

The Top Five 2005

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.



RECENT SIGNIFICANT CASES IDENTIFIED BY JUSTICE S. GOUDGE, 2005

A Note to Teachers: These are unofficial case summaries for the assistance of the classroom teacher. They do not represent the text of the Court decision. For the actual reasoning, please refer to the full Court decision.

1. *Chaoulli v. Quebec (Attorney General)*, 2005 (S.C.C.)

<http://scc.lexum.org/en/2005/2005scc35/2005scc35.html>

An individual's Charter right to have private insurance pay for private health services which are already provided in the public system

Chaoulli, a physician, and his patient Zeliotis, brought forth a Charter challenge contesting the validity of prohibitions in the Quebec *Hospital Insurance Act*, and the *Health Insurance Act*. The prohibitions in these two statutes prevented Quebec residents from getting private insurance to pay for private sector health care services when these services are already available under Quebec's public health care plan. A part of their argument was that long wait times in the public system, and the inability to get private insurance and private services, was an infringement of an individual's s. 7 rights (life, liberty and security of the person) under the Canadian *Charter of Rights and Freedoms* and an individual's s. 1 rights (life, personal security, inviolability and freedom) under the *Quebec Charter*.

The Quebec Superior Court and the Quebec Court of Appeal found against Chaoulli and Zeliotis. Both levels of court found that while the *Hospital Insurance Act* and the *Health Insurance Act* violated s. 7 Charter rights, this violation was in accordance with the principles of fundamental justice. Chaoulli and Zeliotis appealed.

The Supreme Court of Canada allowed the appeal in a 4-3 split decision. Three judges, including the Chief Justice, found that in circumstances where a lack of timely health care can result in death, the s. 7 right to protection of life exists. In circumstances where a lack of timely health care can result in serious psychological and physical suffering, the s. 7 right to protection of security of the person exists. Where a law negatively affects an individual's life, liberty or security of the person, it must conform to the principles of fundamental justice. The judges in this case concluded that the statutes jeopardized s. 7 rights in an arbitrary manner. This means that they found that there was no real connection on the facts or evidence presented to the courts that demonstrated that prohibitions on private insurance are actually connected to maintaining quality health care or that

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allowing private insurance will necessarily lead to the fall of public health care. The prohibition was therefore found not to be in accordance with the principles of fundamental justice.

Next they considered whether the breach of s. 7 could be justified under s. 1 of the *Charter of Rights and Freedoms* as a reasonable limit demonstrably justified in a free and democratic society. The court found that there was no rational connection between the government's objectives and the prohibitions in the two statutes. They again recognized that the government had an undeniable interest in protecting the public health regime, and that it may have been intending to try and do this through the prohibition on private insurance, however the evidence did not show that a prohibition on private health insurance actually protected the public health care system. They also found that the prohibition went further than necessary to protect the public system and was not minimally impairing. The prohibition against contracting for private health insurance was therefore not shown to be justified as a reasonable limit under s. 1 of the *Charter of Rights and Freedoms*.

Justice Deschamps agreed with the decision and also addressed the *Quebec Charter* issue. She found that patients on waiting lists were in pain and could not fully enjoy any real quality of life. She agreed that their rights to life and to "personal inviolability" under s.1 of the *Quebec Charter* were infringed by these two statutes and that this could not be justified under s. 9.1 of the *Quebec Charter*. S. 9.1 of the *Quebec Charter* is a provision corresponding to s. 1 of the *Canadian Charter*. Using *Canadian Charter* analysis, she found that there was a rational connection between the government's objective of preserving the integrity of an accessible public health insurance scheme for all Quebecers and the prohibition on private insurance, but that the complete prohibition on private insurance went further than was necessary and was not a measure that minimally impaired the protected rights. She found that there was evidence that a range of less dramatic measures could have been applied instead of an outright private insurance prohibition.

