TOP FIVE 2012

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LAX KW'ALAAMS INDIAN BAND v CANADA (ATTORNEY GENERAL), 2011 SCC 56

Date Released: November 10, 2011 http://scc.lexum.org/en/2011/2011scc56/2011scc56.html

Facts

The Lax Kw'alaams Indian Band ("Band") has ancestral land along the northwest coast of British Columbia. Before contact with Europeans, they regularly traded fish grease from the eulachon, and occasionally traded other fish products as well. For example, their ancestors also harvested and consumed salmon, halibut, herring spawn, seaweed and shellfish.

> ***Constitution Act, 1982***
>
> 35 (1). The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. a political position or public office.

The Band claimed the right to the commercial harvesting and sale of "all species of fish" within their waters, under s. 35(1) of the *Constitution Act, 1982*. Under s. 35(1), Aboriginal groups can claim the right to commercial activities that are a logical extension of traditional cultural practices on their ancestral property. The Band argued that the harvesting, consuming and trading of these fish resources were integral to its distinctive society before European contact. In addition to this claim, the Band argued that the Crown has a "fiduciary duty" (a legal responsibility for the well-being of the Band) with respect to its fisheries, due to promises made in the 1870s and 1880s.

Procedural History

The trial judge did not find that the pre-contact customs, practices, and traditions supported the claimed rights to commercial activities. The Court of Appeal affirmed that judgment.

Issues

Is evidence of commercial activity with respect to a single fish species (the eulachon) a sufficient legal basis on which to grant an Aboriginal right to a modern, industrial, multi-species fishery?

Decision

The Lax Kw'alaams' appeal was dismissed unanimously.

Ratio

The Supreme Court of Canada (SCC) considered the evolution of treaty rights of Canada's Aboriginal Peoples as set out in s. 35(1) of the *Constitution Act*. For a practice, custom, or tradition to be protected as an Aboriginal right, there must be evidence that it was an integral part of that group's society prior to contact with European settlers. The SCC set out a new step for dealing with large-scale commercial claims, and found that the Band's ancestral trade focused almost exclusively on a single species of fish. Thus, the Band had not made the case for a broad Aboriginal right to harvest and sell all fish species within their ancestral waters.

Reasons

The steps a court must take to assess a claim to an Aboriginal right under s. 35(1) are as follows:

1. Characterize the claim (i.e., describe the right being claimed very specifically);
2. Determine whether the claimant group has proved
   a. The existence of the activity or practice prior to European colonization, and
   b. That this activity was integral to the distinctive, pre-contact society;
3. Determine whether the modern right being claimed has a reasonable degree of continuity from the ancestral practice (i.e., how likely it is that the ancestral practice would have evolved into the modern right).

Finally, the SCC set out a new step for dealing specifically with claims regarding large scale commercial activity. If, in following the existing steps outlined above, a commercial right is judged to exist, a court must delineate that right by specifying rules about how it should be applied, keeping goals like conservation and fairness to competitors in mind.

The Court ruled that the Lax Kw'alaams' claim to a modern right to fish commercially all fish species in their territory was not a "logical evolution" of their ancestors' pre-contact trade in eulachon grease. The Court found insufficient continuity between the claimed practice and the Band's desire to build a modern commercial fishery. It held that commercial fishing in the Band's territories was not a practice, custom, or tradition that was an integral part of the distinctive society pre-contact. Apart from the eulachon, if there was any trade, it was sporadic, low volume, isolated and for food, social and ceremonial purposes. Aboriginal rights can evolve, but this claim was substantively different than the pre-contact custom.

DISCUSSION

1. In what ways have industry and resource management changed since Aboriginal rights were affirmed in the *Constitution Act, 1982*?

2. Given that Aboriginal groups have a legal right to maintain their traditional practices, should they also have the legal right to transform these into commercial enterprises? Why or why not?

3. When making a claim like the one above, how strong a link should there be between ancestral and modern practices? What kind of evidence should be used to prove that link?

