Playing by the rules: Does election legislation apply to political leadership races?

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On October 30, 2021, Heather Stefanson was elected the new leader of the Progressive Conservative Party of Manitoba (the Party), following the results of the Party's leadership election. As a result, Ms. Stefanson became the Premier-designate of Manitoba. However, the leadership election did not occur without controversy, as the runner-up, Shelly Glover, disputed the validity of the election given the significant number of voting irregularities that contravened provincial election legislation throughout the race.

In *Glover v. The Progressive Conservative Party of Manitoba*, 2021 MBQB 267 (*Glover*), the Court dismissed Ms. Glover's claim and upheld the results of the leadership contest. The Court stated that the provincial election legislation did not apply, and instead, the contest was governed by the Party's internal rules. As a result, *Glover* supports the notion that voting irregularities which breach provincial election legislation, but not a party's internal rules, do not constitute grounds for invalidating a leadership race. Despite this, political parties should closely review the language within their organizational documents, to ensure they have not created internal rules which they do not plan to follow during leadership races.

Analysis

The Court began its analysis by clarifying that the province's election statutes (i.e., the *Elections Act*, C.C.S.M. c. E30 and *Election Financing Act*, C.C.S.M. c. E27) do not apply to political leadership contests, unless expressly incorporated. The Court states that the election legislation is intended to apply to the election of MLAs, not to leaders of political parties and other "unincorporated associations". Instead, political leadership races are governed by a party's internal organizational documents, which are to be interpreted and applied using principles of contractual interpretation.

In coming to this conclusion, the Court distinguished the case of *Opitz v. Wrzesnewskyj,* 2012 SCC 55 (*Opitz*), which dealt with the judicial recount in Etobicoke Centre during the 2011 federal election. In *Opitz,* the Supreme Court of Canada applied the federal *Elections Act*, S.C. 2000, c. 9 to address the dispute over a small number of irregular votes that threatened Ted Opitz's victory. While *Opitz* informs how voting irregularities should be assessed vis-à-vis legislation in general elections, the Court in *Glover*

clarified that irregularities in internal leadership races should instead be scrutinized with reference to a party's organizational documents.

As a result of this, the Party's leadership election was governed by its constitution and leadership election rules and procedures. Notably, the Party's constitution included a provision requiring compliance with "all election laws and election financing laws." However, the Court determined that this provision was intended to require compliance with election laws during the elections of MLAs and not internal leadership races. The Court required objective evidence of an intention otherwise, given that the election legislation is ordinarily intended to govern over general elections, not internal contests. Accordingly, the provincial election laws did not apply to the Party's leadership election.

Therefore, in order for party members and/or leadership candidates to overturn an election result, they must show that:

a. There was an irregularity that impeached the validity of certain votes;
b. That irregularity breached the party's internal organizational rules; and
c. The irregularity was material, in that the number of impeached votes outnumbered the winning candidate's plurality.

To that end, Ms. Glover disputed the validity of the leadership election based on the following voting irregularities – a number of which contravened provisions within the election legislation:

1. The number of votes cast exceeded the number of voters appearing on an internal voter's list (i.e., there were 501 disputed votes cast, and only a 363 victory margin);
2. No audit of the votes was conducted;
3. The unsealed ballot box was removed from the counting floor before the results were announced;
4. Ballots were divided among counting tables without close tracking;
5. Not all the tally sheets were signed and/or initialed; and
6. The precise procedure for conducting the final vote tally was not followed.

The Court was then tasked with assessing whether any of these irregularities breached the Party's internal rules, and if so, whether the number of disputed votes affected Ms. Stefanson's plurality. The Court reviewed the voting irregularities, finding that a number of them in fact breached requirements under the provincial elections legislation, such as transporting the ballot box while it was unsealed and failing to follow the precise procedure for the final vote tally. However, because the election legislation did not form part of the rules for the leadership contest, these irregularities were not considered a breach of contract by the Party.

The other irregularities also did not breach any of the Party's internal rules, despite Ms. Glover's argument that the irregularities breached separate rules provided in a Party bulletin sent to scrutineers outlining the balloting process. The Court found that the Party bulletin was an aspirational document and these new rules did not become binding because the Party's constitution states that only the executive council can approve new rules for the leadership election process.

Implications

Glover serves as a warning to political parties to ensure they are aware of the procedural obligations they owe their members as a result of their organizational documents. References to election legislation and use of bulletins to educate members may create binding obligations on parties in some circumstances. Therefore, parties seeking to create their own rules for leadership elections should review and consider revising any references to election legislation in their constitutional documents. Additionally, parties may benefit from adding language into their constitutions which provide their executive councils with the sole and final discretion to determine procedural rules.

While parties have considerable flexibility in instituting the procedural rules for leadership contests, the *perception* of procedural fairness is also important. In fact, following Ms. Stefanson's victory, protests were held alleging that the leadership election was unfair and lacked credibility, citing a number of the aforesaid irregularities. As such, parties may consider using the election legislation as an informative guide for ensuring procedural fairness during their upcoming leadership races, in order to maintain party integrity. In fact, the Court in *Glover* noted that there are many procedural safeguards in the election legislation that could have been followed in this case in order to make the voting process more secure.

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