Canadian Broadcasting Corporation et al. v. Attorney General of Canada

[Indexed as: Canadian Broadcasting Corp. v. Canada (Attorney General)]

105 O.R. (3d) 679

2011 ONSC 2281

Ontario Superior Court of Justice,
Himel J.
April 11, 2011

Charter of Rights and Freedoms -- Procedure on Charter application -- Expedited hearing -- Media applicants bringing application attacking constitutionality of s. 329 of Canada Elections Act after federal election was called and requesting urgent and expedited hearing -- Request denied -- Application could have been brought before federal election was called -- Requiring respondent to prepare for hearing in expedited time frame would cause it significant prejudice -- Requiring application judge to make quick decision in important and complex issue not in public interest -- Canada Elections Act, S.C. 2000, c. 9, s. 329.

After a federal election was called, the media applicants brought an application challenging the constitutionality of s. 329 of the Canada Elections Act, which prohibits the transmission of election results in one electoral district to another electoral district before the close of all polling stations in that other district. The applicants sought a

declaration that s. 329 violates s. 2(b) of the Canadian Charter of Rights and Freedoms and is not saved under s. 1 of the Charter. They requested an urgent and expedited hearing of the application before the election was held. [page680]

Held, the request should be denied.

Prior to the election being called, the applicants' interest in s. 329 of the Act was not purely hypothetical. It would not have been premature for them to bring this application prior to the election being called. Requiring the respondent to prepare for the hearing of the application within an expedited time frame would cause it significant prejudice. Moreover, the application judge would be required to provide an almost immediate decision in a complex case. An expedited determination of the issues raised in the application would not be in the public interest.

Cases referred to

Apotex Inc. v. Wellcome Foundation Ltd., [1998] F.C.J. No. 859, 228 N.R. 355, 81 C.P.R. (3d) 443, 81 A.C.W.S. (3d) 141 (C.A.); Canada (Minister of Citizenship and Immigration) v. Dragan, [2003] F.C.J. No. 434, 2003 FCA 139, 303 N.R. 112, 25 Imm. L.R. (3d) 163, 122 A.C.W.S. (3d) 7; Conacher v. Canada (Prime Minister), [2009] F.C.J. No. 1136, 2009 FC 920, [2010] 3 F.C.R. 411, 202 C.R.R. (2d) 136, 352 F.T.R. 162, 311 D.L.R. (4th) 678 (F.C.); MacKay v. Manitoba, [1989] 2 S.C.R. 357, [1989] S.C.J. No. 88, 61 D.L.R. (4th) 385, 99 N.R. 116, [1989] 6 W.W.R. 351, J.E. 89-1289, 61 Man. R. (2d) 270, 43 C.R.R. 1, 17 A.C.W.S. (3d) 169; May v. CBC/Radio Canada, [2011] F.C.J. No. 519, 2011 FCA 130; R. v. Bryan, [2007] 1 S.C.R. 527, [2007] S.C.J. No. 12, 2007 SCC 12, 276 D.L.R. (4th) 513, 359 N.R. 1, [2007] 5 W.W.R. 1, J.E. 2007-530, 237 B.C.A.C. 33, 72 B.C.L.R. (4th) 199, 217 C.C.C. (3d) 97, 45 C.R. (6th) 102, 153 C.R.R. (2d) 316, 72 W.C.B. (2d) 362, EYB 2007-116393; Smith v. Ontario (Attorney General), [1924] S.C.R. 331, [1924] S.C.J. No. 15, [1924] 3 D.L.R. 189, 42 C.C.C. 215

Statutes referred to

Canada Elections Act, S.C. 2000, c. 9, s. 329

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 4

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 14.05(3) (d), (g.1)
Authorities referred to
Hogg, Peter, Constitutional Law of Canada, 5th ed. (Scarborough, Ont.: Thomson Carswell, 2007)
Royal Commission on Electoral Reform and Party Financing, Reforming Electoral Democracy: Final Report (Ottawa: Royal Commission on Electoral Reform and Party Financing, 1991)

REQUEST for an expedited hearing of a Charter application.

