

May 23, 2018

## The Balance of Confidentiality

**By:** Anoushka Pamela Gandy

**Case Commented On:** *Campbell v Alberta (Chief Electoral Officer)*, [2018 ABQB 248 \(CanLII\)](#)

*Campbell* involves an appeal from a decision of the Chief Electoral Officer of Alberta to sanction Jarrett Campbell and Jaskaran Sandhu during the provincial election held on May 5, 2015. The Chief Electoral Officer applied to the Court of Queen’s Bench for guidance regarding what should be contained in a Certified Record produced by the Electoral Officer under Alberta’s *Elections Act*, [RSA 2000, c E-1 \[Elections Act\]](#). The main issue before the court was whether the Chief Electoral Officer was able to redact information that is confidential and irrelevant to the appeal (*Campbell*, at para 2).

The provincial election was held on May 15, 2015; Harman Kandola ran for the Progressive Conservatives and Rod Loyola for the New Democrats. Mr. Campbell and Mr. Sandhu, part of the Progressive Conservative party, prepared and distributed a flyer on the eve of the election. The flyer stated, “Rod Loyola supports values for brutal socialist dictator Hugo Chavez!” Pictures of Mr. Loyola were also placed beside logos associated with the former Soviet Union and Marxist-Leninist Communism. The flyer had also indicated that Mr. Loyola spoke at a Marxist-Leninist rally and reiterated the values that Hugo Chavez stood for (*Campbell*, at paras 4-5).

An email complaint was sent to the Chief Electoral Officer about the flyer and the Chief Electoral Officer appointed two investigators to look into the complaint (*Campbell*, at paras 6, 8). Mr. Campbell and Mr. Sandhu were interviewed and admitted that they created the flyer but believed the information contained in the flyer to be true (*Campbell*, at para 8). Mr. Campbell and Mr. Sandhu stated that there was more than enough evidence to conclude Mr. Loyola was a communist. It was also confirmed that Mr. Kandola was unaware of the preparation and distribution of the flyers (*Campbell*, at para 9).

The Chief Electoral Officer advised Mr. Campbell and Mr. Sandhu that he would be imposing a \$1,200 fine on each of them pursuant to 153.1 of the *Election Act*. Section 160 of the *Act* states that before or during an election, if a person makes or publishes a false statement with respect to a candidate in order to affect the votes, that individual is liable for an offence (*Campbell*, at para 10). The Chief Electoral Officer stated that even though not all the content in the flyer was false, the logo of a hammer and sickle with Mr. Loyola’s picture beside it implied he was a communist. As well, the timing of release was deemed to be for the purposes of affecting votes in the election occurring the next day (*Campbell*, at para 12).

Mr. Campbell and Mr. Sandhu filed an Originating Application – Notice of Appeal from the decision of the Chief Electoral Officer and the \$1,200 administration fine. On the same date, Mr.

Campbell and Mr. Sandhu filed a Notice to Obtain Record of Proceedings, requiring that the Record include (*Campbell* at para 15):

1. A copy of the decision;
2. Document starting the proceedings;
3. Reason for the decision;
4. Evidence and exhibits filed with the Chief Electoral Officer; and
5. Anything else in the Chief Electoral Officers possession that is relevant to his decision.

The Chief Electoral Officer considered provisions of the *Election Act* with respect to statutory appeals, his own duty to protect privacy and confidentiality and the *Alberta Rules of Court*, [Alta Reg 124/2010](#) with respect to production of a Record (*Campbell*, at para 17).

Under the *Election Act*, ss 3.1(1) and 4.4(1) deal with the Chief Electoral Officer's duty to maintain confidentiality and not to disclose any information, however, there is an exception under 4.4(2) allowing information to be revealed to the person whose conduct is subject to proceedings (*Campbell*, at para 19). The *Election Act* does not expressly grant a right to a statutory appeal of a decision by the Chief Electoral Officer; it is implied under s 153.1(2) and s 157.3(7) (*Campbell*, at paras 22-24). The *Election Act* does not contain rules, processes, procedures about production of documentation or how a right of appeal should be addressed (*Campbell*, at para 24). As well, Records created by or in the custody of the Chief Electoral Officer are not subject to disclosure under the *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#) (*Campbell*, at para 20).