2. *Auton (Guardian ad litem of) v. AG of British Columbia, 2004 (S.C.C.)*

<http://scc.lexum.org/en/2004/2004scc78/2004scc78.html>

Charter rights and the B.C. Government's refusal to pay for special therapy for autistic children

The guardians of several pre-school autistic children brought a case forward on their children's behalf arguing that the B.C. Government's failure to fund a new and controversial behavioural therapy under B.C.'s public health care scheme was a violation of the children's equality rights under s.15 (1) of the *Canadian Charter of Rights and Freedoms*. Section 15 states that a person cannot be discriminated against on the basis of a number of protected grounds, including disability. The Government argued that it had to balance the needs of the autistic children with the needs of all children with special needs, and since the therapy was controversial and not medically necessary, the Government could not fund it in light of existing financial constraints.

The trial judge considered whether the treatment was "medically necessary" as a factor in determining if s. 15 of the *Charter* had been violated. Counsel for the children argued

that the autistic children's treatment should be paid for by the state, in the same way that the government funds other medical necessities for children their age. The trial judge found that the

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failure to fund the therapy violated the children's equality rights and ordered the province to fund the therapy and pay the children's parents for the expense of past treatment. The Court of Appeal upheld this judgment and increased the funding for these treatments.

The British Columbia Government appealed. In a unanimous decision, the Supreme Court of Canada found that the autistic children were not entitled to provincial funding for the therapy.

First, the Supreme Court found that funding for the therapy was not a benefit which the autistic children were automatically entitled to under the law. The *Canada Health Act* and B.C.'s health legislation do not promise that any Canadian will receive funding for all medically required treatment. Under the *Canada Health Act* and BC's health legislation all that is required is that the provincial government fund "core services" and the provincial government has the discretion to provide full funding or partial funding for "non-core services". Because the Supreme Court determined that therapy in question would fall under "non-core services", it was not a benefit required by law, and the province was entitled to decide not to fund the treatment.

Second, the appellants were unable to show that they had been denied services based on their disability contrary to the *Charter*. The Court reiterated that the specific role of s. 15 of the *Charter* is to ensure that governments who provide benefits required by law do so on a non-discriminatory basis. In order to establish differential treatment under the *Charter*, there must be evidence that the person has been denied a benefit that the government has given to another individual or comparator group in the same set of circumstances. A comparator group is an individual or group that is similar to the person claiming discrimination in all ways except for the personal characteristic on which the discrimination claim is based. In order to establish discrimination, the appellants would have had to show that a non-disabled child, or a child of the same age with another kind of disability, had received provincial funding for a non-core therapy which was considered controversial and only recently recognized as medically necessary. The Court was unable to find a comparator group that had received funding for a similarly controversial and novel treatment to the one required by these children. There was no evidence presented that showed how the Province had responded to requests for new therapies from other people, or that the Province's response to this new autism therapy was any different from its approach to other, novel therapies. Discrimination on the basis of disability therefore was not established.

In sum, there was no differential treatment under the law, because a right to the therapy did not exist under the law. The applicants were also unable to show that they had been denied treatment on the basis of their disability and that the Government had favored other groups by funding similar non-core controversial therapies. Consequently the government's conduct did not infringe section 15 of the *Charter*.

*In a similar case in Ontario, the Superior Court found that the Province of Ontario was discriminating against children with autism based on age and disability by denying them this same therapy. This case is now on leave to appeal see: *Wynberg v. Ontario*, (2005) (ON S.C.)
<http://www.canlii.org/on/cas/onsc/2005/2005onsc13356.html>

3. ***R. v. Orbanski, R. v. Elias, 2005 (SCC)***

<http://scc.lexum.org/en/2005/2005scc37/2005scc37.html>

Limits on an individual's Charter right to counsel during a roadside alcohol-screening test

Orbanski was stopped by police after being observed driving through a stop sign without stopping and swerving on the road. Elias was stopped in his vehicle at a random roadside stop. In both cases the officer who approached the vehicle could smell alcohol. Each driver was asked by the police if they had been drinking. Orbanski was also asked to perform a roadside sobriety test, which he failed. Elias failed an approved screening device test. Orbanski and Elias were arrested and neither was advised of their right to counsel prior to being questioned or tested. Both drivers were charged with impaired driving and "driving over 80" contrary to the *Criminal Code*.

Orbanski and Elias both claimed they had been detained by the police and therefore should have been informed of their right to counsel before being asked if they had been drinking and driving. They claimed their rights under s. 10 (b) of the *Canadian Charter of Rights and Freedoms* had been infringed and that this was not a justified limit on their right to counsel under s.1 of the *Charter*.

