

# KEEPING CURRENT

March 26, 2021

## Federal Conservative Party Member Wins Pyrrhic Court Victory: Losses in Party Election

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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I preface this political law blog with the full disclosure that although I am involved in party politics, I am not a member of any federal political party in Canada.

The world of party politics is filled with intrigue, controversy and the airing of dirty laundry in public. In almost 40 years of involvement in party politics, I have borne witness to the good and the bad that political parties have to offer. Unfortunately, the bad sometimes involves party members engaging in battles among themselves rather than setting aside differences to work together as a team to defeat the real enemy in politics - the other side.

When internal battles cannot be resolved through reason, tolerance and diplomacy, they sometimes, like in the recent case of [Melek v. Conservative Party of Canada, 2021 ONSC 1959](#), end up on the front pages of newspapers, the headlines of social media or in court. In this case, the internal dispute involved the issue of whether the applicant party member, who had immigrated to Canada as a teenager from Egypt in 1990, could run for a position on the party's National Council.

While the applicant won her court fight, her desire to be elected to the party's National Council ended in defeat.

The applicant had joined the federal Conservative Party in 2015. In 2019, she ran for the party in the federal election and received approximately 20,000 votes in a losing effort. In 2021, she sought to be elected to the party's National Council as a representative for Ontario. The vote was held at the party's recent National Convention that was held virtually.

Under the federal party's governing Constitution and its Rules and Procedures for the Election of National Council (the "**Rules**"), to run for Council a candidate had to be certified as such by the party's appointed returning officer. Section 5.3 of the Rules provided the returning officer "shall certify all eligible individuals who meet the criteria in section 4." There was no discretion given to the returning officer to reject a candidate who met the eligibility criteria.

The eligibility criteria under section 4 of the Rules required that the candidate

(i) reside in Ontario; (ii) is a delegate to the National Convention; (iii) has paid a \$500 deposit; and has submitted (iv) 50 supporting signatures from Ontario federal Conservative Party members in good standing; and (v) a signed affirmation that states “I have read, understand, and do hereby affirm my personal commitment to the principles and policies of the Conservative Party of Canada and the Constitution of the Conservative Party of Canada.”

Although the applicant met all of the criteria, the returning officer refused her candidacy because he was concerned about two of her social media retweets from 2012 that showed images or comments disparaging Muslims.

The applicant had removed these retweets from her Twitter account, had apologized for them, had her apology accepted by former federal Conservative leader Andrew Scheer and had been allowed to stand as a candidate for the party in the 2019 federal election.

The applicant also advised the returning officer that she was committed to equality, inclusiveness and tolerance. Nevertheless, the returning officer denied her candidacy and the applicant brought a court application to overturn the returning officer’s decision.

As a matter of legal principle, courts are generally reluctant to intervene in disputes involving unincorporated associations, including political parties. However, Justice Belobaba ruled that the court had jurisdiction over the controversy on the grounds that the applicant’s right was founded in contract. A court will intervene in matters involving unincorporated associations where, among other things, a private law right founded in contract or tort is affected: [\*Aga v. Ethiopian Orthodox Tewahedo Church of Canada\*, 2020 ONCA 10.](#)

The contractual right here arose out of the party’s Constitution, which set out the rights and obligations of party members and the applicant. Justice Belobaba also found that the right at issue was significant to merit intervention.

Ultimately, Justice Belobaba held that since the returning officer possessed no discretion to deny the applicant’s candidacy either under the party’s Constitution or the Rules, the applicant could not be denied the ability to run as a candidate. Having met the eligibility criteria, the returning officer should have certified her candidacy and allowed her name to be placed on the ballot.

Certification and requiring the party to place the applicant’s name on the ballot was the obvious and appropriate remedy in the circumstances. This remedy was justified by the law of contract which provides that the remedy for a breach of contract is to put the wronged party in the position he or she would have been had the contract been performed: [\*Karahalios v. Conservative Party of Canada\*, 2020 ONSC 3145.](#)

Further, since damages were neither an appropriate nor a complete remedy, the applicant was entitled to specific performance. As stated by the Ontario Court of Appeal in [\*Matthew Brady Self Storage v. InStorage Limited Partnership\*, 2014 ONCA 858](#), “...specific performance is a discretionary equitable remedy granted where damages cannot afford an adequate and just remedy in the circumstances.”

This case demonstrates that political parties and other unincorporated associations are not immune from court intervention when dealing with their members. They must follow their respective Constitutions, by-laws and rules and ensure that the contractual rights of members are not breached. Moreover, however, this case



demonstrates that political parties should tread carefully when selecting candidates for nomination or running their own internal elections. If the applicant's dated retweets were a significant concern to the party, as they appear to have been to the returning officer, then the party ought not to have approved of her candidacy in 2019. Once the party accepted the applicant's apology and her commitment to equity, inclusion and tolerance and allowed her to stand for election to potentially represent all Canadians, then the party should not have in any way whatsoever prevented her from running for an internal party position. Although the candidate ultimately did not get what she wanted (a position on National Council) and thereby only obtained a Pyrrhic court victory, the federal Conservative Party may not have achieved its desired goal either because even though the applicant was unsuccessful in the National Council election, the party has been left with a negative court decision and headlines that it wrongly denied the applicant, who was supported by approximately 20,000 constituents in the 2019 federal election, a contractual right to have run in an internal election.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact the Chair of our dispute resolution group, **Stephen Thiele**, at 416.865.6651 or via email at [sthiele@grllp.com](mailto:sthiele@grllp.com).

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