amount that a candidate may incur as election expenses is set out in sections 440 and 441 of the Act. Pursuant to subsection 443(1), no candidate or official agent (or person authorized to enter into contracts under paragraph 446(c)) shall incur election expenses that exceed the campaign's spending limit.

#### B – ROLE OF THE OFFICIAL AGENT

[13] Before accepting a contribution or incurring an electoral campaign expense, all candidates must appoint an official agent (subsection 83(1) of the Act). The official agent is responsible for administering the financial transactions for the candidate's electoral campaign and for reporting those transactions in accordance with the provisions of the Act (section 436).

[14] During an election, the official agent must open a separate bank account for electoral expenses. All of the candidate's financial transactions involving the receipt or payment of money must be withdrawn from or deposited to this account (subsections 437(1) and 437(3)).

[15] Only a candidate, their official agent or a person whom the official agent has authorized in writing to enter into contracts may incur electoral expenses (subsections 438(5) and 446(c)). Only

the official agent, however, can pay those expenses (subsection 438(4)) or accept contributions to the candidate's electoral campaign (subsection 438(2)).

## C – REPORTING REQUIREMENTS

[16] The reporting scheme established in Part 18 of the Act constitutes an essential component of the electoral financing regime. At the end of an election, candidates' official agents and the parties' chief agents must report their contributions received and their expenses incurred in the manner provided in the Act.

[17] Election expenses reporting requirements for a registered party are found in sections 429 to 434 of the Act. Where the contributions received and the expenses incurred by the party do not need to be reported in the party's election expenses return, they will normally be required to be reported in the party's annual return that must be submitted by the party for each fiscal period (section 424). Furthermore, for each electoral district, these annual returns shall contain a statement of the commercial value of the goods or services provided and of the funds transferred by the registered party to a candidate or an electoral district association (paragraph 424(2)(h)).

[18] In the case of candidates, the reporting requirements are found in sections 451 to 462 of the Act. At the end of an election, the official agent is responsible for providing the CEO with an audited electoral campaign return which includes, *inter alia*, a statement of electoral and other expenses, a statement of the commercial value of all contributions received (monetary and non-

monetary) and a statement of the commercial value of any transfers of funds or goods and services between the candidate and a registered party (subsections 451(1) and 452(2)(a), (b), (f), (i) and (j)).

[19] Together with the electoral campaign return, the official agent shall provide the CEO with documents evidencing the expenses set out in the return, including bank statements, deposit slips, cancelled cheques and the candidate's written statement concerning his or her personal expenses (subsection 451(2.1)). Moreover, the official agent shall, on closing the bank account he or she opened in relation to the electoral campaign, provide the CEO with the final statement of the account (subsection 437(5)).

[20] An auditor's report is also submitted to the CEO along with the electoral campaign return and the declarations made, in the prescribed form, by the official agent and the candidate (subsection 451(1) and section 453). The auditor's report shall include in the prescribed form, a completed checklist for audits and, as the case may be, a negative statement concerning the accuracy and comprehensiveness of the information provided in the financial records. The candidate's auditor fees are part of the electoral campaign expenses of the candidate (section 406).

[21] At any time, the CEO may correct a document submitted on behalf of a candidate, pursuant to subsections 451(1) and 455(1), or a registered party, pursuant to subsections 424(1) and 429(1), if the correction does not materially affect the document's substance (subsection 432(1) or 457(1)). On the written application of the chief agent of a registered party or a candidate or his/her official agent, the CEO may grant an extension of the deadline for submission or permit the correction of

any of the above listed documents. Most notably, such discretion may be exercised where there is evidence of inadvertence or an honest mistake of fact (see paragraphs 433(3)(c) or 458(3)(d)).

[22] Furthermore, the CEO may always request in writing that the registered party, the candidate or the official agent correct a document within a specified period of time, subject only to the right these three entities have to ask to be relieved by a judge from complying with the request (see subsection 432(2), paragraph 434(1)(a), subsection 457(2) and paragraph 459(1)(a)). Such an application is not made to the Federal Court but to "a judge who is competent to conduct a recount". The judge may not grant an order unless he or she is satisfied that the application arose by reason of one of the listed factors, which include inadvertence or an honest mistake of fact (see subsections 434(3) and 459(3)). See also *Conservative Fund Canada v. The Chief Electoral Officer of Canada* (31 December 2009), Toronto 09-8323-00CL (Ont. Sup. Ct.) (*Conservative Fund of Canada*).

[23] Thus, if the CEO is made aware of the expenses that have been erroneously omitted from a candidate's or a party's return, he may request that the return be corrected notwithstanding the fact that a certificate has already been issued pursuant to sections 435 or 465 (addressed below). He may also make a request for an amendment where an election expense was improperly included.

#### D – REIMBURSEMENT BY THE RECEIVER GENERAL

[24] Section 435 of the Act governs the partial reimbursement (50%) of paid election expenses incurred by a registered party. *Inter alia*, reimbursement is subject to compliance by the registered party and its chief agent with the reporting requirements found in sections 429 to 434.

[25] Sections 464 to 470 regulate the partial reimbursement (60%) of paid election and personal expenses incurred by candidates during a federal election. Similar to the scheme set out for registered parties, reimbursement for candidates is subject to the candidate's compliance with the reporting requirements found in sections 451 to 462.

[26] Section 464 of the Act provides that immediately after an election, upon receipt of a certificate issued by the CEO, the Receiver General shall pay a first instalment of money equal to 15% of the candidate's election expenses limit (as calculated in section 440) to every candidate who has received 10% or more of the number of valid votes cast.

[27] According to subsection 465(1) of the Act, the CEO shall provide the Receiver General with a certificate that authorizes the payment of a final instalment if the CEO "is satisfied that [, *inter alia,*] the candidate and his or her official agent have complied with the requirements of subsection 447(2) and sections 451 to 462".

[28] The final instalment is the lesser of: (1) 60% of the sum of the candidate's paid election expenses and their paid personal expenses minus the partial reimbursement granted under section 464, or (2) 60% of the election expenses limit set out in sections 440 and 441 minus the partial reimbursement granted under section 464 (subsection 465(2)).

## E – OFFENCES AND CRIMINAL PROSECUTION

[29] Apart from the provisions in Part 18 of the Act that deal with the administrative treatment of contributions made and expenses incurred during an election, the Act establishes, in Part 19 – Enforcement, a concurrent scheme which permits the Commissioner of Canada Elections (the Commissioner) to investigate any actions which may constitute an offence as defined in sections 480 to 499 (note that sections 500-508 deal with the punishment for the offences enumerated in sections 480-499). These investigations may ultimately lead to criminal proceedings against persons who are believed to be in contravention of the Act.

[30] If the Commissioner believes on reasonable grounds that an offence under this Act has been committed, the Commissioner may refer the matter to the Director of Public Prosecutions (the DPP) who shall decide whether to lay a criminal charge (subsection 511(1)).

[31] Notably, it is an offence for the chief agent of a registered party to exceed the party's spending limit (paragraphs 497(1)(1) and 497(3)(g)). Likewise, it is an offence for the candidate, the official agent or the person authorized in writing to enter into a contract (pursuant to paragraph 446(c)) to exceed the candidate's election expenses limit as established by the Act (subsection 443(1) and paragraph 497(1)(s)).

## II – FACTUAL BACKGROUND

[32] The applicants, L.G. Callaghan and David Pallet, are the official agents of two candidates of the Party, who participated in the 2006 election. Mr. Callaghan acts for Robert Campbell in the

Dartmouth-Cole-Harbour riding (Dartmouth), while Mr. Pallet acts for Dan Mailer in the London-Fanshawe riding (London).

[33] 308 candidates of the Party participated in the 2006 election. The Conservative Fund of Canada (the Fund) was the chief agent for the Party. Along with 65 other official agents for Conservative candidates, election expense claims were made by the applicants with respect to their share in a “regional media buy” (RMB) program put in place by the Party (the claimed advertising expenses).

[34] As is evidenced by the invoices submitted with the participating candidates’ electoral campaign returns, the Fund appears to have been the supplier for this RMB program.

[35] The writs for the 2006 election were issued on November 29, 2005. According to the evidence submitted by the parties, the Party developed its RMB program in early December 2005. This program provided for pools of radio and television advertising to be offered for purchase to selected Conservative candidates throughout Canada (with the exception of Alberta). The amount contributed by each participating campaign was contingent on the availability of space in the official agent's budget, taking into consideration his or her projected electoral expenses. Thus, a candidate could contribute to a regional media buy (RMB) as long as it was within the campaign’s election expenses spending limit. That being said, a campaign could not participate in the RMB program without the agreement of either its candidate or its official agent.

[36] The advertisements (ads) in question were broadcast on television and radio during the 2006 election period (except on the blackout day) in the local area of each participating campaign. The Party was responsible for the production and the content of the ads. Except for the “tag line” which showed the official agent’s authorization, these ads would be the same ones that the Party had already used or was concurrently using in its national campaign to promote the Party and its leader.

[37] When soliciting for participation in the RMB program, the selected campaigns were informed that the Party would finance their campaign's commitment to the program by way of monetary transfers between the Fund and the respective campaigns' bank account.

[38] The evidence shows that the Party did in fact finance candidates' contributions using the following scheme: first, the Fund issued an invoice to the official agent. Simultaneously, the official agent completed a wire transfer form instructing the same amount indicated in the invoice to be transferred from the campaign to the Fund. This wire transfer form was signed and sent back to the Fund, who filled in any missing information. The Fund then prepared a second wire transfer, directing the same amount of money to be transferred from the Fund to the candidate. Finally, after the transfer from the Fund was completed, the wire transfer form completed by the official agent was sent to the bank to have the money paid right back.

[39] Indeed, during the 2006 election, the Fund transferred some 1.2 million dollars to the 67 local campaigns participating in the RMB program. The totality of this amount was returned to the Fund by way of these “in and out” transfers with each participating candidates.

[40] By December 19, 2005, the London and Dartmouth campaigns had both agreed to participate in the RMB program. According to a Party document entitled “ROC CANDIDATE ALLOCATION (as of Dec 19/05)”, both Dartmouth and London had committed to contribute \$10,000.00.

[41] Retail Media Inc. (RMI), the company who was already acting as the supplier/agency of record for the media buys made by the Party, was the intermediary responsible for booking broadcast time for the participating campaigns, including Dartmouth and London.

[42] The Fund eventually billed the Dartmouth campaign an amount of \$3,947.07, including GST, as appears from the invoice numbered MBUYROC050019 dated December 23, 2005, which was duly paid on January 11, 2006. The same amount was claimed as an election expense by the applicant L.G. Callaghan. In the return filed on May 19, 2006 on behalf of Robert A. Campbell (Dartmouth), said election expense is identified as the “2005-2006 Candidate share of media advertisement”.

[43] The Fund also billed the London campaign the amount of \$9,999.15, including GST, as appears from the invoice numbered MBUYROC050013 dated December 23, 2005, which was duly paid on January 10, 2006. The same amount was claimed as an election expense by the applicant David Pallet. Again, in the return filed on May 11, 2006 on behalf of Dan Mailer (London), said election expense is identified as the “2005-2006 Candidate share of media advertisement”.

[44] In both the Dartmouth and London ridings, the ads which ran during the 2006 election contained “tag lines” that identified the ads as having been authorized by the applicants.

[45] By separate, but almost identical letters dated April 23, 2007, the applicants were advised that the claimed advertising expenses would be excluded from the amount that the respondent would certify for reimbursement by the Receiver General, on the ground that the CEO was “not satisfied that the documentation submitted establishes the claimed election expense”.

[46] The present judicial review application was commenced on May 14, 2007. It is noteworthy that similar refusal letters were sent to other official agents of Conservative candidates on April 13, April 23, and on August 27, 2007. While there were 34 official agents originally named in this application, Mr. Callaghan in his capacity as official agent for Robert Campbell, and Mr. Pallet in his capacity as official agent for Dan Mailer, are the only remaining applicants.

### III – REASONS FOR REFUSING TO CERTIFY THE CLAIMED EXPENSES AND THE RELATED EVIDENCE

[47] The impugned decisions were not the result of an analysis conducted solely by the respondent. According to the evidence on record, questions had been raised by Elections Canada representatives during the audit of the electoral campaign returns filed by certain Conservative candidates. It is of note that these concerns, which gave rise to the decision to refuse to certify, were not borne out of the returns filed by the candidates who are represented by the applicants in the present application.

