

THE CHARTER CHALLENGE LE DÉFI DE LA CHARTE

Ontario Justice Education Network
Réseau ontarien d'éducation juridique

CASE SCENARIO FALL 2007

J. BIGBUCKS
(APPLICANT)

v.

CANADA (ATTORNEY GENERAL)
(RESPONDENT)

Superior Court of Justice

BETWEEN:

J. BIGBUCKS
(Applicant)

- AND -

CANADA (ATTORNEY GENERAL)
(Respondent)

REASONS FOR JUDGMENT

Laurier Macdonald, J.:

1. This is an application by J. Bigbucks to have several sections of the *Federal Elections Financing Act*, a statute of the Dominion of Canada, declared to be unconstitutional. Mr. Bigbucks alleges that the contribution and spending limits imposed by that legislation infringe his rights under the *Charter*. He further alleges that none of these infringements can be reasonably justified in a free and democratic society. For the reasons that follow, I have concluded that the application is merited and I declare the contribution and spending limits which are set out below to be of no force or effect.
2. It is necessary to set out some background information in order to deal with the

arguments which have been made before me. Mr. Bigbucks is a resident of Ontario and the owner and publisher of Taxpayers' Viewpoint Magazine. This magazine advocates a variety of changes to the present social structure of Canada, including the abolition of welfare for individuals, the abolition of medicare, the end of subsidies for education at all levels of schooling, the end of progressive taxation, an increase in military spending and the reinstatement of capital punishment. It also advocates numerous subsidies for corporations. Mr. Bigbucks himself is not a member of any political party, but does contribute money to the Extremely Conservative Party of Canada and is a frequent attendee at that party's political conventions. He has not been known to contribute to the Moderately Conservative Party, the National Liberal Party or the Social Democratic Party. He is also known to be a man of great wealth and has stated that he is prepared to use his riches to bring about the type of Canada that he believes should exist.

3. Mr. Bigbucks' application was the subject of numerous requests for intervention before this court by both persons and organizations who either support or oppose his views. This included the Canadian Capitalist Coalition in support and Canadians for Greater Democracy in opposition. In the end, I declined to allow any interventions in this case. However, it is clear that there have been certain people or groups who have lent their views, knowledge and expertise to the litigant whom they were supporting.
4. I wish to make one point very clear in this decision. It is not my duty as a judge of this

court to decide if Mr. Bigbucks' views are worthy of support or should be promoted. This is a court of law, not a political forum. The place to seek amendments to legislation is before Parliament and not in the courts. My sole duty is to consider whether the applicant and respondent have presented their arguments in a manner which allows me to weigh their views of the impugned legislation against the provisions of the *Canadian Charter of Rights and Freedoms*. If they have demonstrated that the provisions of the legislation infringe the constitution, I am duty bound to consider whether that legislation can reasonably be justified in Canadian society. If it cannot, then it must be struck down. The rule of law demands no less.

5. I now turn to the impugned legislation, which I set out in summary form below:
- a) no person shall contribute more than \$3,000 to a political party within one calendar year;
 - b) during an election period, defined as the time between the dissolution of Parliament to midnight on the day of a general election, no person shall spend more than \$5,000 to support, directly or indirectly, a viewpoint espoused by one political party with the intention of promoting the chances of election of a candidate of that political party; and
 - c) during the same period, no person shall spend more than \$5,000 to attack or denigrate, directly or indirectly, a viewpoint espoused by a political party with the intention of lessening the chances of election of a candidate of that political party.

In other words, these contribution and spending limits allow limited contributions to registered political parties and during election periods allow limited spending to promote or attack candidates' positions. This is a limitation of direct promotion or attack upon a candidate. Thus, for example, a third party could not spend more than the set limit to appeal to voters in any candidates' riding that a particular candidate should not be elected or re-elected. The "do not vote for John Smith" type of ad is covered in this scenario. However, the legislation goes further in that it limits the ability of a third party to comment upon a matter of public importance if it mirrors a position taken by a particular candidate, even without reference to the candidate him or her self. Thus, a person could not spend more than \$5,000 to say that the public should vote for candidates that support better pensions for the elderly as that may have the effect of supporting particular persons running for office. Nor could a person spend more than that amount of money to suggest that candidates who support higher military spending are worthy of consideration.

6. Mr. Bigbucks has alleged that this legislation infringes his rights under the *Charter* in several ways:
 - a) it interferes with his freedom of expression under S. 2(b);
 - b) it violates his freedom of association under S. 2 (d);
 - c) it violates his right to liberty under S. 7; and
 - d) none of these limits upon his rights are justifiable.

7. The Attorney General counters each of these arguments. While the respondent concedes that the impugned legislation does affect on the rights of the applicant, in the widest sense of the word, it proffers two main points. First, *Charter* rights must always be read in context. The purpose of federal election spending legislation is to ensure that a person cannot “buy” an election by spending large sums to defeat particular candidates. It would be a relatively simple matter, in the respondent’s suggestion, to target candidates who are opposed to the applicant’s views, who are standing for office in marginal ridings where a shift of a few hundred votes could make the difference between victory and defeat. By spending money in those ridings, the message of the candidate could be “drowned out” by the large spender. This could have a devastating effect on democratic elections, setting aside the true will of the populace and subjugating it to the will of those with the most resources. This, the respondent states, is fundamentally anti-democratic. The purpose of this law is to promote democracy, not to allow it to be hijacked by a specific minority.
8. The second point made by the Attorney General is that even if the applicant’s rights have been infringed, this is a reasonable limit, demonstrably justified in a free and democratic society. The Attorney General points out that many other jurisdictions have electoral expense legislation and there is no reason that Canada should be any different. Electoral expense laws enhance the ability of all to participate in the democratic process and that right is not given to the wealthy few. Thus, the limits are acceptable.