4. Although the Court ruled that the only historical evidence of trade was with regard to the Eulachon, it found that the Lax Kwa'alaams' way of life was deeply linked to fishing many different species for survival. Work in pairs to think of factors that would both encourage AND impede the evolution of a survival activity into a commercial activity.

5. With your partner, create a list of points that argue for and against the argument that the Government of Canada has a duty to protect the interests of Canadian Aboriginal groups. Try to consider the difficulties Aboriginal groups in Canada have faced, conservation of resources and fair market practice.

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RICHARD v TIME, INC., 2012 SCC 8, [2010] 2 S.C.R. 310

Date Released: February 28, 2012 http://scc.lexum.org/en/2012/2012scc8/2012scc8.htm

Facts

Jean-Marc Richard received a letter from Time Magazine which announced in bold letters:

"OUR SWEEPSTAKES RESULTS ARE NOW FINAL: MR JEAN MARC RICHARD HAS WON A CASH PRIZE OF $833, 337.00."

However, in lower case letters and smaller font, the text continued, "*If you have and return the Grand Prize winning entry in time*."

The prize announcement was made in four other places in the letter, each time qualified by conditions. Mr. Richard, believing that he had won the prize, returned the winning entry form, which had required him to take out a two-year subscription to the magazine. He received his first issue in the mail, but did not receive his cash prize. After speaking with a marketing representative of the magazine, he learned that the letter was merely an invitation to participate in a sweepstakes, and that his reply letter did not have the winning number. He would not be receiving the $833,337.00. He was also informed that the letter was signed under a fictitious pen name.

***Consumer Protection Act* (Quebec)**

218. To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.

219. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

238. No merchant, manufacturer or advertiser may, falsely, by any means whatever,

(a) hold out that he is certified, recommended, sponsored or approved by a third person, or that he is affiliated or associated with the latter;

(b) hold out that a third person recommends, approves, certifies or sponsors certain goods or services;

(c) state that he has a particular status or identity.

272. If the merchant or the manufacturer fails to fulfill an obligation imposed on him by this Act, by the regulations or by a voluntary

undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

(a) the specific performance of the obligation;

(b) the authorization to execute it at the merchant's or manufacturer's expense;

(c) that his obligations be reduced;

(d) that the contract be rescinded;

(e) that the contract be set aside; or

(f) that the contract be annulled,

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

Mr. Richard filed a motion seeking a declaration that he was the winner of the prize, and that he was further entitled to both compensatory (to make up for his losses) and punitive (to punish Time, Inc. for wrongdoing) damages.

Procedural History

The trial judge allowed the action in part, setting the value of Mr. Richard's injuries at $1000.00, and punitive damages at $100,000.00. The Court of Appeal of Quebec reversed that judgment, finding in favour of Time, Inc. and setting aside the awards.

Issues

How should the courts decide whether an advertisement gives a false or misleading representation?

Did taking out a magazine subscription under misleading conditions constitute a contract?

How skeptical is the "average" consumer?

Decision

Appeal granted, in part.

Ratio

This decision sets out a process for considering claims of false advertising. In claims of false or misleading advertising, a court must perform a two-step test, which considers the general impression given by representations (statements) made in the ad. The Supreme Court of Canada (SCC) clarified the meaning of an advertisement's "general impression" under section 218 of the *Quebec Consumer Protection Act* (*CPA*) and held that the standard for assessing that impression is the perspective of a "credulous and inexperienced consumer".

Reasons

In a unanimous decision, the SCC set out a two-step process for assessing the truthfulness of a representation made in an advertisement under s. 218 of the *CPA*: original right under s. 35(1) are as follows:

1. Describe the general impression that the representation is likely to convey to the average consumer; and
2. Determine whether that general impression is true to reality.

If it is not, the merchant has committed a prohibited practice under the *CPA*.