[48] For a couple of months prior to the final decision being made, there were on-going discussions between the Party and Elections Canada. As a result of these communications, the Party supplied Elections Canada with additional information concerning the RMB program.

[49] Elections Canada was informed by the Party in January 2007 that there was “no single contractual document between the registered party of the candidates and the supplier [RMI] that speaks to the arrangements of regional media buy.”

[50] In early April 2007, a meeting was held between Party representatives, including Ms. Susan Kehoe, then Chief Financial Officer of the Fund, and representatives of Elections Canada. During this meeting, the Party requested that Elections Canada attempt no further contact with Conservative candidates on the basis that no further information would be provided.

[51] While the decisions under review are the decisions encapsulated in the two letters addressed to the applicants, dated April 23, 2007, these letters were not the last communication between Elections Canada and the Party. On April 25, 2007, the respondent provided the following reasons in support of his decision to refuse to certify to the Receiver General all RMB expenses claimed by Conservative candidates for the 2006 election that had not already been reimbursed:

...

My decision in relation to the “media buy” program was made on the basis of my assessment of the circumstances surrounding that program, which remain unresolved. Among other things, these included the fact that the internal invoicing between the party and the candidates was not adequately supported by third party documents, coupled with the absence of correlation between the various

campaigns' share of the costs for the advertisements and their commercial value with respect to those campaigns. While there may be different ways of assessing the commercial value, the basis upon which it is done must be a reasonable one. Commercial value cannot be solely based on each campaign's willingness and ability to support a particular amount. This has been in the past, and remains, the position of Elections Canada.

As stated above, the circumstances surrounding the “media buy” are under review by the Commissioner of Canada Elections and you may wish to communicate with him if you have any questions in this regard.

[52] In a nutshell, in addition to reiterating that the information provided by the candidates and the Party was insufficient and raising the issue of the commercial value of the claimed advertising expenses, the respondent politely informs the Party that he has reasons to believe that the Party has done something illegal, hence, his decision to refer the matter for investigation by the Commissioner.

[53] A few months after the present application was initiated, in her affidavit dated January 14, 2008, Ms. Janice Vézina, the Associate Deputy Chief Electoral Officer, Political Financing, and Chief Financial Officer in the Office of the Chief Electoral Officer of Canada, explained that in addition to the grounds of refusal already mentioned, Elections Canada was concerned with the lack of “documentary evidence that could assist in establishing the existence of a contractual arrangement [between] any of the participating candidates in the media buy program [and] the supplier (RMI) for the purchase of the advertising”.

[54] Moreover, Ms. Vézina highlighted the fact that the respondent, in coming to his decision, manifestly considered two important “contextual elements”:

- (a) One was the fact that the content of the advertising itself did not directly promote the candidates who were claiming the expense. As such, the ads failed to dispel the doubts that had already been raised as to whether the expenses were truly expenses of the candidates’ campaigns;
- (b) The other was the fact that the Party was close to its authorized spending limit under the Act, such that it could not claim the ads as a part of its expenses without overspending.

[55] At this point it should be mentioned that the Commissioner is currently investigating whether or not the Party or Fund incurred expenses exceeding their election expenses limit contrary to paragraphs 497(1)(1) and 497(3)(g) of the Act, in addition to whether, contrary to subparagraph 497(3)(m)(ii), the Fund filed an election expenses return that it knew or ought to have known contained a materially false or misleading statement.

[56] As part of this investigation Ronald Lamothe, Assistant Chief Investigator for the Office of the Commissioner of Canada Elections, made an *ex parte* application to the Ontario Superior Court of Justice for a search warrant pursuant to section 487 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[57] This application was granted on the basis of an Information sworn by Mr. Lamothe, and a search warrant was issued enabling the search of the offices of the Party and the Fund. The search

was executed April 15 and April 16, 2008, and some 22 boxes of documents and a number of hard drives were seized.

[58] This being said, the Court was informed by counsel at the hearing that the Commissioner's investigation, which commenced more than two years ago, is still on-going. There has been no formal accusation brought by the DPP under the Act against either the Party or the Fund.

#### IV – THE PRESENT PROCEEDING

[59] Subject to section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the FCA), the Federal Court has exclusive original jurisdiction to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or to grant declaratory relief, against any “federal board, commission or other tribunal” exercising powers conferred upon them by an Act of Parliament (sections 2 and 18 of the FCA).

[60] This supervisory role of the Court extends beyond formal decisions; it encompasses the examination of the legality of a diverse range of administrative actions, including those that maybe taken by the respondent under Part 18 of the Act: *Rae v. Canada (Chief Electoral Officer)*, 2008 FC 246 at paragraph 13 (*Rae*); *Stevens v. Conservative Party of Canada*, 2004 FC 1628, aff d 2005 FCA 383 (*Stevens*).

[61] The question that is now before this Court is whether the respondent can legally refuse to certify for the purposes of reimbursement under section 465 of the Act, the claimed advertising

expenses on the ground that he is not satisfied that these expenses have actually been incurred by the applicants or the candidates for whom they act as official agents.

[62] The applicants are requesting from the Court, a writ of *mandamus* to force the respondent to deliver new certificates to the Receiver General, which include the claimed advertising expenses, and/or a writ of *certiorari* to set aside the impugned decisions either with or without directions for the respondent.

#### V – STANDARD OF REVIEW

[63] *Mandamus* is a remedy used to compel the performance of a public legal duty. In order for the Court to grant an order of *mandamus*, there must exist a legal public duty to act; the duty must be owed to the applicant; the Court must be satisfied that the applicant has a clear right to the performance of that duty; there must be no other adequate remedy available; the order must be of some practical value or effect; there must be no equitable bar to the relief sought; and, the balance of convenience must warrant the issuance of the order: *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 at paragraph 45 (C.A.), aff'd [1994] 3 S.C.R.1100 (*Apotex*).

[64] As such, the issuance of a writ of *mandamus* writ does not require the determination of the appropriate standard of review. When a decision must be made, *mandamus* will apply even if there is discretion as to how the decision can be decided. For example, *mandamus* is still available where the decision-maker has fettered his or her discretion by relying upon irrelevant considerations or otherwise acting contrary to law: Donald J.M. Brown, Q.C. and the Honourable John M. Evans,

*Judicial Review of Administrative Action in Canada*, vol. 1 (Toronto: Canvasback Publishing Inc., 2009) at paragraph 1:3230 (Brown & Evans); *Apotex*, above, at paragraph 45.

[65] If the test for a *mandamus* set out in *Apotex*, above, is met, this Court must issue the order. In certain circumstances, *certiorari* can be combined with *mandamus* because when a decision has already been made, it may be necessary not only to quash that decision, but to force the decision-maker to take specific action: Brown & Evans, above, at paragraph 1:3300.

[66] In the case at bar, if the conditions for the issuance of a writ of *mandamus* are not met, the applicants nevertheless seek an order in the nature of *certiorari* to set aside the impugned decisions.

[67] With regard to the writ of *certiorari*, the applicants argue that the CEO has no discretion under section 465 of the Act to review or consider the accuracy of an electoral campaign return filed by or on behalf of a candidate pursuant to section 451. The applicants suggest that the applicable standard of review is that of correctness and therefore, this Court ought to issue a writ of *mandamus* requiring the respondent, in accordance with section 465 of the Act, to issue a certificate that includes the claimed advertising expenses to the Receiver General.

[68] On the contrary, the respondent argues that the CEO has the discretionary power to conduct a simple audit, a complete audit, or to conduct no audit at all. When the CEO chooses to audit, his decision must be reviewed on a reasonableness standard. This is so, particularly because of the expertise of the CEO and the nature of the question, namely mixed fact and law.

[69] There is no privative clause in the Act preventing the Court from examining the legality of a refusal by the CEO to certify claimed election expenses. Whether or not an expense should be certified for reimbursement by the Receiver General is not a polycentric question; such a determination can only be made on a case by case basis and after an examination of the evidence submitted by each campaign.

[70] The scope and interpretation of section 465 of the Act, which is a jurisdictional provision, is a pure question of law and should be subject to a standard of correctness. Whether or not a particular expense claimed by a candidate or a registered party is an election expense eligible for reimbursement is a question of mixed fact and law. First, the CEO must interpret subsection 407(1) (the definition of election expense), and then, he must apply this definition to the facts.

[71] As noted in *Democracy Watch v. Campbell*, 2009 FCA 79 at paragraph 21 (*Democracy Watch*), unless there is an extricable question of law, questions of mixed fact and law are generally reviewed on the same standard as questions of fact, namely reasonableness. However, where there is an extricable question of law, depending on whether the question is one of central importance to the legal system or outside the scope of the decision-maker's powers, the question may be reviewed on either a standard of correctness or a standard of reasonableness. (*Democracy Watch* at paragraph 22).

[72] In the present application, the respondent's decision to refuse to certify the claimed advertising expenses for reimbursement pursuant to section 465 of the Act necessarily includes an

interpretation of election expense as provided in subsection 407(1). The interpretation of each element mentioned in subsection 407(1) is an extricable question of law. The overall interpretation of subsection 407(1) and its related provisions is of central importance to the legal system.

Moreover, the CEO does not possess a relative expertise over the Court in interpreting the financial provisions contained in Part 18 of the Act. This is implicit from the comments made and the general approach taken by the Federal Court of Appeal in *Stevens v. Conservative Party of Canada*, 2005 FCA 383 at paragraph 26 (*Stevens II*). Therefore, the respondent's interpretation of subsection 407(1) and its related provisions is subject to review on a standard of correctness. That said, the application of this interpretation to the facts, is subject to review on a reasonableness standard.

[73] A reasonableness review involves the determination of whether a decision falls within a range of possible, acceptable outcomes that are defensible with regard to the law as well as the evidence that was before the decision-maker at the time the decision was made (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraphs 46 and 47 (*Dunsmuir*)).

[74] The facts will differ from case to case. In practice, however, a decision by the CEO to certify claimed expenses comes with no reasons, no explanation and no context. Indeed, at the time the impugned decisions were made, the respondent had already accepted to certify the claimed advertising expenses of 17 candidates who participated in the RMB program. In the case of the respondent's refusal to certify the claimed advertising expenses of the other 50 candidates who participated in the RMB program, including the applicants, the reasons given by the respondent are

minimal, to say the least. The letters sent by the respondent hardly permit the Court to follow the reasoning that led to the refusals in question.

[75] With respect to the existence of a “tribunal record,” the Court is left in this case with only the Candidate Contact Log. Summary (Log), pertaining to the two candidates for which the applicants were acting as official agents, and the documentation submitted by the applicants or by the Party on their behalf. Unfortunately, the Logs do not help the Court determine what could have been the specific reasons, if there were any, to exclude the claimed advertising expenses for the purpose of reimbursement.

[76] No deference should be shown to the respondent or any other Elections Canada personnel with respect to the interpretation of the Act. Provided that the requirements mentioned in section 465 are met, the respondent has no discretion to exclude from certification any expense actually incurred by a candidate that constitutes an “election expense” under section 407.

[77] In view of the foregoing, with respect to the legality of the respondent’s refusal to certify the claimed advertising expenses on the ground that there is insufficient documentation or proof on record establishing that these expenses had actually been incurred by the applicants, the Court must consider the circumstances surrounding the RMB program, as well as the facts which are particular to the applicants’ situations.

[78] As stressed by this Court in *Eli Lilly and Co. v. Apotex Inc.*, 2009 FC 991 at paragraph 364, “[s]tandards of review are neither useful nor designed to address situations where the evidentiary record before the Court is different than the one before another decision-maker.” This is the case in the present application, since both the applicants and the respondent have submitted extensive material and evidence which were never before the decision-maker.

[79] Thus, the legality of the impugned decisions must be assessed as if this were a proceeding *de novo*.

#### VI – SCOPE OF THE CHIEF ELECTORAL OFFICER'S DUTIES UNDER SECTION 465 OF THE ACT

[80] As their first proposition, the applicants submit that the respondent is under a legal duty to certify the claimed advertising expenses under section 465 of the Act. According to the applicants, the decision to certify is not a discretionary one; the respondent must simply verify that the documentation referred to in section 451 has been submitted by the candidate and his or her official agent.