Mark J. Freiman and Lucas E. Lung, for applicants Canadian Broadcasting Corporation and Bell Media Inc.

Sean Gaudet and James Gorham, for respondent Attorney General of Canada.

[1] HIMEL J.: -- This matter was before me in the Motions Scheduling Court as a request by the Canadian Broadcasting Corporation and Bell Media Inc. (the "applicants") to schedule an application brought under rule 14.05(3)(d) and 14.05(3)(g.1) [page681] of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The applicants ask that the case be heard on an urgent basis as they challenge the constitutional validity of s. 329 of the Canada Elections Act, S.C. 2000, c. 9, which prohibits the transmission of election results in one electoral district to another electoral district before the close of all polling stations in that other district. They seek to have the court declare that s. 329 violates s. 2(b) of the Canadian Charter of Rights and Freedoms (freedom of expression) and is not saved by s. 1 of the Charter. They ask that the application be heard some time prior to the federal election which is scheduled for May 2, 2011. The Attorney General of Canada opposes the request for an urgent hearing.
Factual Background

[2] On Saturday, March 26, 2011, Parliament was dissolved and a federal election was called for Monday, May 2, 2011. The

applicant Canadian Broadcasting Corporation ("CBC") is Canada's national public broadcaster and the applicant Bell Media Inc. owns CTV, Canada's largest national private-television broadcaster. These applicants challenge the constitutional validity of the following provision:

> 329. No person shall transmit the result or purported result of the vote in an electoral district to the public in another electoral district before the close of all of the polling stations in that other electoral district.

[3] In the decision of R. v. Bryan, [2007] 1 S.C.R. 527, [2007] S.C.J. No. 12, 2007 SCC 12, the Supreme Court of Canada held that s. 329 of the Canada Elections Act was a breach of the right of freedom of expression but that this infringement is justified under s. 1 of the Charter. The court held that s. 329 by virtue of its objective of ensuring informational equality among voters is a reasonable limit on s. 2(b) of the Charter. The court concluded that the government was able to demonstrate that the s. 329 ban meets the proportionality test. In reaching this conclusion, it considered affidavit evidence before it which included a government report entitled Reforming Electoral Democracy: Final Report (Ottawa: Royal Commission on Electoral Reform and Party Financing, 1991), the Report of the Royal Commission on Electoral Reform and Party Financing (the "Lortie Report"), a Decima Research/Carleton University Poll concerning the electoral system in Canada and the evidence of Dr. Robert MacDermid, a professor of political science at York University.

[4] In the matter before me, counsel for the applicants was retained during the week following the election call and has [page682] amassed certain evidence for the application. He contacted the respondent with a draft notice of application containing the argument and the evidence which the applicants intend to rely upon at a hearing. That evidence includes five affidavits as follows:

(1) an 18-page affidavit by the general manager and editor-in-chief of the English language services of CBC. She outlined changes in the culture of news broadcasting over the last five years, commented on the efforts that must be

taken to comply with s. 329 in an environment that she describes as the "new social media age" and argues that as a result of the prohibition in s. 329, the CBC will be unable to provide reporting on election results while other social media outlets will be doing so;

(2) an 11-page affidavit of the executive producer of the weekly W5 public affairs program broadcast on CTV and election producer for CTV. He also described the impact of the Internet and new social media on CTV's operations and on how news is gathered generally in Canada. He provided the opinion that extraordinary precautions will need to be taken to ensure that there is no breach of s. 329. These precautions will result in cost and inconvenience to CTV and CTV will be unable to provide accurate and timely information to Canadians;