The Chief Electoral Officer followed the *Alberta Rules of Court*, Rule 3.14, for production of a Record along with his duty to confidentiality under sections 3.1 and 4.4(1) & 4.4(2) of the *Elections Act* and prepared a draft Certified Record with the following redactions (*Campbell*, at para 31):

1. Identity of the complainant;
2. Information regarding investigations and allegations against individuals other than Mr. Campbell and Mr. Sandhu; and
3. Personal information about individuals interviewed such as names, contact numbers and email addresses.

Mr. Campbell and Mr. Sandhu objected to the redaction of the other persons interviewed by the investigator, name of the complainant, and investigation into allegations against other individuals other than themselves (*Campbell*, at para 32).

The Chief Electoral Officer deferred to the Alberta Court of Queen's Bench (ABQB) for guidance and Justice K.P. Feehan held that redactions are permissible and reasonable in some circumstances. There is no statutory guidance for what should be included in a Record in a statutory appeal under the *Election Act*; however, it is appropriate to apply the general rules of production of Records (*Campbell*, at para 39).

Justice Feehan relied on the decision of Justice Slatter in *Weatherill (Estate of) v Weatherill*, [2003 ABQB 69 \(CanLII\)](#), who stated that "the court should not measure counsel's line of

argument too finely” (at para 16) when determining whether a document is relevant or material, especially at an interlocutory stage of proceedings (*Campbell*, at paras 38 and 43). Justice Feehan then found that the Chief Electoral Officer should not have redacted the name of the complainant but should be able to exercise discretion to keep the names of other persons interviewed confidential. The contents of those interviews should not have been kept confidential. However, the Electoral Officer should be allowed to exercise discretion regarding the names of the other persons investigated, but not the substance of those investigations (*Campbell*, at para 44).

### **Commentary:**

Mr. Campbell and Mr. Sandhu were distributing flyers in order to influence the votes in Mr. Kandola’s favor. They were charged by the Chief Electoral Officer with an administrative \$1,200 fine and were found to have distributed the flyers to influence voters. This brings up the issue of “Good Faith,” where an individual’s intention is to be fair, open and honest through every interaction. Mr. Campbell and Mr. Sandhu believed that Mr. Loyola was a communist and believed there was evidence to prove this. Even if they fully believe this to be true, the *Elections Act* states that before or during an election, if an individual publishes or distributes a false statement regarding another candidate and if it is being distributed for the purpose of altering votes, that individual is liable under the *Elections Act* (*Campbell*, at para 10). In this case, distributing the flyers was found to be for the purpose of altering the votes in the election and even though Mr. Campbell and Mr. Sandhu believed the contents of the flyer to be true, positioning the former Soviet Union logo beside Mr. Loyola’s picture was meant to imply he is a communist.

The main issue before the court is whether it is appropriate for the Chief Electoral Officer to redact information that would be classified as confidential and irrelevant to the appeal. The Chief Electoral Officer sought guidance to determine disclosure laws regarding the names of the complainants and the substance of the interviews and if they should be kept confidential based on the Chief Electoral Officers duty of confidentiality. This case provides guidance on which redactions are permissible and what information must be included in a Certified Record in statutory appeal. It is important to consider privacy rights and the duty of confidentiality during disclosure procedures. In order to balance the duty of confidentiality, it may be necessary to redact the complainant’s names and personal information. If the complainant’s identity and personal information along with the names and personal information contained within the interviews are not kept confidential, this breaches their privacy rights and could deter individuals from coming forward or making complaints if their information is not kept confidential. However, the substance of the interviews and Chief Electoral Officer’s decision should be disclosed. The court would have a difficult time deciding on the merits of the case without the substance in the reports. In addition, it would make it near impossible to prepare for an appeal. This would deny Mr. Campbell and Mr. Sandhu access to justice and their ability to prepare a proper appeal.

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