[81] In this regard, the applicants submit that the respondent has no jurisdiction to commence an audit into the accuracy of the information contained in the electoral campaign returns; nor does he have the power question the authenticity of any document supporting a claim for reimbursement. The investigating powers of the respondent under section 465 of the Act, if any, amount to “a document review, and nothing more.”

[82] Even in the face of a false document, the applicant asserts that the respondent is required to certify the expense for reimbursement. The only recourse available to the CEO under such circumstances would be his ability to refer the matter to the Commissioner who, unlike the CEO, is empowered to conduct investigations and pursue the prosecution of a candidate and/or his official agent.

[83] According to the respondent, the primary issue in this case is whether it was reasonable for the CEO, in light of the circumstances before him, to decide that the candidates did not incur the election expenses in question. A secondary issue, the respondent submits, is the basis of allocation (or lack of) used by the applicants and the Party in general, to distribute the cost of the RMBs.

[84] The respondent argues that the CEO has the discretionary power to conduct a simple audit, a complete audit, or to conduct no audit at all. Elections Canada's audit process relies on the self-reporting system created by the Act. When an electoral campaign return and its supporting documentation submitted by the official agent and the candidate are in order, the audit process can be relatively straightforward.

[85] However, if a “red flag” is raised in the course of the review of the return, this can result in a higher level of scrutiny that requires additional audit steps to be undertaken. This is what happened in the case at bar according to the respondent.

[86] The Elections Canada audit process for the 2006 election involved the review of electoral campaign returns for over 1,600 candidates. As of January 2008, registered parties had received some 27 million dollars in reimbursement of election expenses, while reimbursement to candidates totalled nearly 24 million dollars.

[87] In the case of 17 of the official agents for Conservative candidates who participated in the RMB program, their electoral campaign returns had already been reviewed and the final instalment of their reimbursement processed before Elections Canada was alerted, in autumn 2006, to the fact that the RMB program might warrant closer examination.

[88] This “red flag” did not come from the applicants, but came from another official agent for a Conservative candidate who demonstrated a lack of knowledge regarding the media buy purchase when speaking with a representative from Elections Canada. Furthermore, during the same conversation, the official agent referred to “contributing” a portion of his candidate’s spending limit to the Party’s “national advertising”.

[89] This led the respondent to make a formal request for additional documentation from all Conservative candidates that listed the claimed advertising expenses in their electoral campaign returns. Ultimately, the respondent was not satisfied that the advertising expenses claimed in relation to the RMB program were actually incurred by the candidates, including the candidates who are represented by the applicants in the present application. This conclusion led to the CEO’s

decision to exclude these expenses from the amount to be certified to the Receiver General for reimbursement under section 465 of the Act.

[90] Some 1.2 million dollars were transferred during the 2006 election from the Fund to the 67 campaigns who agreed to participate in the RMB program. The respondent concedes that “in and out” transactions between a registered party and a candidate, during an election period, are not prohibited by the Act. However, in the present case, the respondent submits that the RMB program was a sham which illegally permitted the Party to transfer to participating candidates the liability it incurred for the broadcasting of national advertising.

[91] At the hearing before the Court, the respondent raised the concern that larger parties who have access to greater resources could, by way of “in and out” transactions, increase their advertising capabilities. Once they reach their spending limits, larger parties could finance their candidates’ advertising campaigns and ensure that the content of these campaigns are equally beneficial to the party’s, or its leader’s, platform. This is what the respondent suggests that has happened during the 2006 election with the implementation by the Party of its RMB program.

[92] The respondent also presses the Court to conclude that allowing the RMB program would render spending limits meaningless and give rise to unwarranted reimbursements. The respondent argues that the Court finding in favour of the applicants in this case would be the equivalent of the Court allowing candidates to avoid their spending limits by transferring their expenses to the Party or to other candidates in less competitive ridings.

[93] In essence, the respondent submits that the Court should give effect to an interpretation of the Act that preserves the integrity of the spending limits and confers discretionary power on the CEO to decline to certify election expenses incurred by campaigns, which have been financed entirely by a registered party.

[94] The applicants reply, however, that it is not for the CEO to determine the appropriateness of the content of ads used by parties and their candidates nor to examine the legality of transfers made by a party to a campaign (as long as these transfers are reported by the party, which is the case here). They submit that local issues are not necessarily the most important elements in a local election campaign. In fact, party or national issues can be more important and since each candidate also represents his or her party in the riding, it should be open to them to use and emphasize the party platform in their advertising campaign.

[95] This is what happened here according to the applicants who submit that they have actually incurred the advertising expenses claimed in their returns.

[96] While the applicants make clear that they are not making a Charter challenge with respect to the CEO's decision, they argue that to look at the content of advertisements and to disallow the use of this type of party "branding" would be to infringe the Charter protected freedom of expression. According to the applicants each candidate and registered party should be free to address any political issue. The CEO has no jurisdiction to regulate the "level playing field" created by the provisions found in the Act (see *Conservative Fund Canada*, above).

[97] The Court dismisses extreme positions taken in this case by the applicants and the respondent. Clearly, the respondent had the right and duty to audit the returns submitted by the candidates who participated in the RMB program. However, the respondent did not enjoy an unfettered discretion to decline to refuse to certify the claimed advertising expenses.

[98] Without this Court coming to a decision, even if the respondent has raised a legitimate issue concerning the inappropriate use of transfers between registered parties, who enjoy broad public financing, and their candidates, Parliament, and not this Court, is the authority suited to make the necessary changes. Nothing would prevent Parliament from amending the Act to limit the amounts that can be transferred during an election from a party to a candidate.

[99] While the democratic right to vote in a federal election is guaranteed to every Canadian citizen by section 3 of the *Canadian Charter of Rights and Freedoms*, there is no provision in the Act, and no judicial declaration made by the Supreme Court of Canada or the Federal Court of Appeal, conferring quasi-constitutional status to the Act or any of its provisions. Furthermore, the respondent has not put forward any argument that alludes to the fact that any constitutional right guaranteed by the Charter or fundamental principle enshrined in the Constitution may come into play in this case if the CEO is not allowed to play an extended role in ensuring that a certain level playing field is respected by participants.

[100] At present time, the CEO is “the independent and neutral steward of the integrity of the electoral process” and “[c]are should be taken to ensure that the impartiality of this critical role is

not unnecessarily compromised – actually or potentially, in the eyes of the public – by enacting a regime that would call upon the Chief Electoral Officer to make judgment calls on how a political party is conducting its internal affairs or spending its funds” (*Longley v. Canada (Attorney General)*, 2007 ONCA 852 at paragraph 74) (emphasis added).

[101] While it is of great important that the integrity of the electoral financing regime be preserved and the Act “seek to create a level playing field for those who wish to engage in the electoral discourse” (*Harper*, above, at paragraphs 62 and 102), Parliament has expressed no clear intention in the Act to empower the CEO to play a general regulatory or supervisory role in the creation or enforcement of rules regarding the financing of electoral campaigns or the conduct of participants. At present, the CEO has not been given the power by Parliament to fill gaps in the Act.

[102] In the Court’s opinion, the powers and duties of the CEO under sections 435 and 465 of the Act are presently limited to the power to audit and verify the accuracy or reasonableness (in light of the legislative reference to “commercial value”) of expenses reported by candidates and registered parties for the purpose of reimbursement by the Receiver General. Thus, the fact that the RMB program put in place by the Party in December 2005 is unprecedented in scale (67 campaigns) and financing (approximately 1.2 million dollars), does not by itself give the CEO licence to refuse to certify advertising expenses duly incurred by the participating campaigns.

[103] The Court accepts that a clear distinction must be made between an audit, which is for the purpose of reimbursement under the Act, and an investigation, which is for the purpose of bringing

a criminal charge under the Act. In the case of a criminal prosecution, the prosecuting party must prove the requisite elements of the offence beyond a reasonable doubt, which may require the proof of intent, before a person can be found guilty by a court. On the other hand, the purpose of the audit is simply to ensure that the candidate and/or registered party are entitled to have their claimed election and/or personal expenses reimbursed.

[104] Thus, the Court reiterates that the CEO has no power under the Act to conduct a general investigation into the manner that a registered party spends its funds or helps finance its candidates' campaigns during an election. Indeed, in cases where the CEO suspects that a person is not complying with the Act, his duty is to refer the matter for investigation by the Commissioner. That being said, the Court cannot endorse the overly restrictive view of the powers under sections 435 and 465 put forward by the applicants.

[105] In the case at bar, the Court is not asked to review the internal affairs of a party; it is the Public Purse that finances the electoral regime. In our democratic society, Parliament decided to improve the participation of individuals and registered parties in the election process by providing a mechanism through which certain electoral expenses could be partially reimbursed with public funds. Given the value of taxpayer dollars, it is necessary to ensure that the contributions received and the expenses incurred by candidates and registered parties are accurately reported.

[106] The amount of funds reimbursed under sections 435 and 465 of the Act can be significant. When it comes to ensuring that that the appropriate sums of money are claimed from Her Majesty

under the Act, there is an analogy that may be made between the role of the CEO and Elections Canada personnel and the role that the Minister of National Revenue and the Canada Revenue Agency exercise under a number of fiscal statutes.

[107] The applicants rely heavily on the general comments that were made on behalf of the Federal Court of Appeal by Justice Décary in *Stevens II*, above. In that case, the Federal Court, and then the Federal Court of Appeal, was called upon to determine the legality a decision by the CEO to authorize the merger between the Progressive Conservative Party and the Canadian Reform Conservative Alliance. It was as a result of this merger that the current Conservative Party of Canada was created. Contrary to the provisions of the Act, the CEO had accepted the merger application on the same day it was filed. The legality of the decision in question essentially turned on the interpretation and application of sections 400 to 403 of the Act, which are not in issue in the present case.

[108] The Federal Court held that there was an error of law because the CEO did not wait the required 30 days before accepting the merger application and amending the registry as required by subsections 400(1) and 401(1)(a) of the Act. However, in exercising her discretionary power, Justice Heneghan refused to set aside the CEO's decision, finding that while made contrary to law, the error had no material effect (*Stevens*, above, at paragraph 118).

[109] The Federal Court of Appeal held that the "general rule" was that the CEO "may and must accept information provided to him assuming that it is being provided by an authorized person and

that it is accurate” (*Stevens II*, above, at paragraph 26). Thus, as it was stated by Justice Décary, “the role of the Chief Electoral Officer, when he is to make a decision on a [merger] application submitted to him, is limited, in general, to ensuring that, on the face of the documents submitted by persons duly authorized, the conditions required by the Act are met” (*Stevens II*, above, at paragraph 27) (emphasis added).

[110] In my humble opinion, what was stated by Justice Décary cannot be applied to the context of an audit of election and personal expenses claimed by a registered party or a candidate for the purpose of reimbursement by the Receiver General pursuant to sections 435 and 465 of the Act. In the case of a merger application, what is in issue is really the will of the merging entities. Hence, it would be surprising if the Act allowed the CEO to embark on an inquiry into the circumstances behind a merger, when this is really an internal matter between the members of particular political parties.

[111] As recognized in the jurisprudence and doctrine, “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 at paragraph 26; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at paragraph 21; Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at page 87). As a result, the interpretation of section 465 of the Act cannot be divorced from its place within the Act or from its place within the legislative scheme designed for reporting electoral expenses incurred by registered parties and candidates.

[112] While the CEO's powers have been characterized as "mechanical" (*Stevens II*, at paragraph 19), pursuant to paragraph 16(d) of the Act, the "Chief Electoral Officer shall [...] exercise the powers and perform the duties and functions that are necessary for the administration of this Act" Indeed, with respect to a candidate's electoral campaign return, the Act specifically allows the CEO to require the official agent to provide by a specified date, any additional documents the CEO deems necessary, if he is of the opinion that the documents evidencing expenses set out in the electoral campaign return are not sufficient (see subsection 451(2.2)).

[113] In accordance with section 465 of the Act, before providing the Receiver General with a certificate, the CEO must be "satisfied that the candidate and his or her official agent have complied with the requirements of subsection 447(2) and sections 451 to 462" (emphasis added). This requires the CEO to be satisfied that the election expenses return accurately reports the election expenses of the candidate.