(3) a 15-page affidavit of Dr. Michael Geist, a University of Ottawa law professor who holds the Canada Research Chair in Internet and E-commerce Law. He has appeared as an expert witness on Internet and technology issues before various government committees and his work has been cited before the courts. In his affidavit, which has approximately 50 documents attached, he reviewed the experts' affidavits filed on the R. v. Bryan challenge to s. 329. He says that Facebook was not available to the general public in 2005 and Twitter did not exist at the time. He says these social media tools are now used widely by Canadians. He takes the position that on election day, millions of Canadians will likely turn to social media tools to gather information and that banning such communication will be technically impossible;

(4) a 15-page affidavit sworn on April 7, 2011 of Dr. Ruth M. Corbin, who is managing partner of a marketing science company which conducts market research and analysis. She [page683] is an adjunct professor of trademark and intellectual property law at Osgoode Hall Law School, holds a Ph.D in psychology and has been deemed an expert witness before courts in Canada. She reviewed the survey research considered by the Supreme Court in the R. v. Bryan case and provided the view that based on current standards for evaluating expert survey evidence, the evidence concerning the Decima poll that was before the Supreme Court does not

meet today's standards of statistical reliability, is of questionable validity and the relevance of the information to the current environment has been affected by the technological change in the media of communications; and

(5) a two-page affidavit of the director of legal and business affairs of the Australian Broadcasting Corporation, who says that although Australia has three time zones, it does not have staggered voting hours for federal elections and there is no law prohibiting the transmission of election results to the public in areas where polling stations remain open.

Positions of the Parties

[5] The position of the applicants is that this application should be heard on an urgent basis as the decision will have a profound impact on the right of freedom of expression of the media and of individual Canadians during the election. Counsel argues that the restriction in s. 329 was originally enacted to regulate the traditional broadcast media and that the evidence before the Supreme Court in R. v. Bryan reflected the state of the media at that time. However, the situation has changed dramatically over the last five years. As is outlined in the evidence upon which the applicants will rely, the Internet and new social media tools such as Twitter, Facebook and blogs create opportunities for the uncontrolled transmission of information. This information may include misinformation. The applicants argue that they will be unable to provide accurate timely information about the election. Counsel says that he would be available to argue the matter on April 26 or 27, 2011, and that the argument would take a total of approximately one half day.

[6] Counsel for the Attorney General of Canada submits that the applicants have created an unfair urgency by seeking an application date within such time constraints. He takes the position that he received the application record on April 8 and that he requires time to retain experts on behalf of the respondent [page684] and prepare responding evidence. The parties will have to conduct cross-examinations and prepare written argument for the court within a time frame that is untenable. Counsel further submits that the argument of the

constitutional validity of s. 329 will take at least one to two days and that there is insufficient time to allow for preparation and argument to be done prior to the date set for the election.

[7] Counsel for the respondent relies upon a decision of the Federal Court in Conacher v. Canada (Prime Minister), [2009] F.C.J. No. 1136, 2009 FC 920, 311 D.L.R. (4th) 678 (F.C.), refusing to grant an expedited hearing of the application on the eve of an election where contraventions of the Charter were being asserted. In that case, the court was of the view that the issues were weighty, substantial and complex and needed to be considered on the basis of a full factual record. The court refused to order an expedited hearing of the application on the merits.

[8] Counsel for the Attorney General argues that the applicants could have brought this application in a more timely way with adequate notice to the respondent and the court. Counsel for the applicants submits that they could not have brought this application prior to an election being called because an application to challenge the constitutional validity of a provision cannot be brought in a factual vacuum. They contend that prior to the federal election being called, this application would have been based on a hypothetical set of facts without an evidentiary basis. They argue that they have acted as expeditiously as possible.

Decision

[9] A court will not grant a constitutional declaration if an issue is purely academic or hypothetical: see Smith v. Ontario (Attorney General), [1924] S.C.R. 331, [1924] S.C.J. No. 15. As Peter Hogg states in Constitutional Law of Canada, 5th ed. (Scarborough, Ont.: Thomson Carswell, 2007) at vol. 2, p. 791:

> A case is not "ripe" for decision if it depends upon future events that may or may not occur. In that situation, the case would involve a premature determination of what is still only a hypothetical question. For example, a challenge to the constitutionality of a bill that has not been enacted would

not be ripe: the bill may never be enacted or may be significantly amended before enactment.