The Court ruled that in the case of false advertising, the "general impression" is one a person has after an initial contact with the entire advertisement, and it relates to both the layout of the ad and the meaning of the text used. In other words, consideration must be given both to the literal meaning of the words and to features like the use of large, prominent print to make promises of rewards as compared to small fonts to qualify these promises.

The SCC also considered the question of whose perspective should be used to assess whether claims would appear seem believable to most people – to the "average consumer." The Court ruled that the Court of Appeal of Quebec had erred in defining the average consumer as having "an average level of intelligence, skepticism and curiosity." Rather, it set the standard lower, describing the average consumer as someone who is "credulous, inexperienced and takes not more than ordinary care to observe that which is staring him or her in the face."

Using these terms of reference, the Court found that an average consumer would have been under the impression that Mr. Richard won the grand prize, as there were misleading representations in the advertisement.

Under s. 272, a consumer can bring an action for a contractual remedy, but a contract must exist for the *Act* to operate. In this case, Mr. Richard established that there is a relationship between the prohibited practices and his magazine subscription contract. In other words, the advertisement deliberately misled him in order to encourage him to take out a subscription.

Mr. Richard received $1000 for the personal suffering caused by Time Magazine, and a further $15,000 in punitive damages to discourage and sanction the magazine's misleading marketing practices.

Finally, the SCC ruled that Time Magazine's use of a pen name did not amount to fraud under s. 238, as there were no false representations about the identity of the fabricated signor.

DISCUSSION

1. What is the most unrealistic or exaggerated claim you have seen in an advertisement? What do you think was the purpose of making this claim?

2. Have you ever seen a letter like the one Mr. Richard received? In what ways, if any, was it different from the one you described in Question 1?

3. What do you think Mr. Richard was trying to prove? Do you think he was entitled to any damages? Do you think he was honest in claiming he believed he won the grand prize?

4. What is another way to describe a consumer who is, as the SCC wrote, "credulous and inexperienced"? What are some strengths and weaknesses of using this definition of an average consumer?

5. Working in a group, create an advertisement that you think might border on being misleading. Trade your work with another group, and critique the ad you receive using some of the considerations used by the Supreme Court in this case.

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DORÉ v BARREAU DU QUÉBEC, 2012 SCC 12

Date Released: March 22, 2012 http://scc.lexum.org/en/2012/2012scc12/2012scc12.html

Facts

Gilles Doré was defense counsel in a criminal proceeding being heard by Justice Boilard of the Superior Court of Quebec. In response to some of Mr. Doré's oral arguments in court, Justice Boilard called him "an insolent lawyer" and suggested he was not representing his client adequately. He made similar comments in his written judgment of the case, referring to Mr. Doré's oral submissions as "totally ridiculous", "bombastic rhetoric and hyperbole," and claiming that Mr. Doré had a "narrow vision of reality" and had done "nothing to help his client discharge his burden." Shortly after leaving the courtroom, Mr. Doré wrote Justice Boilard a private letter in which he called him "pedantic, aggressive and petty", accused him of being "fundamentally unjust" and questioned whether he had sufficient legal knowledge to be a judge.

Code of Ethics of Advocates (Syndic du Barreau du Quebec)

Division 2 - 2.03. The conduct of an advocate must bear the stamp of objectivity, moderation and dignity.

Mr. Doré complained to the Judicial Council of Canada, and Justice Boilard was issued a reprimand. This was the only punishment the judge received for his actions. Conversely, the Chief Justice of Quebec forwarded Mr. Doré's letter to the Syndic du Barreau du Québec, which handles disciplinary issues with lawyers in the province. The Syndic filed a complaint against Mr. Doré on the grounds that his letter violated article 2.03 of the *Code of Ethics of Advocates ("Code")*.

The Disciplinary Council found that Mr. Doré had violated the *Code of Ethics*. Based on his conduct and failure to show remorse, the Council suspended Mr. Doré from the practice of law for 21 days.

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
2. Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Mr. Doré appealed the decision to the Tribunal of Professions, claiming that article 2.03 of the *Code* violated his right to freedom of expression under the *Charter*.