[114] For this to be the case, the expenses reported as election expenses must have been incurred by the campaign and they must be reported at their commercial value (see sections 406, 407 and other related provisions). These requirements necessitate that the CEO have the power to conduct an audit of the electoral campaign return and other documents referred to in section 451.

[115] This now brings us to the examination of the legality of the impugned decisions in light of sections 406 and 407 and the related provisions of the Act which address the issues of election expenses and their proper reporting.

## VII – WHAT CONSTITUTES A REASONABLE ELECTION EXPENSE INCURRED BY A CANDIDATE?

[116] In determining what constitutes a reasonable election expense incurred by a candidate, and more particularly, in order to determine whether an election expense has been reasonably incurred by a candidate if it was incurred for the purpose of contributing to a regional media buy organized by a registered party, the Court will first review a number of basic legal concepts and then examine the past practices of the CEO.

### A – BASIC LEGAL CONCEPTS

[117] Pursuant to section 406 of the Act, an “electoral campaign expense of a candidate” is “an expense reasonably incurred as an incidence of the election”, and it includes, *inter alia*, an "election expense" and a "personal expense" as defined in sections 407 and 409, respectively.

[118] A personal expense of a candidate is an electoral campaign expense, other than an election expense, that is reasonably incurred by the candidate in relation to his or her campaign (section 409). A candidate’s personal expenses are not subject to the election expenses limit.

[119] Candidates and registered parties share a common definition of election expense, which is found in subsection 407(1) of the Act:

<b>407.</b> (1) An election expense includes any cost incurred, or non-monetary contribution received, by a registered party or a candidate, to the extent that the property or service for which the	<b>407.</b> (1) Les dépenses électorales s’entendent des frais engagés par un parti enregistré ou un candidat et des contributions non monétaires qui leur sont
---	---

<p>cost was incurred, or the non-monetary contribution received, is used to directly promote or oppose a registered party, its leader or a candidate during an election period.</p>	<p>apportées, dans la mesure où les biens ou les services faisant l'objet des dépenses ou des contributions servent à favoriser ou à contrecarrer directement un parti enregistré, son chef ou un candidat pendant une période électorale.</p>
---	--

[120] When one reads subsection 407(1) of the Act in conjunction with the reporting requirements applicable to both registered parties and candidates (sections 429 to 434 and sections 451 to 462, respectively), to satisfy the definition of election expense, the following three criteria must be met: (i) the expense must be incurred by the entity reporting the expense; (ii) the goods or services for which the expense is incurred must be used during the election period; and (iii) the goods or services for which the expense is incurred must be used “to directly promote or oppose a registered party, its leader or a candidate”. This third element is sometimes referred to as “the purpose test.”

*Expense incurred by the entity reporting the expense*

[121] In the *Oxford English Dictionary*, 2d ed., the verb “incur” is defined as: “...to become through one's own action liable or subject to; to bring upon oneself... [t]o cause to be incurred; to bring on or upon (some one); to entail...” Likewise, in the *Black's Law Dictionary*, 9th ed., the verb “incur” is defined as: “[t]o suffer or bring on oneself (a liability or expense)”.

[122] Section 446 of the Act provides that a contract involving an expense in relation to a candidate's electoral campaign is not enforceable against the candidate unless it is entered into by

the candidate personally (paragraph (a)); the candidate's official agent (paragraph (b)); or a person whom the official agent has authorized in writing to enter into the contract (paragraph (c)).

[123] In this regard, paragraph 446(c) has to be understood in relation to its actual purpose, which is to protect local campaigns from being held liable for expenditures that could be in excess of their spending limit, that neither the candidate nor the official agent authorized. With this in mind, it is clear that the purpose of section 446(c) is not to prohibit contracts (whether written or oral) entered into by persons other than the official agent or the candidate that are later ratified by the official agent through payment. Payment for a good or service, whether at the time the deal was made or after the good or service is provided, is recognition of a liability or debt incurred.

[124] Accordingly, the Court finds that the respondent, or Elections Canada's representatives, erred in law in requiring that there be actual written contracts between the candidates or their official agents and the supplier of the advertising services that were provided in December 2005 and January 2006. Payment for these advertising services in January 2006, by the official agents of participating candidates, is proof that these services were duly authorized. Moreover, as illustrated below, the requirement to have actual written contracts appears to be contrary to Elections Canada's and the CEO's past practices with regard to RMBs.

*Non-monetary contributions received by a candidate*

[125] Pursuant to paragraph 407(3)(a) of the Act, an election expense includes a cost incurred for, or a non-monetary contribution in relation to the production of advertising or promotional material and its distribution, broadcast or publication in any media or by any other means.

[126] According to subsection 2(1) of the Act, a “contribution” includes both monetary and non-monetary contributions. A “monetary contribution” is defined as an amount of money that is not repayable, while “non-monetary contribution” is defined as the commercial value of a service, other than volunteer labour, or of property or of the use of property or money to the extent that they are provided without charge or at less than their commercial value (subsection 2(1)).

[127] Excluded from the definition of contribution, and therefore not subject to restriction, is the provision of goods or services, or the transfer of funds (other than trust funds) between different political entities, i.e. a registered party, an electoral district association (EDA) or a candidate endorsed by the party (see subsections 404.2(2) & (3) of the Act). This is an important means for both candidates and parties to increase funds available for election expenditures, however, unlike transfers between different political entities, it is prohibited by the Act for a candidate to provide goods and services or to transfer funds to another candidate (see subsections 404.2(2); (2.1); (2.2)).

[28] One of the conclusions that may be drawn from the above information, therefore, is that it is not illegal for a party to incur expenses on behalf of a candidate and then bill a candidate for those expenses. Similarly, it is not illegal for a party to acquire goods or services and then resell them to a

candidate. In both cases, however, the transactions must be duly reported. Where the party transfers funds to a candidate to finance that candidate's purchase of goods or services supplied by the party, the result is what is referred to as an "in and out" transaction.

[129] That being said, any difference between the amount actually paid back to the party and the commercial value of the good or service provided or sold to the candidate (taking into account any amount transferred to the candidate) will have to be reported as a non-monetary contribution received by the candidate. This is because the full commercial value of the good or service provided or sold to the candidate is considered an election expense of the candidate, as explained above.

*Purpose test*

[130] The respondent submits in his written memorandum that the object and scheme of the Act require subsection 407(1) to be read disjunctively, resulting in the following definition:

407(1) An election expense includes any costs incurred, or non-monetary contribution received, by a [ ... ] candidate, to the extent that the property or service for which the costs was incurred, or the non-monetary contribution received, is used to directly promote or oppose [...] a candidate during an election period.

(Emphasis added.)

[131] According to the respondent therefore, to be an election expense for a candidate, the election expense must be used to directly promote or oppose a candidate, and not a registered party or its leader. The Court does not accept the respondent's disjunctive interpretation outlined above. A plain reading of subsection 407(1) does not authorize the Court to discard the words used by Parliament in enacting this provision. Rather, a plain reading favours the conjunctive interpretation that was

found in material published by the CEO prior to the 2006 election. Namely, an election expense for a candidate can be one that exclusively promotes a candidate, or it can be one that directly promotes both a candidate and a registered party or its leader.

[132] In all cases, claimed election expenses, including advertising expenses, must satisfy the purpose test set out in section 407 of the Act. However, a review of the documentary evidence on record confirms that a rather pragmatic and flexible approach has been adopted by Elections Canada and the CEO in ascertaining whether advertising expenses incurred by candidates during an election meet the purpose test.

[133] Indeed, the evidence on record confirms that in the past, the CEO has generally refrained from inquiring into the content of ads, despite the fact that "election advertising" is defined as "the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including one that takes a position on an issue with which a registered party or candidate is associated" (emphasis added) (section 319).

[134] In the 1997 federal election, national political parties were not allowed to conduct advertising on the day before polling day (June 1, 1997) nor on the day of polling (June 2, 1997) pursuant to section 48 of the Act (as it read at the time). That said, the provision in the Act that contained a similar restriction applicable to candidates had been struck down on Charter grounds by the Alberta Court of Appeal in *Somerville v. Canada (Attorney General)* (1996), 136 D.L.R.

(4th) 205 (Alta. C.A.); therefore, while registered parties could not advertise on those days, there was nothing prohibiting candidates from doing so.

[135] In his report on what transpired during the 1997 federal election, the broadcast arbitrator stated as follows:

The criteria applied to determine whether specific advertisements were to be accepted for broadcast were the identity of the sponsor and that of the body or person invoiced. The content of the advertisements accepted was subject only to the freedom of expression guaranteed by the Charter. As a result, a number of individual candidates purchased time on the day before polling and on the actual day of election. Since the time purchased was often used to run a national advertisement with a local tag line, this rendered the prohibition in section 48 (on party advertising) somewhat ineffectual.

(Emphasis added.)

[136] It is important to emphasize that the broadcasting arbitrator accepted as candidate ads what were in effect national ads with a local tag line, provided that the candidate had purchased the time. While the comments made by the broadcast arbitrator relate specifically to those provisions of the Act that deal with broadcasting, there is no evidence in the record that the CEO refused to certify any of the advertising expenses incurred by candidates on the last two days of the 1997 election period.

[137] As a result of the amendments made to the Act in 2000 (S.C. 2000, c. 9), the current Blackout provision prevents everyone from transmitting any election advertising on polling day (see

section 323). Therefore, advertising on behalf of both candidates and political parties is prohibited on polling day and the difficulties encountered in 1997 no longer exist.

[138] Ms. Janice Vézina confirmed during the cross-examination of her affidavit that in addition to the requirements that election advertising be incurred and paid for by the candidate, to be an election expense, the advertising must also promote the candidate (the purpose test). According to Ms. Vézina, this last requirement is met so long as the candidate feels that the advertisement promotes his or her campaign, regardless of the actual content of the candidate's ad. This means that where the ad is the same as one used by the registered party the candidate is affiliated with, it can still be found to satisfy the purpose test.

[139] On this issue, Ms. Véniza stated:

The message has to promote the candidate. The content can include the Party leader, Party logo, Party platform. I think we're mixing the means and the end. The end purpose has to be to promote the candidate, but the means can be to include Party promotion in the candidate's ad... (Applicants' Record, Vol. VI, Tab 16, page 1831).

[140] Thus, Elections Canada auditors, when auditing advertising expenses, will confirm that there are supporting documents that evidence the legitimacy of the amounts claimed, but they do not generally look at or have access to the ads or scripts themselves. In fact, copies of the ads are not typically included in the supporting documentation provided with an electoral campaign return. In many ways, therefore, an advertising expense is generally not looked at any differently by Elections Canada auditors than any other expense.

[141] The inclusion of a particular “tag line” in an election advertisement is not conclusive as to whether the advertising expense meets the requirements of an election expense. Likewise, there could be situations where advertising is broadcast by a candidate without a “tag line” as required by section 320 of the Act, but the expense would still be treated as an election expense of the candidate, for the purpose of reimbursement. In the latter situation, an offence may have been committed under paragraph 495(1)(a) of the Act (failure to indicate authority for election advertising), but the omission of the tag line would not effect the treatment of the expense under Part 18 of the Act.

[142] Over the years, the CEO has published various handbooks that articulate his interpretation of the Act. Among these publications is the "Election Handbook for Candidates, their Official Agents and Auditors" (the handbook). While this handbook provides insight as to how the CEO and Elections Canada have understood certain provisions in the Act at various points in time, it is in no way binding on the Court. Nevertheless, from a practical point of view, candidates and their official agents are strongly advised by the CEO to seek independent legal counsel if they wish to depart from the interpretation adopted by the CEO in the handbook.

[143] The evidence shows that for at least part of the nineties the CEO “consider[ed] adherence to [the] handbook as meeting the statutory handbook requirements for issuing [a] certificate for reimbursement purposes” (see the 1997 handbook). It seems, however, that in more recent times, such assurances were not explicitly included in the handbooks published by the CEO.

[144] Nevertheless, a reading of all the handbooks published by Elections Canada up to, but excluding, the most recent handbook issued in March 2007 (the 2007 handbook), clearly suggests that the CEO will treat as an election expense for the purpose of reimbursement, any cost incurred by a candidate's campaign for the purchase of an ad that is used to promote both the candidate and its affiliated party.