The issues before the court were whether the accused's had been detained triggering a s.10(b) right under the *Charter*, and if so, whether the police infringement of this right was a reasonable limit given for example the urgency in administering roadside screening tests. An additional issue was whether the police requests for drivers to perform sobriety tests or answer questions about prior alcohol consumption fall within the scope of authorized police action.

At trial, the judge hearing each case held that the accuseds' right to counsel under s.10 (b) were infringed while they were detained and that the limits on the right to counsel arising from the police conduct were not prescribed by law within the meaning of s.1 of the *Charter* therefore the infringement was unjustified. The police evidence was excluded under s.24(2) of the *Charter* in both cases, and the accused were acquitted.

On appeal, the Manitoba Court of Appeal set aside the acquittals and ordered new trials. The Court of Appeal held that s. 10(b) of the *Charter* had been breached and the limit on the right to counsel was not justifiable. However, when deciding the appropriate remedy to apply, the Court held that the evidence should still be admitted anyway, because to exclude it would do greater harm to the administration of justice.

The Supreme Court of Canada, on further appeal, weighed an accused's right to counsel under s.10(b) of the *Canadian Charter of Rights and Freedoms* against the need for society to protect itself from the damage caused by impaired drivers. When detained by the police everyone has the right to counsel under s. 10(b) of the *Charter*. The Court recognized that the right to consult a lawyer is crucial to an accused's ability to exercise his/her rights. As well, being detained by the police deprives an accused of liberty and places him/her at a disadvantage as against the state. However, the s. 1 of the *Charter* provides that the right to counsel is not absolute and can be constrained by reasonable and justifiable limits if those limits are specifically prescribed by law. These limits can be inferred from the general police power to stop vehicles while acting in

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the execution of their lawful duty. The police were acting in the lawful execution of their duties and responsibilities when they stopped Orbanski after observing his erratic driving. They were also acting lawfully when they stopped Elias even though the stop was random. The scope of justifiable police conduct will not always be defined expressly in a statute. The court concluded that the limit on s. 10(b) right of the drivers in both cases was “prescribed by law.”

The court then went on to consider the test set out in *R. v. Oakes* to determine if the limit on the *Charter* right was reasonable and justified. The limit on s.10(b) right was considered to be justified because the objective of reducing the effects of impaired driving is a compelling state objective and the infringement of the right to counsel is rationally connected to that objective. The infringement of the right to counsel in this situation was found to be proportionate and no more than necessary to meet the objective of reducing the effects of impaired driving.

Orbanski and Elias were both found to have been detained by the police under routine police procedures. The administering of the roadside screening test, prior to consulting counsel was held to be a justifiable breach of the accuseds’ *Charter* rights. Both cases were returned for a new trial, with the evidence gathered by the roadside screening to be considered by the trial judge.

4. *Tierney-Hynes v. Hynes*, 2005 (Ont. C.A., application for leave to SCC was dismissed)

<http://www.ontariocourts.on.ca/decisions/2005/june/C42400.htm>

The court’s ability to vary a dismissal or termination of a support order, if one of the spouses’ financial situation changes

The husband was a physician who had been supported by his wife during his medical training. They divorced and a court order was made granting spousal support (to the wife) and child support. When the husband went back to school for specialist training in his

field of medicine, the wife agreed that support should be stopped (terminated) since his finances would be strained while he was studying. So, the husband got a court order which dismissed the original spousal support order.

After his training, the husband did very well financially and the wife had health problems and could not support herself. The wife brought an application to the courts to re-institute spousal support.

The Motion Court judge who first considered her application to re-institute spousal support, decided that the court lacked the jurisdiction to vary a dismissal of a support order. The wife appealed this decision.

The Court of Appeal allowed the appeal. In doing this it looked at the *Divorce Act* and interpreted this statute (this process is called statutory interpretation). The court found that spousal support is considered by this statute to be a contractual issue, and as such can be considered to be a private matter. The court considered the party’s responsibility towards each other and our social interests

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to ensure that justice is done between spouses. The court acknowledged that finality is an important issue in our system and that the husband had relied on the certainty and finality of a court order. However, the court found that the existing order should not be a constraint on a new application if one of the spouse's financial situation changes.