Procedural History

The Tribunal found that while the Syndic du Barreau's actions clearly violated Mr. Doré's freedom of expression under s. 2(b) of the *Charter,* this violation was justifiable because lawyers work in a profession that has a special obligation to uphold public confidence in the judicial process. In other words, they have a more limited right to freedom of expression with respect to commentary on their profession than is true of Canadian citizens in general. Upon reviewing the decision, the Superior Court and the Quebec Court of Appeal both concurred with the Tribunal and found that the infringement was justified. Mr. Doré appealed to the Supreme Court of Canada (SCC) on the grounds that the Court of Appeal had erred in determining that the *Oakes* test should not apply in this case.

Issues

Is the *Oakes* test suitable in an administrative law context?

Decision

Mr. Doré's appeal was dismissed unanimously.

Ratio

The SCC considered whether to use the *Oakes* test or a conventional administrative law approach when a lawyer's freedom of expression is violated by sanctions by a professional governing body. The conventional approach gives more leeway to the governing body to determine whether such a violation is reasonable. While *Charter* values should be incorporated into judicial review of administrative decisions, lawyers must be aware that there are limits on their freedom of expression, in regard to expression that would undermine the image of the judiciary.

Reasons

The SCC concurred with prior decisions in finding both that Justice Boilard had treated Mr. Doré unfairly and that the decision of the Tribunal had infringed his freedom of expression. The legal question it faced was how to proceed in deciding whether this infringement was justified.

The Court considered two ways to move forward:

1. It could adopt the *Oakes* framework, which was developed for reviewing legislation rather than administrative decision-making.
2. Alternatively, it could integrate two elements of the *Oakes* test – balance and proportionality – into the administrative law approach, in order to preserve *Charter*

values while maintaining the existing framework.

The Court found that the latter option was appropriate and that a full *Oakes* review would undermine the discretion normally given to administrative decision makers. It ruled that assessing reasonableness be done by focusing on proportionality, which considers whether the interference is "no more than is necessary." The standard of review is not "correctness," but rather, whether the decision was "reasonable," given the skills, expertise, and knowledge of the tribunal. Relying on "correctness" (as in *Oakes*) as the standard of review would be to essentially retry a case.

The SCC then applied the facts of this case to the process it had set out. The specific issue was how to balance the public interest in civility in the legal profession with Mr. Doré's *Charter* right to freedom of expression and making an open criticism of the judicial process.

The Court found that there is a strong public interest in maintaining faith in the judicial system and that Mr. Doré – and lawyers in general – are aware that there are special constraints on their freedom of expression which limits them from exercising that freedom in a way that tarnishes the public image of the judiciary. Lawyers can make reasonable, legitimate complaints, so long as it is done so with civility. The Court concluded that in light of the excessive bad-mouthing in the letter, the Disciplinary Council's reprimand was a reasonable one. Mr. Doré's displeasure with Justice Boilard was justifiable but the extent of his response was not. The Court did not issue specific guidelines about a more appropriate form, time, place, and manner for expressing criticism, leaving these questions to be settled in the future.

DISCUSSION

1. In your own words, describe why lawyers have less freedom of expression than the general public when they interact with the judiciary. Is this limitation necessary?

2. Should judges be allowed to describe lawyers in the language that Justice Boilard did? Should their freedom of expression be limited in the same way as that of lawyers?

3. Justice Boilard's comments were part of the official record of the case being heard because they were made in court, whereas Mr. Doré's were made in a private letter. Does this affect your impressions of this case?

4. The SCC found that Mr. Doré's displeasure was justifiable. What other means might he have taken to express himself? What would you have done in his place?

5. The *Charter* normally protects individuals against government actions that limit rights and freedoms. In what ways does this case correspond to or differ from normal *Charter* applications?

