

The Top Five - 2004

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



Harper v. Canada (Attorney General) 2004 SCC 33 (CanLII)

<http://www.canlii.org/en/ca/scc/doc/2004/2004scc33/2004scc33.html>

In *Harper*, the Supreme Court of Canada was asked to decide whether specific sections of the *Canada Elections Act* relating to election advertising spending limits infringed individuals' right to vote, right to freedom of expression or right to freedom of association, all of which are rights guaranteed under the *Canadian Charter of Rights and Freedoms (Charter)*. As in the case with any consideration of *Charter* infringement, if the court determines that the provisions limit people's rights, then that court also has to decide whether the limits on those rights can be justified in a free and democratic society.

One provision of the *Canada Elections Act* challenged by Stephen Harper (Stephen Harper, current leader of the Opposition, started this court action prior to being elected to the federal parliament), was the section that limits anyone other than a political candidate or a political party (i.e. a "third party") from spending more than \$3000 per electoral district and \$150,000 nationally on advertising during an election campaign. In effect, this provision limits third parties from effectively communicating with voters during an election campaign. The legislation does not limit editorials, debates, interviews, commentary, distribution of books (if the book was planned to be released regardless of the election campaign), documents sent by a person or group to other members of their group, and Internet posting of personal opinions. Harper argued that this provision limits freedom of expression, which is a right guaranteed under the *Charter*. Harper also argued that by limiting his freedom of expression, his right to participate in the voting process in a meaningful way was limited.

At trial, the judge found that the *Canada Elections Act* provisions violated individuals' *Charter* rights. The judge then asked whether that violation could be justified in a free and democratic society and found that it could not. He noted that the Attorney General did not produce enough evidence to convince him that the law was necessary to maintain electoral fairness (the purpose of the *Canada Elections Act*). The Attorney General appealed the trial judge's decision.

The Alberta Court of Appeal dismissed the Attorney General's appeal but allowed Harper to counter-appeal. Two of the Court of Appeal judges ruled that all the sections of the *Canada Elections Act* in question ought to be treated as unseverable (i.e. treated

as a whole rather than as distinct and individual parts) and that the sections violated people's constitutionally guaranteed rights. As a result, the Court of Appeal ruled that those sections of the *Canada Elections Act* were of no force and effect and should be struck down. One judge disagreed, stating that although the spending limits infringed people's rights, the limits were justifiable under s. 1 of the *Charter*. The Attorney General appealed the majority decision to the Supreme Court of Canada.

Before deciding the main issue before them, the Supreme Court judges found that the Alberta Court of Appeal was wrong to rule that all the provisions had to be considered together. The Supreme Court found that Part 17 of the Act creates a scheme that limits third party election advertising expenses. The regime can be divided into four parts. The Supreme Court ruled that each part stood on its own and, therefore, the constitutionality of each set of provisions had to be considered separately.

The members of the Supreme Court did not reach a unanimous decision when asked to decide whether the provisions infringed rights guaranteed by the *Charter*. To reach its decision, the Court considered an earlier case that it had decided in 1997. (See *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569.) In that case, the Supreme Court found that the spending limits set out in Quebec's referendum legislation were meant to ensure fairness in the election process. The Court noted that spending limits were necessary to prevent the wealthiest citizens from being the only people who could advertise their opinions. Additionally, the Court found that spending limits were necessary to ensure that the right of all electors to be informed of all political positions was preserved. The Court observed that Parliament had the right to create laws that ensured that voters had equal participation in the electoral process.

Harper argued that voters could not meaningfully participate in the election process if their right to political expression was curtailed. The majority rejected this argument stating that if only wealthy citizens were permitted to dominate political advertising, the voter may not be adequately informed of all the parties' views. The majority of the Supreme Court ruled that the spending limits do infringe the right to freedom of political expression but they do not infringe the right to vote in an informed manner because the purpose of the legislation is to promote electoral fairness.

Because the majority found that the provisions of the *Canada Elections Act* did not infringe on the right to vote, it did not need to consider whether that infringement was justifiable in a free and democratic society under s. 1 of the *Charter*. However, the Court had to conduct this analysis for the issue of the infringement of freedom of expression. In the end, the court ruled that the spending limit provisions could be justified under s. 1 of the *Charter*. The majority ruled that Parliament has the right to make laws that will protect people from manipulation. The Court's majority found that the laws on spending limits were connected to the purpose of the legislation, which is to ensure a fair electoral process. The Court also found that the limit on freedom of expression was minimal since it only limits spending for the duration of the election campaign. Finally, the majority found that the provisions increase Canadians' confidence in the fairness of the electoral process.

The majority also found that the provision that prevents third parties from advertising on election day does infringe the right to freedom of expression. However, that infringement is justified under s. 1 because misleading advertising on election day can be damaging to the election process.

On the issue of whether having to report election advertising expenses to the Chief Electoral Officer infringed a person's *Charter* rights, the Court unanimously ruled that these provisions do not violate *Charter* rights because the procedure actually enhances confidence in the election process. This is because reporting the amount of spending on advertising makes the process transparent. (Citizens can see that everyone is treated equally and subjected to the same spending limits.)

Two Supreme Court judges dissented with the majority, finding that the provisions of the *Canada Election Act* are unconstitutional. The judges found that the spending limits reduce a person's freedom of expression and therefore are invalid. The dissenting judges also found that there is no connection between spending limits and unfairness in the electoral process. The spending limits prevent citizens from fully participating in political debates. The minority would have struck the spending limit provision down for being invalid.