[145] The fact that the same ad would have been used by the party to promote itself on a different occasion would not be considered a reason for refusing to certify such an expense.

[146] This liberal interpretation of section 407 is reflected in the different versions of the handbook published by Elections Canada over time. For example, the handbook issued in December 2005 (the 2005 handbook) provides:

Election advertising

Election advertising means the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party of the election of a candidate, including one that takes a position of an issue with which a registered party or candidate is associated....

Identification of election advertising

All election advertising that promotes or opposes a registered political party or the election of a candidate, including taking position on an issue with which a registered party or candidate is associated, must indicate that it is authorized by the official agent of the candidate.

(Emphasis added.)

[147] Indeed, the handbooks have even provided for the possible situation of a candidate and a party agreeing to share an ad. According to the handbooks, if such a scenario arose, the CEO would review the basis for allocating the cost incurred by each, to verify that it was reasonable. As mentioned in the 2005 handbook:

...The following are examples of transfers:  
[404.2(2), 404.2(3)]

...a proportion of expenses incurred to promote or oppose a candidate or a party. Elections Canada will accept the basis of allocation used by the official agent, provided that it is reasonable in the opinion of the Chief Electoral Officer, and provided that the auditor agrees that the allocation is reasonable and in keeping with this handbook.

[148] At the hearing before this Court, the respondent's counsel explained that in such circumstances, the reasonableness of the allocation would depend on the commercial value of the election advertising and not the content of the ad. The issue would not be whether the message seemed to favour either the party or the candidate more, since this would require an analysis of the content of the ad, which auditors of Elections Canada are simply not trained to do.

[149] Therefore, in practice, aside from the legal limits on the freedom of expression as provided by the Charter, the only restrictions on election advertising are the blackout provision in section 323 and the spending limits established in sections 422, 440 and 441 of the Act. Thus, accurate reporting of expenses incurred during a federal election is essential if any effect is to be given to the prohibition on exceeding these limits.

## B – HYPOTHETICAL SCENARIOS WITH RESPECT TO CLAIMED ADVERTISING EXPENSES

[150] According to the evidence on record, in the purchase of radio or television time, it is common practice for registered parties, through their chief agents, to contract with intermediaries that act as agents of record for the parties in their dealings with broadcasters. These intermediaries, therefore, are the ones then responsible for the booking of advertising time. Consequently, it is also common for registered parties to act as suppliers or agents for their candidates who participate in regional media buys organized by the registered party.

[151] Moreover, the evidence on record, including the practices of other registered parties as set out in the exhibits to Geoff Donald's affidavit (a political operations officer with the Conservative Party), illustrates that there is a presumption that a candidate has incurred an advertising expense if said expense has been paid from the candidate's campaign account.

[ 152] In most instances, RMBs will not pose any problem for the CEO, provided that the expenses are reported by participating candidates and/or the registered party in their respective returns.

[153] Thus, in order to assess the reasonableness of the grounds invoked by the respondent to decline to certify the claimed advertising expenses, it is useful to examine various hypothetical scenarios in which the respondent will generally accept to certify (the first three scenarios) or refuse to certify advertising expenses claimed by candidates (the fourth scenario).

[154] The following four hypothetical scenarios help to illustrate the application of section 407 of the Act with regard to advertising expenses incurred in four different fact situations. It should be noted that the content of the ad is not a concern in any of these scenarios.

First scenario: sharing of an advertising expense between a candidate and a party (or between candidates)

[155] A candidate and a party (or two or more candidates) may decide to jointly incur an advertising expense in order to purchase an ad that promotes both the party and the candidate (or all participating candidates). In this scenario, each contributor pays a portion of the cost.

[156] In practice, one participant may purchase the ad and act as a supplier to the other participants. Another possibility is that one participant obtains written authorization to incur the expense on behalf of all participating candidates (see subsections 438(5) and 446(c)). In any case, only the agent of the participant is allowed to pay the supplier (who may be a different entity depending on how the purchase is structured), since payment must be made in accordance with subsections 416(1) and 438(4).

[157] The portion paid by each participant will constitute an election expense that will count towards their respective spending limits and will give rise to a reimbursement pursuant to sections 435 and 465 of the Act. The portion reported by each participant must reflect the commercial value of the expense, and in this regard, the allocation between the participants must be reasonable (section 406).

[158] For example, if all participating candidates agree to pay 50% of a radio ad and the party agrees to pay the remaining 50%, the party would be required to report as an election expense only its share (representing 50% of the commercial value) of the advertisement. The party would report this election expense either as a paid or unpaid expense, depending on the facts at the time of reporting. If paid, the expense is eligible for reimbursement pursuant to section 435. In either case however, the expense would count towards the party's spending limit (see subsection 407(4) and section 422).

[159] Candidates who have jointly incurred the other half of the advertising expense would similarly report an election expense representing their share. This amount would count towards the candidate's spending limit and if the candidate actually paid their share of the expense, they would be entitled to a reimbursement pursuant to section 465 of the Act.

[160] In either case, if the expense is paid by someone other than the person who incurred it, that payment would represent a non-monetary transfer or non-monetary contribution that would count as an election expense of the recipient for purposes of their applicable spending limit but this transfer would not give rise to any reimbursement.

[161] In the above example, if the amount reported by the party as an election expense does not reflect 50% of the commercial value of the ad, the party may seek to correct its election expenses return. If the party paid more than 50% of the commercial value of the ad, it will need to ensure that the amount reported as an election expense represents only its share, and that any additional amount

paid by the party is reported in the party's annual return as a non-monetary transfer to the candidates (see section 424). Since non-monetary transfers to candidates are permitted, this type of arrangement is not problematic as long as the transactions are properly reported.

[162] On the other hand, if the participating candidates have collectively reported 50% of the commercial value of the ad, but have individually failed to properly report their correct share, the situation is more complex. In the case of multiple candidates who jointly incur an expense, unreasonable allocation (i.e. disregard for the commercial value) may effectively lead to one candidate making a non-monetary contribution to another candidate, a transfer that is not permitted under the Act. However, it is perfectly in line with the Act if the remaining 50% of the ad is properly incurred and reported by one candidate, but benefits other candidates in some unintentional way. These “spill over effects” on neighbouring ridings is unavoidable and of no legal consequence to the other candidates.

Second scenario: purchase of advertising by a candidate from a party

[163] A candidate may be the sole purchaser of an ad from a party acting as the supplier. The entire expense must be reported at commercial value as an election expense of the candidate, and the full value would count towards the candidate's spending limit. If the expense is paid by the candidate, the expense would give rise to a reimbursement.

[164] In this scenario, the party acting as a supplier does not incur an election expense since the goods or services purchased were not used to promote the party, but rather, were sold to a candidate

for use in their election campaign. The party would not report any election expense and no reimbursement would be available pursuant to section 435 of the Act. This type of transaction would be reported in the party's annual financial return (section 424) but not in its election expenses return (section 429).

[165] Whether the candidate relies on money provided by way of a transfer from the party to pay for the purchase of advertising (subsection 404.2(2.2)), or whether the candidate relies on monetary contributions received from individual supporters (section 404) is irrelevant, all that matters is that there was a true purchase and that the goods and services were provided by the party.

[166] It is this second scenario that is illustrated in Exhibits 14 and 16 to Geoff Donald's Affidavit (Applicants' Record, Vol. I, Tab 7, pages 210-220 and 226-234). According to the evidence on record, a group of candidates appear to have jointly purchased a radio ad from the New Democratic Party (NDP) during the 2006 election. Based on the evidence, it seems that the cost of the ad was allocated equally among the candidates, but that the NDP transferred money to the candidates to help subsidize the purchase. Since the NDP provided money to the candidates, the transfer of money would be reported in the candidate's electoral campaign return as a monetary transfer from the NDP as well as in the party's annual financial return as a monetary transfer to the candidates.

[167] As in the hypothetical scenario, the NDP acted as a supplier. It follows that the NDP should not have reported as a party election expense the commercial value of the ads (or any portion of the

cost the ads) used by the candidates to promote their campaign. If it had, this would have been a mistake and a correction could have been sought.

Third scenario: a gift of advertising to a candidate by a party

[168] A party may buy advertising and then give it to a candidate or group of candidates who decide to use it to promote their campaigns.

[169] In this scenario, the purchase of an ad that is provided as a gift (i.e. without charge) to the candidate by the party would not constitute an election expense for the party and would not give rise to a reimbursement pursuant to section 435 of the Act. If it is used by the candidate during the campaign to promote his or her election, the candidate would need to report the commercial value of the ad as a non-monetary transfer from the party. The commercial value of the ad would also constitute an election expense for the candidate and would count towards the candidate's spending limit, but it would not give rise to a reimbursement, because it is not a paid expense (section 465). Finally, the party would be required to report the cost of the ad as an expense and similarly, it would be required to report its gift of the ad to the candidate as a non-monetary transfer. Both of these transactions would be reported in the party's annual financial return (section 424).

[170] That being said, if the party had also used, on a separate occasion, the same ad to promote itself or its leader during the election period, the commercial value of the ad would count as an election expense of the party and would have to be reported as such. The party would be entitled,

however, to have the amount it paid for the use of the ad partially reimbursed pursuant to section 435 of the Act.

[171] A gift may also be made by the party in the case of an ad used to promote both a party and a candidate where the party assumes all or part of the candidate's share. The gift is again treated as a non-monetary contribution. This scenario is addressed by the CEO in the handbook issued in 2000 (the 2000 handbook), 2004 (the 2004 handbook) as well as the 2005 handbook that uses the term non-monetary transfer for the first time.

[172] This type of arrangement is illustrated at Exhibits 34 and 35 to Geoffrey Donald's Affidavit (Applicant's Record, Vol. I, tab 7, pages 359 to 363). These exhibits illustrate a scheme whereby the Liberal Party of Canada in Alberta (the Liberals) transferred funds to Liberal candidates and paid for services on their behalf during the 2004 federal election. Most notably, the Liberals paid for an ad placed in the Edmonton Journal on June 27, 2004, promoting the election of the Liberal leader as well as Liberal candidates from Northern Alberta. While the Liberal candidates clearly used the ad to promote their campaigns, the ad only contains the authorization of a registered agent of the Liberal Party of Canada.

[173] In this example with the Liberals, it can be said that the party made a gift to one or more candidates. The Liberals would not have reported any expense in its election expenses return, and if it had, this would be a mistake and a correction could have been sought.

Fourth scenario: a transfer of advertising expenses from a party to a candidate

[174] While all of the previous scenarios require candidates to report the advertising expense as an election expense under the Act, there is a fourth scenario which would prohibit a candidate from doing so. In this scenario, the candidate would also be ineligible for reimbursement under section 465 of the Act.

[175] Under this scenario, the party incurs an advertising expense for the purpose of promoting itself or its leader. Instead of recording this expense as its own, however, the party illegally transfers or passes on to candidates, who have not incurred the expense, the responsibility to report and claim it. In this scenario, the party ought to report the expense in question as an election expense in its election expenses return pursuant to section 429 of the Act. Since it does not do so, the CEO would be authorized to require the party to correct its return (subsection 432(2)).

[176] In the case at bar, the respondent has taken the position that the advertising expenses claimed by the applicants do not fall under any of the first three scenarios described above. It is the respondent's position that the advertising expenses constitute an illegal transfer of responsibility from the Party to candidates who participated in the RMB program, similar to the one described in the fourth scenario.

[177] The applicants agree that a party is not allowed to incur an expense to promote itself or its leader and then make subsequent arrangements to have the expense in question reported as a

candidate expense. However, the applicants submit that the claimed advertising expenses are truly candidate election expenses and not Party election expenses.

[178] For the reasons below, having considered the totality of the evidence on record, the Court finds that the claimed advertising expenses were actually incurred by the applicants. That said, the amounts reported by each applicant must be corrected to have the difference between the commercial value of the claimed advertising expenses and the amount actually invoiced by the Fund reported as a non-monetary contribution. Ultimately however, the Court finds that the impugned decisions are unreasonable and must be set aside.

#### VIII – LEGALITY OF THE REFUSAL TO CERTIFY THE CLAIMED ADVERTISING EXPENSES

[179] For the reasons mentioned above, the Court has already found that the respondent can legally inquire into any claimed expense in a return submitted by a candidate under section 451 of the Act. There is no legal duty incumbent on the respondent to certify a candidate's expense for the purpose of reimbursement under section 465 unless he is satisfied that the claimed expense qualifies as an election expense within the meaning of sections 406 and 407 of the Act.