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BAGLOW v SMITH, 2012 ONCA 407

Date released: June 14, 2012 http://www.ontariocourts.ca/decisions/2012/2012ONCA0407.htm

Facts

John Baglow, the plaintiff, was an active political blogger who frequently contributed postings that were left-wing in nature on a right-wing blog run by the defendants, Mark and Connie Fournier. The ensuing debates were often highly inflammatory and continued over a series of blogs and websites. Canada's role in the "war on terror" in the Middle East was a frequent topic of these debates. During the course of a particularly heated disagreement over Omar Khadr, a third party wrote that Mr. Baglow was "one of the Taliban's more vocal supporters." Although Mr. Baglow posted under a false name ("Dr. Dawg"), his true identity was well known to other political bloggers and easily available to the general public. Mr. Baglow was deeply offended by this characterization and demanded that the defendants remove the posting in question from their blog. When they refused, Mr. Baglow sued them for defamation.

Procedural History

The defendants sought to have the lawsuit dismissed by summary judgment – a simplified legal process in which a judge makes a decision based on the accepted facts rather than holding a full trial with testimony, expert witnesses and legal arguments. The trial judge found that in the context of a political blog, "insults were regularly treated as part of the give and take of debate", and subsequently ruled that summary judgment was appropriate and dismissed Mr. Baglow's claim. Mr. Baglow appealed.

Issues

Are defamatory comments made online acceptable in law?

Can a trial judge determine whether statements made online are likely to constitute defamation without hearing from experts or witnesses (i.e. through summary judgment)?

Decision

Lower court decision set aside. Appeal allowed; matter to be heard at trial.

Ratio

The Court of Appeal for Ontario (ONCA) determined that issues of online defamation are not suitable for summary judgment. As social media is an emerging area of law, a defamation claim in the context of political blogging – and other novel issues in law – should proceed to a full trial so that a determination can be based on a full body of evidence.

Reasons

The ONCA found that summary judgment has rarely been granted in defamation cases, in part because the question of whether a statement is defamatory has long been considered to be one that is better left for trial.

Previously, in *Grant v Torstar Corp.,* (2009 SCC 61), at para. 28, the Supreme Court of Canada held that in order to establish defamation, a plaintiff must establish that:

(a) the impugned words are defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;

b the words in fact refer to the plaintiff; and

c) the words were published, i.e., that they were communicated to at least one person other than the plaintiff.

At issue here was whether the words were defamatory. The ONCA noted that the scenario in this case had received little attention by other Canadian courts: an allegedly defamatory statement made in the course of a "robust and free-wheeling exchange of political views in the internet blogging world." A large question addressed was whether those same comments, which might be expected online, are acceptable in law. The Court held that this case raised important issues regarding defamation on the internet and in the political blogosphere and ruled that the lower court judge had erred in finding that he could properly determine whether defamation had, in fact, occurred without the benefit of witness and expert testimony. The panel of three judges unanimously set aside the trial judge's decision and ordered that the matter be allowed to proceed to a full trial.

DISCUSSION

1. What are some advantages and disadvantages of summary proceedings versus full trials?

2. Are the rules for communicating in person the same as those for communicating online? Should there be different rules?

3. The ONCA noted an SCC ruling that successful claims of defamation must show that the words in question would "lower the plaintiff's reputation". Should this be different for an online persona than for a person's real, legal identity?

4. Think of a time when you were offended online. What course of action, if any, did you take? Were there other options available? Do you think that by doing so, you would gain something in a successful court case? Would it be just to prove a point?

5. In pairs, come up with ways in which Internet users can be informed about what is acceptable in online communication. Discuss any barriers there may be in educating users in Canada and around the world. Is it possible to have a single set of uniform guidelines?

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R v DAI, 2012 SCC 5

Date released: February 10, 2012 http://scc.lexum.org/en/2012/2012scc5/2012scc5.html

Facts

K.B., a 26-year-old woman with the intellectual development of a three-to six-year-old, was allegedly sexually assaulted repeatedly over a four-year period by D.A.I., her mother's partner. D.A.I. was criminally charged and a trial commenced.

