The Top Five 2007

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.

R. v. *Bryan*, 2007 SCC12

http://scc.lexum.org/en/2007/2007scc12/2007scc12.html

A ban on publishing election results on a website prior to the closing of all polls was found to be constitutional and did not infringe s.2(b) of the Charter.

During the 2000 federal election, Mr. Bryan, a software developer, posted the election results from 32 ridings in Atlantic Canada on a website before other polling stations elsewhere in Canada were closed. He was charged with contravening s.329 of the *Canada Elections Act*, which bans the transmission of election results from one electoral district to another before the closing of all polling stations in the second district.

In his defence, Mr. Bryan claimed that s.329 of the Canada Elections Act was unconstitutional because it unjustifiably infringed on his freedom of expression guaranteed by s.2(b) of the *Canadian Charter of Rights and Freedoms*. His claim was dismissed and he was convicted of the offence.

Mr. Bryan appealed this decision, and the summary conviction appeal judge declared that s.329 was unconstitutional and overturned his conviction.

The Crown then appealed the decision. The BC Court of Appeal found that s.329 infringed on freedom of expression but that it was a justified limit on freedom of expression under s.1 of the *Charter*. Under s.1 of the *Charter* the government can constitutionally limit an individual's Charter rights and freedoms if the "limit is prescribed by law, and justified in a free and democratic society". This means that the legislative section in question must be authorized by law. Additionally, the following four criteria must be met:

- the legislation must have a pressing and substantial objective;
- the legislation must be rationally connected to its objective;
- the legislation must impair the right in a way that is as least intrusive as possible; and
- the infringement of the right must be proportional to the objective of the legislation. (The Oakes test)

The Supreme Court of Canada dismissed the appeal but was divided in its reasons.

The majority found that s.329 infringed freedom of expression but that this was justified under s.1 of the *Charter*. It looked at the objectives of s.329 of the *Canada Elections Act* - to ensure informational equality between voters so that they have the same information when making choices at the polls, and maintain public confidence in the fairness of the electoral

system - and found these to be pressing and substantial objectives. The legislation was also found to be rationally connected to these objectives, as to allow some voters access to results in other voting districts would violate the objectives of informational equality and fairness in the electoral system. The majority supported the view that maintaining public confidence in the electoral system requires some method of restraining publication of election results until most or all Canadians have voted. They found s. 329 of the Elections Act to be the most effective and least intrusive way to do this, given the fact that the ban was not a complete ban, and exists only for two to three hours, on election day. The majority stressed that while the ban may be inconvenient for the media, this is not enough to override the important goal of protection of Canada's electoral democracy.

The majority also discussed what type and how much evidence of harm needs to be demonstrated to the courts in order to justify an infringement of s2(b) of the *Charter*. It clarified that when considering questions where it is difficult to measure harm, such as establishing the harm associated with loss of public confidence in the justice system, then the use of logic and reason can be assisted by some social science evidence that shows proof of harm. In this case, considerations of Canadian voters' subjective perceptions of the fairness of the electoral system, in combination with findings of the Lortie Commission report, and the results of the 2005 poll, was enough to establish that information imbalance is a real and significant harm and that Canadians value the principle of information equality.

The dissenting judges found that the s.329 *Elections Act*, publication ban was an excessive response to an insufficiently proven harm and the violation of 2(b) of the *Charter* could not be justified under s.1. They found that the legislative section was not proportional to the level of harm that was shown. In their minds, the social science evidence presented did not convincingly establish the consequences of imposing a ban, or failing to impose a ban on voter confidence in the electoral process or voter behaviour. The dissenting judges found that the infringement of section 2(b) and harm to the core democratic rights of the media to publish timely election results was demonstrated, but the benefits of the publication ban were not.

Discussion Issues:

- Should courts consider social science evidence when addressing complex *Charter* issues? Why or why not?
- Is it fair that election results cannot be transmitted from one electoral district to another until the polls close everywhere?
- What impact do you think information about other polls has on voter decision-making?
- Is the s. 329 of the *Elections Act* ban a fair limit on freedom of expression?
- Are there other ways the government could deal with this issue rather than publication bans during voting periods?
- How will new technology challenge the effectiveness of s.329 of the *Elections Act*?
- Why is it important that Canadian's perceive the election process to be fair? What impact does this have on maintaining a democracy?