[180] The result is unaffected by the standard of review endorsed by the Court. Either the respondent erred in determining that the claimed advertising expenses were not incurred by the applicants, or the findings made by the respondent are otherwise unsupported by the evidence on record and are unreasonable in the circumstances: The illegality of the impugned decisions whether reviewed on a standard of correctness or reasonableness, is unchanged.

## A – IMPUGNED DECISIONS UNREASONABLE

[181] The respondent states in the impugned decisions that he is “not satisfied that the documentation submitted established the claimed election expense.” This simply amounts to informing the applicants that the requirements under the Act are not met, which can hardly be said to meet “the existence of justification, transparency and intelligibility within the decision-making process” if the matter is to be reviewed on a standard of reasonableness (*Dunsmuir*, above, at paragraph 47).

[182] The case law of this Court is clear: the decision-maker cannot *ex post facto* add new grounds of refusal after making the impugned decisions. Be that as it may, the Court has examined the extrinsic evidence submitted by the respondent in support of the additional grounds of refusal because the Court has been asked by the applicants not only to set aside the impugned decisions, but to force the respondent to deliver new certificates, a remedy which requires the examination of evidence which was not necessarily before the decision-maker.

[183] The Court notes that the reasons invoked by the respondent to sustain the legality of the impugned decisions have evolved over time and are not necessarily restricted to the limited grounds mentioned in the letters dated April 23, 2007.

### *Purpose test met by the applicant*

[184] The evidence on record shows that the respondent has struggled with the question of whether the advertisements in question promoted the participating candidates or the Party.

[185] Consistent with the restrictive interpretation taken by Ms. Vézina in her affidavit, the 2007 handbook, published well after the 2006 election, specifies that in order to be considered an election expense and meet the purpose test contained in section 407 of the Act, advertising must promote the candidate. Thus, if the advertising promotes a registered party and not a candidate, according to the 2007 handbook and Ms. Vézina, Elections Canada would not consider the expense incurred by the candidate an election expense for the purpose of reimbursement.

[186] Later in the proceeding the respondent suggested, and has not since stated otherwise, that if Elections Canada's auditors had examined the content of the impugned ads, it was only to ensure themselves that they were “national advertising” because, “[a]s such, the ads failed to dispel the doubts that had already been raised as to whether the expenses were truly expenses of the candidates’ campaigns” (Applicants’ Record, vol. III, tab 8, page 912).

[187] The 2005 handbook was used and referred to by candidates and their official agents who participated in the 2006 election, including the applicants. Counsel for the applicants has vehemently argued that official agents have relied on the definition of an election expense found in the 2005 handbook.

[188] The respondent concedes that the language of the handbook in force in the 2006 election, as well as the language in the Act, can be confusing with regard to the definition of election expense. However, counsel for the respondent argues that the primary issue here was not the promotion of the Party, but whether or not the candidates did in fact “incur” the election expense.

[189] Indeed, the respondent's counsel took the position at the hearing that any issue regarding the content of the ads was really a "red herring" that should not distract the Court from the true issues in this case. According to the respondent's counsel, this is not, and should not be, a case where the Court needs to examine the freedoms of expression and political speech in the context of federal elections and the restrictions imposed by the Act.

[190] At the hearing, the respondent clarified that he does not take issue with the content of the ads in question nor with the fact that they were used by the applicants during the election period. Although the content of the impugned ads can be labelled as "national," the respondent is now ready to recognize that it would meet the purpose test – of directly promoting the candidates – if the expenses were actually incurred by the candidates, which the respondent maintains is not the case.

*Concerns that the RMB program constitutes a sham*

[191] According to the evidence on record, at the time the impugned decisions were made, the respondent suspected that the Party had designed an illegal scheme to transfer the Party's national advertising expenses to selected campaigns, because it was close to its spending limit under the Act. This suspicion provided an additional ground on which to refuse to certify the claimed advertising expenses and to suspend or delay payment of the final instalment pursuant to section 465 of the Act, pending the completion of an investigation into the RMB program by the Commissioner.

[192] In the 2006 election, the Party was subject to an election spending limit of \$18,278,278.64 and claimed \$18,019,170.28 in election expenses. More particularly, the Party claimed

\$8,786,108.38 for their total TV and radio advertising expenditures, including production costs. Of this amount, \$833,163.00 was spent on production costs, meaning that \$7,952,945.38 was spent on advertising costs for ads that ran across the country (including Québec).

[193] The RMB program cost the participating candidates \$1,271,771.41. With this, and the above information, in mind, it should be noted that if the Party was required to report this amount in its election expenses return for the 2006 election, the Party would have reported election expenses in the amount of \$19,290,941.69, which would place them approximately one million dollars in excess of their election expenses limit.

[194] For one reason or another, the respondent never formally requested that the Party amend its election expenses return to reflect the costs associated with the RMB program. Had he done so, the Party could have made an application to a competent judge to be relieved from complying with such a request (see paragraph 434(1)(a) of the Act).

[195] Despite his lack of action, the respondent nevertheless submits that a request to the Party to amend its 2006 election expenses return would have resulted in the Party's return showing election expenses significantly in excess of the statutory spending limit. The Court is not able to endorse such an inference given that the respondent has preferred to refer the matter to the Commissioner for further investigation, and the latter has not made any conclusive findings.

[196] While not asking the Court to make a formal finding that the RMB program is a sham organized by the Party, the respondent requests that the Court consider some of the hearsay evidence collected by the Commissioner, in making the determination that it was reasonable for the respondent to refuse to certify for the purpose of reimbursement the claimed advertising expenses. In addition, the respondent submits that such hearsay evidence is relevant to a finding that the balance of convenience does not warrant the issue of an order of *mandamus* as required by *Apotex*, above.

[197] Among the evidence put forward is an affidavit sworn by Mr. Lamothe and some appended documentation. More particularly, the respondent relies on the Information filed in April 2008, by the Commissioner, for the purpose of obtaining a search warrant to search the offices of the Party and the Fund in Ottawa. Contained within the Information are a series of e-mails between RMI representatives and Party officials. Notably, one e-mail dated December 9, 2005, originating from a broadcast negotiator at RMI, suggests that Party officials and RMI representatives may have contemplated “switching” some of the Party’s advertising time over to the ridings because the Party “may [have] be[en] spending up to their legal limit.”

[198] Because of the way in which this hearsay evidence came about, it is not clear how reliable the content is, and the Court is uncertain that the circumstances in which it was prepared would permit an ultimate trier of fact to sufficiently assess its worth. Certainly, this evidence was never considered by the respondent in making the impugned decisions and its reliability is subject to great caution in the circumstances, considering that the Commissioner has not

completed his investigation into the RMB program. This is not the best available evidence to prove the allegation made by the respondent that there has been a transfer of liability for advertising expenses incurred by the Party to the candidates who participated in the RMB program.

[199] The same concerns extend to the other e-mails originating from RMI and Party officials. The Court finds these to be inconclusive, because there is a certain confusion expressed within them and there is no direct evidence on record corroborating any intention “to shift dollars from the currently placed statutory paid time allotment [to Party candidates] under [the name] “The Official Agents for Conservative Party Candidates”.”

[200] At best, if the Court must give some weight to it, the hearsay evidence would demonstrate that, although the television time was initially booked by the Party, this booking was cancelled and new time was booked on behalf of candidates who agreed to incur the costs of television or radio ads that would be broadcast throughout their local ridings.

[201] Furthermore, there is direct evidence on record that demonstrates that the impugned ads ran after the time was booked on behalf of participating candidates, therefore, at no point were the ads broadcast without the approval of participating candidates. Finally, the respondent does not question whether the candidates authorized the ads to run; the impugned ads contained the appropriate tag lines that clearly identified them as having been authorized by the official agents of the participating candidates.

[202] Thus, having considered the totality of the evidence on record, the Court is not satisfied that the suspicions entertained by the respondent support the impugned decisions or constitute reasonable grounds to suspend indefinitely the issuance of new certificates under section 465 of the Act. As further elaborated below, the applicants have clearly demonstrated to the Court that they have a clear right to be reimbursed because the evidence on record shows that the claimed advertising expenses qualify as “election expenses” under section 407 of the Act.

*Discrepancies in the material originally submitted to the respondent*

[203] According to the evidence on record, Elections Canada was justified in proceeding to a more thorough audit and review of the documents supporting the advertising expenses claimed by the candidates who had participated in the RMB program.

[204] According to the respondent, a general concern at the time the impugned decisions were made was the level of control exerted over the official agents' spending decisions, and particularly, the fact that there would not be any transfer of money from the Fund to the participating campaigns (including Dartmouth and London) until the official agent had filled out and submitted to the Fund a wire transfer form that provided the Party with their payment.

[205] This control, in conjunction with the fact that neither candidates nor their official agents seemed to be aware of the details surrounding the creation and broadcasting of the impugned ads, strengthened the respondent's suspicions that Party candidates and/or their official agents, including the applicants, had not incurred the claimed advertising expenses.

[206] On the face of it, the documentation submitted by the applicants to Elections Canada, which is comprised of the various invoices referred to earlier and the proof of payment, supports the conclusion that the applicants incurred the claimed advertising expenses. Thus, unless he has valid reasons to do so, the respondent cannot ignore or put aside such relevant and compelling evidence of a liability incurred by the applicants.

[207] None of the respondent's concerns support the conclusion that the claimed advertising expenses have not been incurred by the applicants. While “red flags” may justify the respondent’s decision to conduct a more thorough audit, they do not in and of themselves render reasonable the subsequent refusal to certify the claimed advertising expenses. According to the evidence on record, it is common practice for parties and candidates not to contract directly with the broadcasters. The booking of ads is always made by an agent. Just as parties have a right to control the content of the ads, they also have the right to impose conditions on the use of the funds they transfer to a campaign.

[208] Finally, it has already been noted that the reasons provided in the impugned decisions are minimal. They do not support the conclusion reached by the respondent in the case of the applicants. Below, the Court reviews the evidence on record to support the finding that the applicants incurred the claimed advertising expenses.

B – ADVERTISING EXPENSES ACTUALLY INCURRED BY THE APPLICANTS

[209] The applicants, Mr. Callaghan and Mr. Pallet, were both official agents in the 2006 election and were duly authorized by law to incur expenditures on behalf of Mr. Campbell in the Dartmouth riding and Mr. Mailer in the London riding, respectively. In the 2006 election, the ridings in question were subject to election expenses limits of \$76,264.72 and \$ 77,145.06, respectively, and claimed election expenses in the amounts of \$41,775.58 and \$63,819.14, respectively.

[210] According to the best available evidence on record, including the affidavits sworn by the applicants as well as their answers during cross-examination, by December 19, 2005, the Dartmouth and London campaigns had both agreed to contribute up to \$10,000.00 to the RMB program.

[211] As it turned out, the London campaign was the only participant in the RMB for its area because the Oxford campaign decided to withdraw from the program. On the other hand, Dartmouth participated in the RMB in the Halifax area with the Halifax and the Halifax West campaigns who committed to contribute \$12,000.00 and \$30,000.00, respectively.

[212] Mr. Callaghan and Mr. Pallet were subsequently invoiced by the Fund for the amounts of \$3,947.07 and \$9,999.15, respectively, as appears from the invoice numbered MBUYROC050019 dated December 23, 2005 and the invoice numbered MBUYROC050013 dated December 23, 2005 (the impugned invoices).

[213] The authenticity of the impugned invoices is not challenged by the respondent and there is no evidence on record that would permit the Court to find that these invoices are fake or forged documents.

[214] The evidence on record does not permit the Court to make a finding in the applicants' case that the impugned ads ran prior to the Dartmouth and London campaigns accepting to participate in the RMB program. According to the traffic reports produced in this proceeding, the impugned ads started to run on January 2 and continued up until January 22, 2006, the day before the general election.

[215] The evidence on record conclusively establishes that the RMB program was a completely voluntary endeavour undertaken by individual campaigns. This is evidenced by the fact that the candidate in the Cardigan-Malpèque riding did not participate despite his initial commitment. Indeed, the evidence shows that once the candidate withdrew, not only did the Fund pay RMI the amount corresponding to the riding's share of the RMB, but the Party also reported this amount as an expense in its election expenses return.

