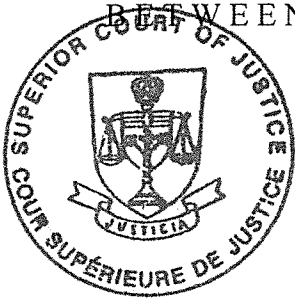


Court File No. CV-18-00606988-00

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:



O'LEARY PRODUCTIONS INC. and KEVIN O'LEARY

Applicants

- and -

HER MAJESTY IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY  
GENERAL OF CANADA, THE COMMISSIONER OF CANADA ELECTIONS and THE  
CHIEF ELECTORAL OFFICER OF CANADA

Respondents

**APPLICATION UNDER Rule 14.05 of the Ontario Rules of Civil Procedure, ss. 1, 2(b), 3, 7  
and 24(1) of the Canadian Charter of Rights and Freedoms, and s. 52 of the  
Constitution Act, 1982**

**NOTICE OF APPLICATION**

**TO THE RESPONDENTS:**

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following page.

THIS APPLICATION will come on for a hearing at a date and time to be fixed by the Registrar, at 393 University Avenue, Toronto, Ontario, M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer,

serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: October 15, 2018

Issued by

Local registrar



Address of  
Court office

393 University Avenue  
10<sup>th</sup> Floor  
Toronto, ON M5G 1E6

**TO: ATTORNEY GENERAL OF CANADA**

Suite 3400, Exchange Tower  
130 King Street West  
Box 36, First Canadian Place  
Toronto, ON M5X 1K6

Tel: 416-973-0942

Fax: 416-952-0298

**AND TO: COMMISSIONER OF CANADA ELECTIONS**

Attn: Mr. Yves Côté  
P.O. Box 8000, Station T  
Ottawa, ON K1G 3Z1

**AND TO: CHIEF ELECTORAL OFFICER**

Attn: Mr. Stéphane Perrault  
Elections Canada  
30 Victoria Street  
Gatineau, QC K1A 0M6

## APPLICATION

### THE APPLICANTS MAKE APPLICATION FOR:

1. A declaration that subsections 367(1)(d), (6) and (7), 478.75(1), 497.5(1)(h) and 500(1) of the *Canada Elections Act*, S.C. 2000, c. 9 (the “Act”) (collectively referred to herein as the “impugned provisions”) infringe on and deny the rights and freedoms guaranteed by sections 2(b), 3 and 7 of the *Canadian Charter of Rights and Freedoms* (the “Charter”) and are not saved by section 1 thereof;
2. A declaration that, insofar as the impugned provisions infringe on and deny the rights and freedoms guaranteed by sections 2(b), 3 and/or 7 of the *Charter* and cannot be justified under section 1 of the *Charter*, those provisions are invalid and of no force and effect, to the extent of the inconsistency;
3. In addition, or in the alternative:
  - a. A declaration that the impugned provisions violate the constitutional principle of the rule of law, which requires that laws be written and interpreted according to an intelligible legal standard that gives individuals fair notice of the conduct that will attract imprisonment by the state;
  - b. A declaration that, insofar as the impugned provisions fail to meet the constitutional standard of legislative precision required by the rule of law, those provisions are invalid and of no force and effect or, in the alternative, must be read down so as to satisfy this standard;

4. A declaration that the Applicant, O'Leary Productions Inc. ("O'Leary Productions") may make the Proposed Loan to the Campaign (defined below) in the amount required to retire the debt of the Campaign and that the Applicants shall not be subjected to prosecution by the Respondents, or any of them, in relation to the Proposed Loan;
5. Costs of this application to be fixed by the judge hearing the application; and
6. Such further and other relief as the circumstances of the case may require, and this Honourable Court may deem to be just and appropriate.

**THE GROUNDS FOR THE APPLICATION ARE:**

**The Parties**

7. The Applicant, Kevin O'Leary ("Mr. O'Leary"), is a Canadian citizen residing in Toronto, Ontario.
8. The Applicant, O'Leary Productions Inc. ("O'Leary Productions"), is a corporation continued in the Province of Ontario and is wholly owned and controlled by Mr. O'Leary.
9. The Respondent, the Commissioner of Canada Elections (the "Commissioner"), is the independent officer responsible for ensuring compliance with, and enforcement of, the Act. The current Commissioner is Yves Côté who was appointed in July 2012.
10. The Respondent, the Chief Electoral Officer of Canada (the "Chief Electoral Officer"), is an individual appointed by Parliament who is responsible for the administration of elections, referenda and other aspects of the electoral system in Canada. The current Chief

Electoral Officer is Stéphane Perrault who was appointed on May 8, 2018. Mr. Perrault previously served as Acting Chief Electoral Officer.