During the trial, the Crown sought to call K.B. to testify about the alleged assaults. D.A.I. challenged her competence to give evidence, arguing that if she was unable to understand the importance of telling the truth, his right to a fair trial could be compromised.

Canada Evidence Act

16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(a) whether the person understands the nature of an oath or a solemn affirmation; and
(b) whether the person is able to communicate the evidence.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

To demonstrate that K.B. was competent to testify, the Crown asked K.B. questions that showed she understood the difference between telling the truth and lying in specific situations. By contrast, the trial judge asked K.B. questions about the nature of truth, of moral and religious duties, and of the legal consequences of lying in court. K.B.'s response to many of the trial judge's questions was "I don't know." Although she could understand the difference between telling the truth and lies, she could not respond to more philosophical and abstract questions.

As a result, the trial judge found that K.B. did not understand her duty to speak the truth and ruled that she was therefore incompetent to testify. K.B. was consequently prohibited from giving evidence and D.A.I was acquitted.

Procedural History

The Court of Appeal for Ontario affirmed the trial judge's decision to prohibit K.B. from testifying. The Crown appealed to the Supreme Court of Canada (SCC) seeking a new trial on the basis that K.B.'s testimony should have been included in the evidence.

Issues

What level of scrutiny does the *Act* permit judges to use when determining whether a potential witnesses' competence has been challenged for reasons of intellectual disability?

What are the consequences of relying on too low or high of a standard?

Decision

In a majority decision (6-3) the SCC ruled that the appeal should be allowed and a new trial ordered.

Ratio

The SCC examined what criteria courts should consider when deciding whether individuals with intellectual disabilities are competent to testify or submit evidence in court. Per the SCC's interpretation of the *Canada Evidence Act*, an adult witness with intellectual disabilities can testify provided they can communicate the evidence and promise to tell the truth. In particular, a witness' mere articulation that they promise to tell the truth is sufficient. A judge does not need to consider whether the witness understands abstract concepts about what a duty to tell the truth entails.

Reasons

The majority of the SCC ruled that the lower courts had erred in their interpretation of s. 16(1)and (3). It held that a plain reading of the Act indicates that even if an adult witness cannot understand the meaning of an oath or solemn affirmation, that person could still testify as long as they can communicate the evidence and promise to tell the truth. Moreover, s. 16(1) of the *Act* does not permit questions as sophisticated as those posed of K.B. by the trial judge. An adult with mental disabilities need not demonstrate an understanding of the truth in abstract terms, nor to show an understanding of moral and religious concepts that go along with truth telling.

The majority was concerned that if the standards to testify in court were set too high for adults with disabilities, it would permit violators to sexually abuse vulnerable people without punishment. On the other hand, the Court also attended to the rights of the accused, and found that the right to a fair trial is not necessarily violated by the admission of such evidence because a judge or a jury must weigh the testimony. It is their duty to carefully assess the evidence and the credibility of the witness. In other words, after hearing the witness testify, a judge or jury can decide whether or not they believe the witness' story.

Dissent

A minority of the SCC held that it is not sufficient for a mentally disabled witness to merely promise to tell the truth. Rather, the minority asserted that to be viewed as competent to testify, such a witness must be able to understand

the difference between the truth and a falsity along with the significance of testifying only the truth. The minority emphasized that the trial judge, after listening to K.B.'s responses to various simple questions, was persuaded that K.B. did not understand what a promise to tell the truth entailed and could not differentiate between a truth and a lie. The minority also stressed that K.B.'s inability to respond to simple questions could mean that her evidence could not be properly be challenged by the defence, which would in turn result in an unfair trial for D.A.I.

DISCUSSION

1. Why might victim testimony be particularly important in sexual abuse cases? Are many other kinds of evidence likely to be available in such cases?

2. Many people who do not have any diminished intellectual ability testify in trials every day. Should the same standard for understanding the truth apply?

3. Who do you believe is more likely to be deliberately misleading with their testimony: someone with an average intellectual ability or someone whose intellectual development is impeded?