[216] In accordance with the original understanding between both applicants and the regional representative of the Party who contacted them in December 2005, the Fund transferred the amounts necessary to pay the impugned invoices. These invoices then appear to have been paid by Mr. Callaghan and Mr. Pallet from their campaigns' account on January 11 and January 10, 2006, respectively.

[217] The respondent does not dispute the fact that both the applicants agreed to pay the impugned invoices and that they were duly paid in January 2006. Furthermore, it was perfectly lawful for the Party to put a condition on the use of any sum of money that would be transferred to a local campaign. It was up to the campaign to accept or refuse such condition, just as it was up to the campaign to accept to participate in a regional media buy organized by the Party.

[218] The evidence on record also establishes that the Fund acted as the supplier of the impugned ads or the agent of the participating campaigns in the RMBs. In this regard, since RMI was already acting as agent of record for the Party with the broadcasters, the cost of the ads for the participating campaigns were processed by RMI who sent the invoices to the attention of the Fund in early January 2006.

[219] RMI structured the business conducted with the Party and the official agents of Conservative candidates into four segments: (1) Media Buy – Rest of Canada (excluding Québec) – Registered Party; (2) Media Buy – Participating Candidates; (3) Media Buy – Québec – Registered Party; (4) Media Buy – Québec – Participating Candidates.

[220] On or around January 1, 2006, RMI sent an invoice numbered 1101868-1 in the amount of \$632,809.77, including GST, which represented the cost of the second segment: media buy – participating candidates (the ROC invoice). As appears from the ROC invoice it was addressed to “The Official Agents for Conservative Party Candidates” and was sent to the Party’s head office in Ottawa, to the attention of Ms. Susan Kehoe.

[221] The respondent did not question the authenticity of the ROC invoice before the Court. The Court has no evidence that the ROC invoice is a fake or forged document, or that the costs charged by RMI do not correspond to the costs of broadcasting radio and television ads for all participating campaigns, excluding the province of Québec since its candidates were invoiced separately.

[222] In the ROC invoice, which Ms. Kehoe received, according to the best evidence on record, the London riding was charged an amount of \$9,345.00, while Halifax, Halifax West and Dartmouth were charged \$4,426.62, \$11,066.54 and \$3,688.85, respectively. These amounts do not include GST.

[223] While there may be a GST issue if the Fund acted as the supplier, this is not an issue to be decided by the Court in this application. That said, the Court has been referred to the judgment rendered by Justice Wilton-Siegel on December 31, 2009, pursuant to an application made by the Fund under section 434 of the Act (see *Conservative Fund of Canada*, above). In this case, Justice Wilton-Siegel concluded that the Fund was entitled to an order pursuant to paragraph 434(1)(b) to correct the general election expenses returns previously submitted to the respondent for the 38th and 39th general elections. This order was granted to give effect to the GST rebates received by the Fund in respect of the general election expenses reflected on such returns.

[224] For the purposes of this application, the respondent recognizes that with regard to RMB program, whether the registered party is the agent of its candidates or the supplier of a good or service, the participating candidate still incurs the RMB expense. The parties agree, however, that

the two different relationships maybe difficult to distinguish in practice because, in both cases, the registered party “acts, in a sense, as an intermediary who either buys or resells to the official agents or buys on behalf of the official agents.”

[225] However, if this Court has to choose between the two options described above, based on the evidence on record, the Court finds that the Fund was acting as a supplier. This finding is supported by the fact that RMI required the Fund to pay before broadcasting time was booked on behalf of either the Party or the official agents of the participating campaigns in the RMB program.

[226] In sum, for the reasons mentioned above, the Court finds that the claimed advertising expenses were actually incurred by the applicants. As already stated, whether the Court examines the legality of the impugned decisions from the point of view of the correctness or the reasonableness standard, the result is the same. Either, the respondent erred in determining that the claimed advertising expenses were not incurred by the applicants or the findings made by the respondent are otherwise not supported by the evidence and are unreasonable in the circumstances.

[227] Therefore, the impugned decisions will be set aside. However, this does not end the matter, since the Court must still determine whether the claimed advertising expenses incurred by the applicants are reasonable and whether they have been reported at their commercial value.

## C – REASONABLENESS OF THE CLAIMED ADVERTISING EXPENSES

[228] The reasonableness of the claimed advertising expenses must be assessed in light of the commercial value of the advertising costs for which the applicants were billed in the impugned invoices.

[229] As mentioned above, section 406 of the Act requires that an electoral campaign expense of a candidate, which includes an election expense, be “reasonably incurred as an incidence of the election”. The Court has also already explained that the difference between the cost charged to participating campaigns by a registered party in a regional media buy and the actual commercial value of the RMB may lead to a non-monetary contribution that should be reported by the candidate in his or her election expenses return.

[230] Section 2 of the Act defines “commercial value”, in relation to property or service, as “the lowest amount charged at the time that it was provided for the same kind and quantity of property or service or the same usage of property or money, by

- (a) the person who provided it, if the person is in the business of providing that property or service; or
- (b) another person who provides that property or service on a commercial basis in the area where it was provided, if the person who provided the property or service is not in that business.”

[231] Whether the Court considers the Fund as the supplier of the impugned services or whether it considers that the Fund or the Party acted as an agent for the participating candidates in the RMB program, the commercial value of the impugned ads can only be established by referring to the invoices provided by RMI, since RMI is the only entity involved that is in the business of providing those services.

[232] Based on the ROC invoice, the Court finds that the amount of \$9,995.15 claimed by Mr. Pallet in his return corresponds to the commercial value of the impugned ads that ran in the London riding. This is so, because London was the only campaign participating in the RMB program in this area.

[233] That being said, the evidence clearly establishes that in the Halifax area, three participating campaigns benefited from the impugned ads, that is, Halifax, Halifax West and Dartmouth. These ridings were specifically grouped by RMI for the purpose of booking broadcast time in the Halifax region. These campaigns had originally committed to contribute a global sum of \$52,000.00, which the Party allocated between the three campaigns in the following manner: Halifax \$12,000.00; Halifax West \$30,000.00 and Dartmouth \$10,000.00.

[234] It turned out that RMI booked less broadcast time for the Halifax area than originally planned, so the total amount used by the three ridings was less than \$52,000.00. When all was said and done, RMI booked and invoiced \$20,524.74 worth of television and radio broadcast time. This

total represents the fair commercial value of the impugned ads broadcast in the Halifax area on behalf of the three participating campaigns.

[235] If the total amount claimed by the Halifax, Halifax West and Dartmouth ridings is considered, the three ridings collectively reported advertising expenses of \$20,524.74, with \$14,445.00 going to radio advertising and \$6,079.74 to TV advertising. The electoral campaign return for Dartmouth shows a payment of \$3,947.07 (19.23% of the total for the region) from the campaign to the Fund for “Advertising – Radio/TV,” while the campaign electoral returns for Halifax and Halifax West show a payment of \$4,736.48 (23.08% of the total for the region) and \$11,841.20 (57.69% of the total for the region), respectively.

[236] The above allocation of the broadcasting costs for the three participating campaigns in the Halifax area is not logical and does not reflect the fact that the three ridings benefited equally from the impugned ads. The Halifax West riding ends up paying much more than the Halifax and Dartmouth ridings. The allocation in this case has to be made taking into consideration the equal participation by the ridings in the total buy arranged by RMI. The actual allocation is below the commercial value in the case of the Halifax and Dartmouth ridings, and above the commercial value in the case of the Halifax West riding.

[237] The fact that the amounts charged by the Fund to the participating campaigns were related only to the amounts these campaigns could afford within their respective election spending limits, is irrelevant in establishing the fair commercial value of the impugned ads for each participating

campaign. This purely arbitrary allocation, whether it was unilaterally determined by the Party or whether it was jointly agreed upon between the Party and each participating campaign, renders any claim for amounts in excess of the commercial value unreasonable under section 406 of the Act.

[238] While this does not constitute a valid ground upon which to decline to certify under section 465 of the Act the sum of \$3,947.07, in the case of the Dartmouth campaign, Mr. Callaghan should have reported in his election expenses return, as a non-monetary contribution, the difference between the amount actually paid to the Fund, which was \$3,947.07, and the amount corresponding to a reasonable share of the cost of \$20,524.74. Since a reasonable share would represent an equal share in the circumstances, each riding should have reported an expense equal to one third of \$20,524.74, or \$6,841.58. In the case of Mr. Callaghan, the difference is \$2,894.51 which represents a non-monetary contribution from the Party, and should be reported as such.

[239] The official agents for Halifax and Halifax West are not parties to this judicial review application. That being said, according to the calculations above, there was an underpayment of \$2,105.10 in the case of the Halifax riding, and an overpayment of \$4,999.62 in the case of the Halifax West riding.

[240] The respondent has pressed the Court to conclude that Halifax West cross-subsidized the Halifax and Dartmouth ridings. Such a finding, however, would mean that the candidates contravened the Act since it is illegal for one candidate to transfer funds to another candidate (see subsections 404.2(2), (2.1) and (2.2)).

[241] This argument is without any factual foundation. There has been no transfer of money between the campaign accounts of the three ridings. As we have seen earlier, any transfers of money originated from the Fund and were sent to the accounts of each participating campaign individually. As opposed to the proposition put forward by the respondent, this is permissible under the Act.

*No allocation of production costs to ROC candidates*

[242] This brings us to the issue of allocation of production costs between the campaigns participating in the RMB program, including the London and Dartmouth campaigns. It must be remembered that an election expense not only includes the costs associated with the distribution, broadcast or publication of advertising or promotional material, but it also includes the production costs (see paragraph 407(3)(a)).

[243] With regard to production costs, the evidence on record establishes that the approach adopted by the Party was not consistent. While campaigns participating in the RMB program in the province of Québec were charged a share of the production costs, the participating campaigns in the rest of Canada were charged no production costs at all. This inconsistency, however, has no bearing on the amount of reimbursement claimed by the rest of Canada's candidates.

[244] The respondent has submitted that a portion of the production costs should have been reported in the candidates' election expenses returns as non-monetary contributions from the Party. The Court does not need to dispose of this argument. Suffice it to say that there is certainly room for debate considering that contrary to the situation in Québec, production costs were already incurred

and reported by the Party for the national advertising campaign in the rest of Canada and the same ads were used by the participating campaigns in the RMB program.

[245] If the respondent considers that a part of the production costs should have been reported by the candidates, the proper course of action would be to make a formal request in writing asking the candidates to amend their election expenses returns (see subsection 457(2)).

#### IX – THE COURT’S EXERCISE OF ITS DISCRETION

[246] Traditional prerogative writs enumerated in section 18 of the FCA, above, such as *mandamus* and *certiorari*, which have been requested by the applicants, can only be obtained upon application for judicial review made under section 18.1 of the FCA. In allowing such an application, the Court is not bound by the remedies contained in the Notice of Application.

[247] In the exercise of its discretion, the Court may exercise any of the remedial powers mentioned in paragraph 18.1(3) of the FCA. For instance, in setting aside an unlawful decision, the Court may make any declaration and refer the matter back for determination in accordance with such directions as it considers appropriate in the circumstances.

[248] Furthermore, the Court may refuse to grant the relief sought by an applicant, despite the unlawfulness of the decision, if there is reason to do so (*Stevens*, above, at paragraphs 50 to 52).

[249] Indeed, in the case of an order of *mandamus*, besides the establishment of a clear right, a number of factors listed in *Apotex*, above, call for a judicious exercise by the Application Judge, of the discretion inherent to the power of judicial review granted to the Court by sections 18 and 18.1 of the FCA.

[250] Having considered all relevant factors, in the exercise of my discretion, I have no reason to deny the remedy requested by the applicants in this case. Thus, the application for the issuance of writs of *mandamus* and/or *certiorari* will be allowed in the manner specified in the Judgment that accompanies the present reasons.

[251] Whether the Court examines the legality of the impugned decisions from the point of view of the correctness or the reasonableness standard, the result is the same. Either, the respondent erred in determining that the claimed advertising expenses were not incurred by the applicants or the findings made by the respondent are otherwise not supported by the evidence and are unreasonable in the circumstances. In either scenario, the impugned decisions are illegal and should be set aside.