The law had been moving toward the "clean break" view and towards the expectation of self sufficiency of the spouses but Parliament has signaled its intention to move away from this model with recent amendments to the *Divorce Act*. The case raised issues about the appropriate balance between providing just results and enforcing the certainty and finality of a court order. The unanimous court took a contextual approach and found that, although spouses can make an agreement about support, it is necessary to retain the flexibility to deal with unanticipated life changes and to be able to respond to this as required. This is consistent with recent moves towards a compensatory model of support.

5. *R v. Hamilton*, 2005 (S.C.C.)

<http://scc.lexum.org/en/2005/2005scc47/2005scc47.html>

Counseling someone to commit a criminal offence in the context of Internet communications

The accused sent out emails to more than 300 people advertising the sale of "Top Secret Files" which he himself had purchased off of a website. This email advertised that inside the files was software that would allow the buyer to generate valid credit card numbers. The accused sold at least 20 copies of the "Top Secret Files", which in addition to the credit card software also included instructions on how to make bombs and how to break

into houses. The accused did not advertise anywhere in his email the fact that these other "how to" instructions were part of the file package.

When the police searched the accused's computer, they found a document describing a credit card number generator which was different from the files in the package he was

selling. They also found that he had a handwritten list of Visa numbers. The accused admitted that he had seen a computer list of all of the things that were included in the package of files that he was selling, but that he had never read the materials on bomb making or how to break into houses.

There was no evidence that either he or his customers had used the fraudulently generated credit card numbers, or that any of his clients had used the instructions to make bombs or break into houses in order to commit crimes.

The accused was charged with four counts of counseling the commission of an indictable offence, including fraud, under s.464 of the Criminal Code.

s. 464(a) of the Criminal Code states that:

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... every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable.

At the trial level, the judge acquitted the accused of all charges. The trial judge accepted the accused testimony that he had not read the files about bomb making or how to break into houses. The trial judge also accepted evidence that the accused had not used the credit card numbers that he had generated. The trial judge found that the accused was aware that the use of generated credit card numbers was illegal.

The trial judge found that the *actus rea* (the action part of the offence) had been present, namely that the accused had encouraged buyers to commit crimes through his communications, but that the accused was not guilty because the *mens rea* (mental intention) of the crime was not present. The trial judge found that the accused was not intending that people would actually carry out any crimes as a result of buying the files. On the issue of the charge related to counseling credit card fraud specifically, the trial judge concluded that the accused was selling the credit card software to make money, and therefore his intent was not to get people to actually commit credit card fraud.

The Court of Appeal upheld the findings of the trial judge and then the Crown appealed to the Supreme Court of Canada.

The Supreme Court of Canada allowed the appeal on the count for counseling fraud, finding that the trial judge had made in error in law about the *mens rea* required for this offence and ordered a new trial on this issue. It upheld the trial judge's and Court of Appeal's decision with respect to the counts related to bomb making and breaking into houses. The fact that the accused had never read the files about bomb making or breaking into houses, meant he lacked the mental intent to counsel people to commit these other crimes.

The Supreme Court clarified that in order to establish the presence of *mens rea* in this type of case, the Crown must show that the accused either intended that others commit a crime, or that the accused knowingly counseled others to commit an offence, and was aware that there was an unjustified risk that they would actually commit a crime as a result of his encouragement. Plainly said, even if no crimes happen as a result of the accused encouraging actions, he/she may still be found to have the mental intent for this crime, if the Crown can show that the accused knew that it was quite likely that someone might commit a crime because of his actions of encouragement.

The Supreme Court, also found that the trial judge had mixed together the idea of "motive" and "intent". Although the accused's motive was to make money out of this venture this did not change the fact that he was intending to induce people to commit fraud through use of the bought files.

In its judgment, the Supreme Court expressed concern about the fact that the Internet is a fertile ground for encouraging illegal conduct. However it noted that criminalization of communications over the Internet is a complex issue because it touches on issues of freedom of speech. It encouraged the legislature to respond to this issue directly and in the near future.