4. Both the majority and dissenting judgments take into account two conflicting goals:
   a. to bring justice to people of limited mental capacity; and
   b. to ensure a fair trial for accused individuals in order to avoid wrongful convictions.

   Which of these do you believe is a more important goal? Why?

5. Do you think the majority SCC decision struck the proper balance between these two considerations? How can the courts balance these goals?

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SL v COMMISSION SCOLAIRE DES CHÊNES, 2012 SCC 7

Date Released: February 17, 2012 http://scc.lexum.org/en/2012/2012scc7/2012scc7.html

Facts

In 2008, a mandatory Ethics and Religious Culture (ERC) program was introduced in Quebec elementary and secondary schools. The program replaced existing Catholic and Protestant religion programs and provides general instruction to students about ethics, morality and world religious traditions including Christianity, Hinduism, Islam and Judaism, among others.

That same year, two Catholic parents requested that their children's school board exempt their children from the ERC program on the grounds that the program infringed both their own and their children's right to freedom of conscience and religion. The parents argued that they had an obligation to pass on the tenets of their Catholic religion to their children. They argued that the ERC interfered with their ability to do so by confusing their children and causing disruption by exposing them to different religious ideas.

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.

Ultimately, the school board refused to exempt the children from the program. As a result, the parents sought a declaration from the Quebec Superior Court that the ERC program infringed their freedom of conscience and religion.

Procedural History

The Superior Court held that the objective presentation of various religions to students does not infringe the parents' or student's freedom of conscience and religion. The decision was appealed and the Court of Appeal for Quebec upheld the Superior Court decision

Issues

Does compelling children to be exposed to religious diversity necessarily infringe upon freedom of conscience and religion?

Decision

The Supreme Court of Canada (SCC) unanimously found that the claimants had failed to show that the mandatory program violated their freedom of religion or conscience.

Ratio

The SCC considered whether the course infringed the right to freedom of conscience and religion under section 2(a) of the *Canadian Charter of Rights and Freedoms*. This decision clarifies what is required to establish a violation of the right to freedom of conscience and religion. To prove an infringement, the claimant must demonstrate, on the basis of objective proof, that s/he cannot actually practice his/her religion or exercise his/her beliefs. A claimant's mere belief that his/her religious practices or beliefs have been infringed is not sufficient to establish an infringement.

Reasons

The SCC unanimously concluded that although exposure to a variety of religious facts can be a source of friction, exposing children to a variety of religious traditions does not in and of itself infringe the parents' or children's freedom of conscience and religion. The Court found that while the parents sincerely believed that they had an obligation to pass on the tenets of their faith to their children, they could not prove that the ERC interfered with or obstructed this practice.

In addition, two of the SCC judges held that the Superior Court erred in failing to consider content of the ERC program in assessing the program's impact on the parents' ability to fulfill their religious obligations. Nevertheless, these two concurred with their colleagues in finding that the parents had failed to prove that freedom of conscience and religion had been infringed, as the program material filed as exhibits for the case provided no insight into how the program would be implemented and taught. As a result, these two SCC judges left the door open to the possibility that the ECR program and the teaching methods used to implement it may in the future be found to infringe individuals' freedom of conscience and religion.

DISCUSSION

1. What do you believe to be the purpose of the ERC course?

2. Does being exposed to a diversity of religious beliefs threaten one's own beliefs? Does it hinder people's ability to practice their religion?

3. What should be the role of schools in passing along public values? Should students at private schools be excluded from the ERC course?

4. Put yourself in the position of the parents in this case. Following this ruling, what could you do to ensure that your children were learning the tenets of your faith?

5. Courses are usually made compulsory when legislators believe they cover material that is basic, essential knowledge for participating in society. Working with a partner, think about compulsory courses you have taken: did they provide essential knowledge? Why or why not? Finally, make an argument for why a course that is NOT currently required should become mandatory.