[10] Prior to an election being called, the applicants' interest in s. 329 of the Canada Elections Act was not purely hypothetical. In accordance with s. 4 of the Charter, a federal election must be called in Canada every five years. The applicants submit that they are two of the largest media organizations in [page685] Canada and that they provide live coverage and up-to-the-minute information on federal elections. The possibility of the applicants being subject to s. 329 when reporting election results was not speculative. The applicants expect to be, and have been in the past, required to comply with s. 329 of the Canada Elections Act at least once every five years. It would not have been premature for the applicants to bring this application prior to the federal election being called.

[11] When considering whether to grant an application for an expedited hearing, procedural fairness to both parties must be taken into account. The factors the court may consider include whether irreparable harm will result if the hearing is not expedited and whether a timetable can be agreed upon which is convenient to the court and the parties: see Apotex Inc. v. Wellcome Foundation Ltd., [1998] F.C.J. No. 859, 228 N.R. 355 (C.A.); Canada (Minister of Citizenship and Immigration) v. Dragan, [2003] F.C.J. No. 434, 2003 FCA 139, 25 Imm. L.R. (3d) 163, 303 N.R. 112.

[12] As outlined above, the application record contains five affidavits which include significant amounts of social science evidence and statistical analysis.

[13] Assessing and responding to the applicants' evidence would require time. The respondent would be required to consider the record that was before the Supreme Court in the R. v. Bryan case, the application record of the applicant which it has just received and would have to retain and consider its own expert evidence. The respondent would also be required to make significant Charter arguments. Each counsel would have the right to cross-examine the affiants submitted by the opposing

side. Then counsel would be required to prepare and file facta and books of authorities. Requiring the respondent to prepare for the hearing of this matter in the expedited time frame proposed by the applicants would cause them significant prejudice. Prejudice to the respondent is a highly relevant factor when determining whether an application should be expedited: see May v. CBC/Radio, [2011] F.C.J. No. 519, 2011 FCA 130, at para. 13; Dragan, supra, at para. 13.

[14] I am not persuaded that the applicants could not have brought this application some time prior to the election being called and in a time frame that would have allowed proper preparation and consideration of these complex issues. This is not a hypothetical situation as it was known for several months that there was likely to be a federal election and, in any event, the law is such that an election must be called at least every five years. The time frame proposed would not allow the respondent [page686] sufficient time to prepare properly. While the issue to be decided is relatively discrete, there is also the question of stare decisis and the issue of the application of the Charter. As stated by the Supreme Court of Canada in MacKay v. Manitoba, [1989] 2 S.C.R. 357, [1989] S.C.J. No. 88, at para. 8:

> Charter cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases.

[15] The issues in this case involve complex matters that require careful analysis. This case is one which raises questions that go to the heart of a democratic system.

[16] I also am of the view that the time frame would not allow the court opportunity to perform its duties in a satisfactory manner. The application judge would be required to provide an almost immediate decision in a complex case. That is not the appropriate way to dispense justice. Challenges to the constitutional validity of legislation require extensive and careful analysis of complex Charter principles. The applicants are asking the court to perform its role in a perfunctory manner rather than in a thoughtful and considered way. In my view, to have an expedited determination of these issues would not be in the public interest.

[17] Considering the circumstances, I am not prepared to schedule an application to contest the constitutional validity of s. 329 of the Canada Elections Act at this time. The request for an urgent and expedited hearing is refused for these reasons.

[18] Should the parties be unable to resolve the issue of costs, they may file brief written submissions according to the following timetable: the respondent by May 6, 2011 and the applicants by May 20, 2011.

Request denied.