

TOP FIVE 2019

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2019 cases were selected and discussed by Mr. Justice Lorne Sossin of the Ontario Superior Court of Justice. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

FRANK v CANADA (ATTORNEY GENERAL), 2019 SCC 1 (CANLII)

Date released: January 11, 2019

<https://www.canlii.org/en/ca/scc/doc/2019/2019scc1/2019scc1.html>

Facts

The right to vote is a fundamental political right and an important part of Canadian democracy. It is protected by section 3 of the Canadian Charter of Rights and Freedoms ("the Charter"). The Canada Elections Act ("The Act") sets out the rules for federal elections in Canada. It states that Canadian citizens who have lived outside of Canada for 5 years or more cannot vote in a federal election (sections 11(d) and 222(1) of the Act).

More than one million Canadian citizens have lived outside of Canada for 5 or more years and cannot vote in federal elections under the Act. Dr. Gillian Frank and Mr. Jamie Duong are Canadian citizens who challenged this law. They were both denied the right to vote in the May 2011 Canadian federal election because they have lived outside of Canada for more than 5 years. Dr. Frank and Mr. Duong claimed that the law unjustifiably violates their rights to vote under s. 3 of the Charter.

Procedural History

The Ontario Superior Court of Justice decided that the sections of the Act that denied non-residents the right to vote infringed s. 3 of the Charter and could not be justified under s. 1.

A majority of the Ontario Court of Appeal reversed that decision and allowed the appeal. Mr. Duong and Dr. Frank appealed to the Supreme Court of Canada ("the SCC").

Issues

1. Do sections 11(d) and 222 (1) of the Canada Elections Act violate section 3 of the Charter?
2. If they do violate the Charter, can they be justified under section 1 of the Charter?

Decision

Appeal allowed. A majority of the SCC held that the Act's residency requirement violated section 3 of the Charter and was not justified under section 1 of the Charter.

Ratio

The Act's infringement of section 3 of the Charter was not justified under section 1 of the Charter. This is because, although the Act's residency requirement was trying to achieve the important goal of maintaining fairness in elections for Canadian residents, the negative effects of the law on non-residents were serious and not proportionate to that goal.

Reasons

The Attorney General of Canada conceded that the Act breached s. 3 of the Charter. However, she took the position that this breach was justified under section 1 of the Charter.

For a breach to be justified under section 1, the law has to have an important purpose, called a 'pressing and substantial objective'. In this case, the SCC stated that the goal of maintaining fairness in elections for Canadian residences was important enough to be a pressing and substantial objective.

To pass the next step of s. 1, the law has to be "proportionate". To be proportionate, the law must first be "rationally connected" to its purpose. This means that there must be a connection between what the law is trying to do and what the law actually does. Second, the law has to be carefully tailored so that it has as small an impact on the Charter right as possible. Third, its overall effects have to be proportionate, meaning the bad effects of the law on Charter rights cannot outweigh its benefits.

This is where the Act ran into a problem. The SCC stated that the law did not appear to be rationally connected to the goal of maintaining fairness in elections, because the Attorney General of Canada had not provided any evidence that when non-residents voted in Canadian elections, this could harm residents or compromise the fairness of elections (for example, nobody had ever lodged a complaint of unfairness). The SCC also said that the law was not carefully tailored. If the reason for the law was to prevent people from voting who did not have a strong connection to Canada, it did not make sense that non-residents who continued to have strong ties to Canada, including family and cultural bonds, would be denied the right to vote. In addition, many Canadian citizens who live outside of Canada are impacted by Canadian laws. For example,

they may pay taxes to Canada or collect social benefits. It was not fair for these non-residents to be unable to vote or have a say in government policies or decisions that could impact them and disrupt their lives. The law's bad effects on non-residents were serious and outweighed its "speculative" benefits for election fairness.

DISCUSSION

1. How did the Act violate Canadians' right to vote?
2. The court said that Parliament cannot limit the right to vote easily. Why is it so important to protect the right to vote?
3. Should there be any limit on the amount of time somebody can live outside of Canada and still be allowed to vote? 20 years? What about 30?
4. Each court noted that fairness in elections is a "pressing and substantial objective". Can you think of any real threats to election fairness in Canada?
5. What else could the government do to help make sure elections are fair in Canada?