[252] Having considered the totality of the evidence, I do not believe that the suspicion of the respondent that the RMB program constitutes a sham provides good reason to refuse the applicants' remedy. The fact that the claimed advertising expenses have been reported below their commercial value does not constitute a bar to their certification under section 465 of the Act. Only the amount that was actually paid by the applicants can lead to a reimbursement by the Receiver General.

[253] On the facts of this case, the difference between the amount paid by the applicant L.G. Callaghan and the commercial value of the claimed advertising expenses was ultimately assumed by the Fund. Assuming that a non-monetary contribution should have been reported in the candidate's electoral campaign return, the applicant L.G. Callaghan is still entitled to receive a reimbursement since the candidate's election expenses limit has not been exceeded in his case.

[254] There is a fundamental distinction between legality and legitimacy.

[255] With respect to the legality or illegality, as the case may be, of the actions taken during the 2006 election period by the Party or the Fund, there remains an ongoing investigation by the Commissioner, and therefore, it would be premature and inappropriate for the Court to comment or rule on this question.

[256] As far as the overall legitimacy of the RMB program is concerned, this is a debatable issue, which is better left for public commentary and debate by all interested persons outside the courts. Subject to compliance with the Constitution, Parliament has the sovereign power and the legislative authority to regulate monetary transfers from registered parties to local campaigns. Parliament can amend the Act to correct any iniquity – whether real or perceived in the eyes of the populace. Furthermore, only Parliament has the authority to confer additional investigating or supervisory powers to the CEO.

[257] While the respondent has raised concerns with respect to the electoral campaign returns submitted by a number of candidates of the Party who participated in the RMB program, notably in the province of Québec, whether the Party or the other 65 candidates who participated in the RMB program have complied with the reporting requirements of the Act are not questions to be determined by the Court in the present application.

[258] It is sufficient to conclude that any inference made or conclusion reached by the respondent concerning the applicants' compliance with the requirements of subsection 447(2) and/or sections 451 to 462 of the Act – whether he came to the conclusion or inference before or after the audit of the returns submitted by the participating candidates – is unreasonable and is not supported by the evidence on record. That being said, the claimed advertising expenses, which the Court has found to have been actually incurred by the Dartmouth and London campaigns, must be reported at their commercial value.

[259] Accordingly, the impugned decisions to exclude from the amount of reimbursement calculated under section 465 of the Act:

- (a) in the candidate's electoral campaign return for Dartmouth, the claimed election expense of \$3,947.07 identified as: "2005-2006 Candidate share of media advertisement"; and
- (b) in the candidate's electoral campaign return for London, the claimed election expense of \$9,999.15 identified as: "2005-2006 Candidate share of media advertisement";

will be set aside and the matter will be referred back to the respondent with the directions outlined below.

[260] With regard to the candidates' electoral campaign returns submitted under section 451 of the Act by the applicants, Mr. L.G. Callaghan and Mr. David Pallet, as official agents of Mr. Campbell and Mr. Mailer, respectively, the cost incurred and the non-monetary contributions received by said candidates during the 2006 election, with respect to their participation in the RMB program, are candidate election expenses within the meaning of sections 406 and 407 of the Act.

[261] The fair market value of the deemed election expenses reported in the electoral campaign return for Mr. Campbell, corresponds to:

- (a) the cost of \$3,947.07 actually incurred by the Dartmouth campaign and duly paid on January 11, 2006, by the applicant L.G. Callaghan to the Fund;  
plus,
- (b) the non-monetary contribution of \$2,894.51 made by the Party to Mr. Campbell, which corresponds to the difference between the amount actually paid to the Fund (\$3,947.07) and the amount that represents a reasonable share of the advertising costs (\$20,524.74) split equally between the Dartmouth, Halifax and Halifax West ridings (\$6,841.58).

[262] The fair market value of the deemed election expenses reported in the candidate's return for Mr. Mailer, corresponds to the cost of \$9,999.15 actually incurred by the London campaign and duly paid on January 10, 2006, by the applicant David Pallet to the Fund.

[263] The respondent shall recalculate the amount of reimbursement, which corresponds to the candidates' paid election expenses and paid personal expenses, less the partial reimbursement made under section 464 of the Act, that Mr. Campbell and Mr. Mailer are entitled to have reimbursed under section 465, and this recalculation shall include the deemed election expenses outlined above.

[264] The applicants assert that they have a clear right to the reimbursement of these paid election expenses, notwithstanding the investigation being conducted by the Commissioner and the additional information that is now on the public record as a result of that investigation.

[265] In the Court's opinion, the criteria mentioned in *Apotex*, above, are satisfied in this case.

[266] First, the applicants have a clear right to the performance of the duty incumbent on the CEO under section 465 of the Act to certify the claimed advertising expenses once the amount to be reimbursed for the impugned election expenses has been recalculated by the respondent.

[267] Second, the impugned election expenses have actually been incurred by the applicants and the only way the applicants can have a monetary claim against the Crown is if the present application is allowed and the respondent is forced to issue a new certificate once the amount to be

reimbursed has been recalculated by the respondent. This is because anyone who seeks to impugn a federal agency's decision must generally proceed by way of judicial review to have that decision invalidated (*Grenier v. Canada*, 2005 FCA 348 at paragraph 20). Therefore, where, as in the present application, a party seeks a monetary claim from a decision made by a federal agent, and the unlawfulness of the decision is a pre-requisite to the monetary remedy, the party may not proceed by way of action before the decision itself has been declared invalid upon application for judicial review (by analogy, see *Manuge v. Canada*, 2009 FCA 29 at paragraph 84).

[268] Third, the fact that there is a concurrent criminal investigation underway that might result in charges under the Act being laid against the Party, the Fund or individuals, is not enough by itself to shift the balance of convenience in favour of the respondent or the Crown.

[269] The Commissioner is currently investigating into whether or not the Party or Fund incurred expenses exceeding their election expenses limit, contrary to paragraphs 497(1)(1) and 497(3)(g) of the Act, and whether, contrary to subparagraph 497(3)(m)(ii) of the Act, the Fund filed an election expenses return that it knew, or ought to have known, contained a materially false or misleading statement.

[270] The impugned decisions were final. The investigation currently underway by the Commissioner does not have a direct bearing on the exercise of the respondent's power to certify, under section 465 of the Act, the claimed election expenses paid by the applicants to the Fund.

[271] No prosecution has been instituted by the Director of Public Prosecutions (DPP). After the applicants have been reimbursed for the claimed advertising expenses, if the Party, the Fund or any other persons are charged and found guilty of the offences mentioned above, subsection 501(1) of the Act, notably paragraph (a.1), authorizes the court to make a restitution order to have any amount paid back to the Receiver General.

[272] Fourth, the respondent has never requested that the Party or the applicants amend their election expenses returns to add or to subtract the claimed advertising expenses, as he is entitled to do under subsections 432(2) or 457(2) of the Act.

[273] Fifth, the *Financial Administration Act*, R.S.C. 1985, c. F-11 (FAA) provides the framework within which public funds are managed. Where there are reasonable grounds to believe that a person is in possession of money for which he or she is accountable to Her Majesty in right of Canada, the FAA provides the mechanisms through which the money may be retrieved (see, for example, sections 76 and 155).

[274] According to the evidence on record, 17 candidates who participated in the RMB program have already been reimbursed by the Receiver General, for their portion of their shares of the RMB expenses. At the hearing for this application, the Court was informed by the respondent's counsel that no proceeding to recover these sums of money had been instituted under the FAA or the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, against these candidates, their official agents, the Fund or the Party.

[275] Sixth, all the remedies contained in the Judgment that follows are limited to the two individual applicants. The sums of money involved are modest.

[276] Finally, the Party and the Fund have undertaken to reimburse the Receiver General, on behalf of the applicants (and other candidates who incurred similar expenses), any amount paid by the Receiver General, if the situation arises where a final judgment or a restitution order under paragraph 501(1)(a.1) of the Act is rendered and the applicants (and other official agents) are required repay the amount received as reimbursement for the claimed advertising expenses.

[277] Assuming that the balance of convenience applies in the present application, the applicants have met the burden of establishing that the balance of convenience is in their favour.

[278] Accordingly, the respondent shall provide the Receiver General with a new certificate setting out the amount of the final instalment, as recalculated, which Mr. Campbell and Mr. Mailer are entitled to receive under the present Judgment, less any sum of money already paid by the Receiver General.

[279] Considering the result, the submissions made by counsel at the hearing and all relevant factors, in the exercise of its discretion, the Court has decided that costs should be awarded in favour of the applicants.

## JUDGMENT

### **THIS COURT DECLARES, ORDERS AND ADJUDGES that:**

1. The application for the issuance of writs of *mandamus* and/or *certiorari* is allowed in the manner hereinafter specified;
  
2. The decisions made by the respondent on or around April 23, 2007, to exclude from the amount of reimbursement calculated under section 465 of the *Canada Elections Act*, S.C. 2000, c. 9 (the Act):
  - (a) in the candidate's electoral campaign return for Robert A. Campbell (Dartmouth-Cole Harbour), the claimed election expense of \$3,947.07 identified as: "2005-2006 Candidate share of media advertisement"; and
  - (b) in the candidate's electoral campaign return for Dan Mailer (London-Fanshawe), the claimed election expense of \$9,999.15 identified as: "2005-2006 Candidate share of media advertisement"are set aside and the matter is referred back to the respondent;
  
3. With regard to the candidates' electoral campaign returns submitted under section 451 of the Act by the applicants, Mr. L.G. Callaghan and Mr. David Pallet, as official agents of Mr. Campbell and Mr. Mailer, respectively, the cost incurred, or non-monetary contributions received, by said candidates during the 2006 election with respect to their participation in the regional media buy

(RMB) program, are candidate election expenses within the meaning of sections 406 and 407 of the Act;

4. The fair market value of the deemed election expenses reported in the electoral campaign return for Mr. Campbell, corresponds to:

(a) the cost of \$3,947.07 actually incurred by the Dartmouth campaign and duly paid on January 11, 2006 by the applicant L.G. Callaghan to the Conservative Fund of Canada (the Fund);

plus,

(b) the non-monetary contribution of \$2,894.51 made by the Party to Mr. Campbell, which corresponds to the difference between the amount actually paid to the Fund (\$3,947.07) and the amount that represents a reasonable share of the advertising costs (\$20,524.74) split equally between the Dartmouth, Halifax and Halifax West ridings, (\$6,841.58);

5. The fair market value of the deemed election expenses reported in the electoral campaign return for Mr. Mailer, corresponds to the cost of \$9,999.15 actually incurred by the London campaign and duly paid on January 10, 2006 by the applicant David Pallet to the Fund;

6. The respondent shall recalculate the amount of reimbursement, which corresponds to the candidates' paid election expenses and paid personal expenses less the partial reimbursement made under section 464 of the Act, that Mr. Campbell and Mr. Mailer are entitled to have reimbursed

under section 465, and which shall include for the purpose of calculation the deemed advertising expenses of Mr. Campbell and Mr. Mailer.

7. The respondent shall provide the Receiver General of Canada with a new certificate setting out the amount of the final instalment as calculated under paragraph 6 of the present Judgment, which Mr. Campbell and Mr. Mailer are entitled to receive under the present Judgment, less any sum of money already paid by the Receiver General of Canada;

8. Costs are in favour of the applicants.

“Luc Martineau”

---

Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-838-07

**STYLE OF CAUSE:** **L.G. CALLAGHAN IN HIS CAPACITY AS  
OFFICIAL AGENT FOR ROBERT CAMPBELL  
AND DAVID PALLET IN HIS CAPACITY AS  
OFFICIAL AGENT FOR DAN MAILER v. THE  
CHIEF ELECTORAL OFFICER OF CANADA**

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** November 23, 2009

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Martineau J.

**DATED:** January 18, 2010

**APPEARANCES:**

Mr. Michel Decary FOR THE APPLICANTS

Ms. Barbara McIsaac FOR THE RESPONDENT

Ms. Nadia Effendi

**SOLICITORS OF RECORD:**

Stikeman Elliott LLP FOR THE APPLICANTS  
Ottawa, Ontario

Borden Ladner Gervais LLP FOR THE RESPONDENT  
Ottawa, Ontario