
Rebecca Jones
416-865-3055
rjones@litigate.com


Zachary Rosen
416-865-2944
zrosen@litigate.com

April 17, 2020

# â€œThe revolution will be scrutinizedâ€•: Court Leaves Opening to Review the Decisions of Political Parties

In recent years, aggrieved candidates have not had much luck seeking relief against their political parties in court. Courts have held that because unincorporated associations, such as political parties, do not exercise public authority, they are not subject to public law remedies like judicial review.

In this week's decision in *Karahalios v Conservative Party of Canada*, however, the Superior Court refused to strike a claim by Mr. Karahalios, a leadership candidate hopeful, against the Conservative Party of Canada, on the basis that the law in this area was undergoing a "revolutionary or redevelopment stage".

Mr. Karahalios is well-known in Canadian conservative politics, in part for his public disputes with federal and provincial Conservative parties. Such disputes have included a successful anti-SLAPP motion against Ontario's Progressive Conservative party in 2017 relating to his "Axe the Carbon Tax" campaign.

In January 2020, Mr. Karahalios registered as a candidate in the federal Conservative leadership race. As part of his candidacy, Mr. Karahalios was required to agree to comply with the Party's Leadership Rules. The Leadership Rules include a privative clause providing that any disputes arising out of the leadership race would be determined by the Party's Chief Returning Officer. Subject to a right of appeal to the Party's internal Disputes, Resolutions and Appeals Committee, the Officer's decision would be final and not subject to further review, challenge or appeal.

Mr. Karahalios' campaign published social media posts quoting past statements about sharia law made by the campaign chair for rival candidate Erin O'Toole, and stating that if Mr. Karahalios were Prime Minister, he would "stop" sharia law.

Mr. O'Toole's campaign filed a complaint with the Party. After an internal investigation, the Conservative Party's Returning Officer issued a ruling fining Mr. Karahalios' campaign and putting restrictions on its access to funds and Party membership lists – a blow to Mr. Karahalios' chances of success in the leadership race. Mr. Karahalios appealed this

ruling internally to the Party's Disputes, Resolutions and Appeals Committee, which not only upheld the Returning Officer's ruling but decided to disqualify Mr. Karahalios as a candidate in the leadership race. This looked like the end of the road for Mr. Karahalios, given that a privative clause in the Party's leadership rules provided that this decision was final and binding.

Nevertheless, Mr. Karahalios commenced an application against the Conservative Party (and other related entities and individuals) before the Superior Court, seeking to restore his candidacy and seeking the return of various funds to his campaign.

Mr. Karahalios framed his application as a breach of contract claim, seeking to avoid the clear rulings of the Supreme Court of Canada in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall* and the Superior Court of Justice's decision in *Trost v Conservative Party of Canada*, to the effect that judicial review is not available against decisions of unincorporated associations (including political parties).

The Conservative Party brought a Rule 21 motion seeking to strike the application, arguing that there was no contract between Mr. Karahalios and the Party, and that even if there were, the privative clause would prevent his having recourse to the courts. The Conservative Party relied on the decision of the Superior Court of Justice in *Ottawa Humane Society v Ontario Society for the Prevention of Cruelty to Animals*, arguing that the privative clause prevents any appeal or judicial review of its internal decisions absent an "overriding public policy" to justify setting the clause aside. Given that Mr. Karahalios had not pleaded any overriding public policy issue, the Party argued that his application should be dismissed.

The Conservative Party appeared to have the better end of this motion. However, despite the apparent deficiency in Mr. Karahalios' pleadings, and despite the state of the jurisprudence appearing to have boxed Mr. Karahalios into a corner, the Court nevertheless concluded that it was not plain and obvious that Mr. Karahalios' claim contained no legally viable cause of action. The Court held that it was "immediately apparent" that the law on the regulation of unincorporated association was "in a revolutionary or redevelopment stage" and that it would therefore be inappropriate to decide these issues based on assumed facts and an incomplete evidentiary record. On that basis, the Court dismissed the Party's motion and ordered that Mr. Karahalios' application proceed as an action, with a scheduled summary judgment motion.

Public law enthusiasts will watch with interest to see whether

Mr. Karahalios' action gets dismissed on a summary judgement motion, based on the current state of the law, or whether we are about to see a re-framing of the law in this area that could open up political parties to increased exposure for alleged breaches of procedural fairness.

One final note, touching on court services in the current COVID-19 pandemic. On March 15, 2020, the Superior Court of Justice issued a Notice to the Profession providing that matters would only be heard by the court if they are "urgent and time-sensitive [and] where immediate and significant financial repercussions may result if there is no judicial hearing."

The Court nevertheless agreed to hear Mr. Karahalios' application on the basis that though it did not raise a "strictly financial issue", it was nevertheless time-sensitive and could have important implications for the federal political process. This liberal and practical reading of the Notice to the Profession shows the efforts being made by the Courts to operate as effectively as possible during the pandemic.

This development, combined with the Court's additional Notice to the Profession issued on April 2, 2020 (indicating that "select" matters will begin to be heard by the Commercial List and Estates List in Toronto) and Chief Justice Morawetz's recent affirmation in a fireside chat with The Advocates' Society that the Courts are open and ready to adjudicate, indicates that the Court is seeking to expand the scope of what matters it hears in the midst of the pandemic.

This should bring comfort to all litigants that the Courts are willing and able to address serious and complex matters by way of videoconference or other virtual hearing protocols – and that it will continue to do so in all cases where the consequences of delay are too serious to ignore.