9. In my opinion, the respondent's arguments cannot stand and the applicant's must succeed. First, a person in Canada must be able to expound his or her views without interference from government. This must be true whether the person communicates these views by picketing, handing out leaflets, writing letters to newspapers or purchasing advertising time on television or radio. It may be true that various media or forms of expression are more available to some than others due to the cost of purchasing advertising, but the essence of free expression is the right to state one's views. It does not mean that anyone else has to agree with these views nor that anyone else has to take special steps to help one disseminate one's views. For example, a person who cannot afford to advertise on television cannot force a TV station to air his or her views for free. The right to free expression does not mean that economic realities or market forces have been suspended or made subject to the highest interpretation of that right. If a person wishes to communicate his or her views by buying TV ads, rather than handing out flyers, that is a decision which he or she may choose to make. In either case, the right of the person to communicate must be upheld.
10. Had the issue of free expression in the legislation been limited to spending money on so called attack ads which targeted a specific candidate in a specific riding, I might have seen this matter differently. However, it is not my duty to read down the legislation, much less totally re-write it, to accord with the constitution. I must take the legislation as it stands. Thus, I find that the spending limit which disallows a person

from spending money on communicating comments on a matter of public importance, or even any political issue, during the time of an election, if it has the effect of supporting or disavowing a candidate is an infringement on the rights of the applicant.

11. The applicant has also submitted that his freedom of association is infringed by this law. I find that this argument, at first, to be somewhat suspect. This law does not stop Mr. Bigbucks from associating with like minded persons. He can attend conferences, meetings or any sort of gathering. He can meet people through all forms of media, for example, via computer links or networks. However, the purpose of this section is to allow the individual to reach his or her potential through interpersonal relationships and collective action. The individual's potential can be political, economic, social or something else. I must ask then, how can Mr. Bigbucks reach his potential which in his case is attempting to bring about legislative change in Canada unless he is allowed to take collective action to change the political landscape? He cannot do this without associating with others and the practical reality of forming associations means that resources must be expended to make them effective. While it would be simple to hold that Mr. Bigbucks, or any other person, whatever their political views, could associate with others simply by meeting with them, this is putting form over substance. The association may be potentially available, but effective association could not occur. Thus, I find that Mr. Bigbucks' freedom of association has also been infringed.

12. The third point is that Mr. Bigbucks claims that his right to liberty is also being infringed. Under S. 7 of the Charter, everyone has the right to life, liberty and security of the person. Liberty means the right to do as one pleases. This includes many facets, but the fundamental point here is that everyone can spend his or her money in the way he or she sees fit. If Mr. Bigbucks wanted to buy Group of Seven paintings, what possible interest could the government have in that? Could this be restricted by an Act of Parliament? If Mr. Bigbucks wanted to spend his money on hockey tickets for underprivileged youngsters, how could the government interfere? They could not. If Mr. Bigbucks wants to spend money to promote a particular political vision or this country, no matter how many people may oppose it, how can one say that he is not allowed to do so? Thus, I find that the right to liberty, which includes the right to be left alone or to do what one wants with his own resources, has been infringed. This means that contribution limits to political parties cannot be sustained.
13. The fundamental issue in this case is whether these infringements are justified in a free and democratic society. The respondent argues, as noted above, that election expense laws are designed to prevent a group from “buying” an election. It points out that other countries have election expense laws and for this reason it should be decided that these are reasonable limits. I may agree that election expense legislation is appropriate. It may even be that state funded elections are appropriate. That is not my task. I must decide if this particular legislation is justified. The respondent states that the only way to allow all voices in an election campaign to be heard is to ensure that

no third party has a special economic advantage to influence the outcome of the vote. In other words, everyone must be put on a much more equal footing and not to allow anyone to try to use its own resources to influence others. In some ways this may be admirable, but to suggest that Canadian voters cannot distinguish between valid and invalid, or reasoned and ridiculous positions, simply due to advertising, it an insult to the intelligence of the Canadian voter. It is a paternalistic approach which reflects a by-gone era. Canadians are not so simply led astray. I do not agree that this is a reasonable limit on the rights of Canadians.

14. Further, the respondent has led no empirical evidence to support its position. While some of the respondent's suggestions may be superficially appealing, or indeed may seem logical, without some form of evidence in the form of statistics or proper studies, I cannot accept their position.
15. I stress that I am not deciding that election expense limits can never be justified. This case only determines that this legislation, with these limits, are not acceptable under the constitution. I go no further.
16. Finally, considering the potential effect of this decision, I suspend the declaration of invalidity for a period of thirty days. If an appeal to the Court of Appeal is filed during that time, that Court will have to determine if any other suspension of invalidity is appropriate.

17. I wish to thank all counsel for their assistance in this matter.

Laurier Macdonald, J.