### **The Campaign**

11. In early 2017, Mr. O’Leary decided to run for the leadership of the Conservative Party of Canada (the “Conservative Party”) in the leadership contest that was expected to occur in the spring of 2017 (the “leadership contest”).
12. Mr. O’Leary formally announced his intention to run on or about January 18, 2017 and created the Kevin O’Leary Conservative Party of Canada Leadership Campaign (the “Campaign”). The Conservative Party selected May 27, 2017 as the date for the leadership contest.
13. Contestants for the leadership of the Conservative Party are subject to various requirements under the Act, including the provisions relating to campaign contribution limits and the re-payment of campaign expenses, as described further below. However, unlike contestants in general elections, leadership contestants are not subject to statutory campaign spending limits.
14. Registered political parties may set their own internal spending limits for leadership contestants. For the 2017 leadership contest, the Conservative Party imposed a spending limit of \$5 million per contestant. It is common for leadership contestants in a national campaign for the leadership of a major political party, such as the Conservative Party, to incur expenses of between \$1-2 million.
15. Mr. O’Leary’s Campaign incurred expenses and outflows of \$1,935,110.97.

16. These expenses included, among other things, the Conservative Party “entrance fee” of \$100,000.00 (half of which is a refundable compliance deposit), travel costs for Mr. O’Leary and his staff, radio, television, print and online advertising, event and venue bookings, salary expenditures, photographers, caterers, and other freelance and independent service providers necessary to assist the Campaign.
17. Many vendors provided services to the Campaign on credit, with the expectation that they would be reimbursed later out of funds contributed to the Campaign.
18. Mr. O’Leary solicited financial contributions from the public to pay for campaign expenses. Such contributions are subject to strict limitations under the Act. These include, among others:
- Donations by individuals to leadership contestants in a particular leadership race are limited to \$1,500 per calendar year (subject to an increase of \$25 on January 1 of each year) (*subsection 367(1)(d) of the Act*); and
  - Leadership contestants are not permitted to contribute more than \$25,000 out of their own money to their own campaign (*subsection 367(6) and (7) of the Act*).
19. Through fundraising efforts, the Campaign has raised a total of \$1,421,104.48 to date and continues to make efforts to raise additional funds.
20. By April 2017, Mr. O’Leary believed that he did not have sufficient support in the province of Quebec to win the leadership contest. He officially discontinued the Campaign and withdrew from the leadership contest on or about May 2, 2017.

### **Effect of the impugned provisions**

21. As at October 31, 2017 (being the date of the Campaign's financial return as filed with the Chief Electoral Officer) the Campaign owed \$532,149.38 in unpaid expenses (the "Campaign Debt"). Over \$300,000 of this amount was owed to small and mid-size business vendors who provided services to the Campaign on credit.
22. The impugned provisions of the Act require that the Campaign Debt be paid off within three years from the date of the leadership contest. The failure to do so constitutes an offence under the Act which is punishable by a fine of \$2,000, imprisonment of up to three months, or both.
23. Mr. O'Leary has continued fundraising activities in order to pay the Campaign Debt. Each donor may only contribute up to the annual limit proscribed under the Act. For 2018, the annual limit is \$1,575.
24. While Mr. O'Leary has continued to receive some donations, many donors are (justifiably) uninterested in contributing to the leadership campaign of a candidate who has withdrawn from a contest that someone else has already won. This particular challenge has and will continue to result in the withdrawal of many potential candidates from political involvement.
25. Further, the Campaign has been frustrated in its efforts to raise donations where related parties have made individual donations using the same "family" or "business" credit card, with the result that those donations are deemed by others to be above the annual limit described above and end up being uncollectable.

26. Mr. O’Leary is prohibited from contributing any more of his own funds to pay the Campaign Debt (as he has already reached the \$25,000 limit as described above).

27. As of the date of this Application, \$429,848.36 of the Campaign Debt remains unpaid.

**The Proposed Loan from O’Leary Productions to the Campaign**

28. On or about May 23, 2017, Mr. O’Leary, through legal counsel, wrote to the Commissioner (the “May 23, 2017 Letter”) requesting, *inter alia*, the Commissioner’s position with respect to a proposed loan from O’Leary Productions to the Campaign in the amount of \$300,000 (the “Proposed Loan”). The purpose of the Proposed Loan was to facilitate payment to small vendors who face financial hardship as a result of their accounts to the Campaign having gone unpaid for a prolonged period of time.

29. On or about May 31, 2017, Mr. O’Leary’s counsel received an email response from the Office of the Commissioner indicating, *inter alia*, that “the concern you raise does not involve the Commissioner’s compliance or enforcement functions.” The email response also stated that the Office of the Commissioner had forwarded the May 23, 2017 Letter to Elections Canada.

30. On May 31, 2018, counsel for Mr. O’Leary wrote again to the Commissioner and Elections Canada, seeking assistance. On June 14, 2018, the Commissioner responded, indicating that his position was that the Proposed Loan would contravene s. 373 of the Act.

**The impugned provisions violate ss. 2(b), 3 and 7 of the Charter**

*Section 2(b)*



31. Section 2(b) of the *Charter* guarantees the right to freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.
32. The Supreme Court has defined freedom of expression in the broadest possible terms. “Expression” has been found to cover “any activity that attempts to convey meaning.”
33. The impugned provisions of the Act, both in purpose and effect, interfere with the applicants’ freedom of expression rights, in violation of section 2(b) of the *Charter*. The impugned provisions limit monetary contributions to the Campaign, both by restricting the amount that Mr. O’Leary may contribute to his own campaign and by restricting the amount that individuals may contribute to the Campaign. This in turn constrained the ability of Mr. O’Leary and the Campaign to reach electors through media, advertising, town halls, telephone and other channels of communication.

### *Section 3*

34. Section 3 of the *Charter* guarantees the right of every citizen of Canada to vote in an election of members of the House of Commons and to be qualified for membership therein.
35. The rights guaranteed by section 3 include the right of each citizen to participate and play a meaningful role in the electoral process. It also includes the right of each citizen to be able to vote in a manner that accurately reflects his or her preferences.
36. The impugned provisions of the Act, both in purpose and effect, interfere with the right of electors to participate in the electoral process and with their right to vote, in violation of section 3 of the *Charter*. Because of the impugned provisions, it is extremely difficult to run a serious leadership campaign without incurring significant debt. Leadership

candidates are then subjected to the possibility of imprisonment if they fail to pay back their debts within three years. This state of affairs could, and no doubt already has, discouraged otherwise qualified candidates from running for party leadership. This in turn reduces the overall pool of candidates, infringing on the right of electors to be able to vote in a manner that accurately reflects their individual preferences.

*Section 7*

37. Section 7 of the *Charter* provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
38. The failure of Mr. O'Leary (or any leadership candidate) to pay his leadership campaign debt within three years after the end of the leadership contest is an offence under the Act punishable by a fine and/or imprisonment. Similarly, it is an offence punishable by a fine and/or imprisonment for Mr. O'Leary (or any leadership candidate) to contribute more than \$25,000 to the Campaign, placing him and other leadership candidates in an impossible position if they are unable to raise the funds through fundraising efforts through no fault of their own and in fact, in the face of their own due diligence.
39. Many leadership candidates have been unable to pay back their campaign expenses, despite valiant attempts to raise the money from donors (during and often long after the leadership contest is over). Those candidates, including Mr. O'Leary, are then exposed to potential prosecution and incarceration, contrary to the principles of fundamental justice and consequently, in violation of their rights under section 7 of the *Charter*.

**Section 1 of the *Charter***

40. The violations of sections 2(b), 3 and 7 of the *Charter* set out above do not constitute a reasonable limit demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*. The impugned provisions do not advance a sufficiently important government objective and, in any event, fail to meet the proportionality requirements of section 1 of the *Charter*. In particular:

- a. Parliament's objective in relation to the impugned provisions is not "pressing and substantial";
- b. The effect of the impugned provisions (to limit contributions to leadership campaigns) is not rationally connected to Parliament's stated objective of reducing unfairness in election campaigns. Political parties should be free to choose their leaders in a manner of their choosing, with those leaders then subject to spending and contribution limits once an election is called;
- c. The impugned provisions do not minimally impair the Applicants' *Charter* rights. Even if some campaign contribution limit were found to be appropriate, the current limits are unreasonably restrictive and fail to account for the overall cost of running a serious leadership campaign which could be, and often is, in the millions of dollars; and
- d. The infringement of the Applicants' *Charter* rights is not proportional to the measures chosen by Parliament to achieve its objective.

**Constitutional and statutory provisions engaged**

41. Sections 1, 2(b), 3, 7 and 24(1) of the *Canadian Charter of Rights and Freedoms*;
42. Section 52 of the *Constitution Act, 1982*;
43. Rule 14 of the *Rules of Civil Procedure*;
44. Such further and other grounds as counsel may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:**

1. The affidavit of Kevin O'Leary, to be sworn;
2. Such further and other affidavits and materials as counsel may advise and this Honourable Court may permit.

October 15, 2018

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**Professional Corporation ■ Lawyers**  
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Lawyers for the Applicants

CV-18-00606988-0000

Court File No.:

AND

O'LEARY PRODUCTIONS INC., et al.  
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<p>ONTARIO SUPERIOR COURT OF JUSTICE</p> <p>PROCEEDING COMMENCED AT TORONTO</p>	<p>NOTICE OF APPLICATION</p> <p>GROIA &amp; COMPANY PROFESSIONAL CORPORATION LAWYERS Wildeboer Dellelce Place 365 Bay Street, 11th Floor Toronto, Ontario M5H 2V1 Tel: 416-203-2115 Fax: 416-203-9231</p> <p>Joseph Groia (LSO# 20612J) Bonnie Roberts Jones (LSO# 41256L)</p> <p>Lawyers for the Applicants</p>
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