TOP FIVE 2012

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

CANADA (ATTORNEY GENERAL) v BEDFORD, 2012 ONCA 186

Date Released: March 26, 2012 http://www.ontariocourts.ca/decisions/2012/2012ONCA0186.

Facts

Prostitution itself is not illegal in Canada, but a number of related activities are against the law. Three women, each of whom had been sex workers, brought an application in the Superior Court of Justice arguing that some of Canada's prostitution laws were unconstitutional. In particular, the individuals challenged s. 210 of the *Criminal Code of Canada*, which prohibits the operation of common bawdy-houses; s. 212(1)(j), which prohibits living on the avails (proceeds) of prostitution; and s. 213(1)(c), which prohibits communicating in public for the purpose of prostitution.

The applicants argued that the laws deprived sex workers of their right to security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*. They argued that the laws increased the risk of death and bodily harm that sex workers face by making it more difficult for them to take steps that can better ensure their safety. Additionally, they argued that the communicating provision violated the right to freedom of expression under s. 2(b) of the *Charter*.

Criminal Code of Canada

210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

(a) is an inmate of a common bawdy-house,

(b) is found, without lawful excuse, in a common bawdy-house, or

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house is guilty of an offence punishable on summary conviction.

212. (1) Every one who

(j) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.,

213. (1) Every person who in a public place or in any place open to public view

(c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an indictable offence punishable on summary conviction.

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
2. Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Procedural History

The Superior Court of Justice held that all three of the laws were unconstitutional because they infringed upon the right to "life, liberty and security of person" and the freedom of expression. The federal and provincial governments appealed the decision to the Court of Appeal for Ontario (ONCA).

Issues

Given that prostitution is not illegal, what should be the purpose of the laws that regulate sex work?

How effectively are these laws accomplishing their intended objectives?

How fairly are these laws balancing the needs of sex workers and the broader community?

Decision

Appeal denied unanimously, in part. The majority found in favour of the government with regard to one of the laws in question, but a minority dissented to this finding and the Court was in unanimous agreement with the respondents with respect to the remaining impugned provisions.

Ratio

In this case, the ONCA considered whether three Canadian prostitution laws violated the right to life, liberty and security of the person, in addition to the right to freedom of expression under sections 7 and 2(b), respectively, of the *Charter*. The *Criminal Code of Canada's* prohibitions on the operation of bawdy-houses and living on the avails of prostitution violate s. 7 of the *Charter*, as they infringe on individuals' right to security of the person and are not in accordance with the principles of fundamental justice. Upon applying a s. 1 *Oakes* analysis to these infringements, the ONCA found that neither provision could be upheld as a reasonable limit under s. 1. By contrast, the *Code*'s prohibition on communication for the purpose of prostitution in public does not violate ss. 7 or 2(b) of the *Charter* and as such can be upheld.

Reasons

The Court was unanimous on all issues but one. First it applied the rules of precedent in deferring to a previous SCC decision (see *Prostitution Reference*, [1990] 1 SCR1123) which established that the communicating provision (s. 213(1)(c)) is a justified limit on the freedom of expression.

The Court was also unanimous in ruling that each of the challenged *Code* provisions infringed the right to security of the person guaranteed by s.7 of the *Charter*. Provisions that infringe s.7 rights can be upheld as long as the infringements are found not to violate the "principles of fundamental justice" (for example, they infringements cannot be arbitrary, overbroad or grossly disproportionate to their objectives). Therefore, the majority considered whether the impugned provisions were in accordance with these fundamental principles.

The Court concluded that the bawdy-house prohibition was too broad because it captured conduct that was unlikely to serve the law's purpose of combating neighbourhood disruption and ensuring public health and safety. For instance, the provision prohibits a single sex worker from discretely doing business at home. The majority further stressed that the impact of the bawdy-house provision was overly disproportionate to the public health and safety objective because evidence suggests that the safest way for a sex workers to operate is to work indoors.

The Court concluded that the living on the avails provision was overbroad and disproportionate because it criminalizes non-exploitive relationships between sex workers and other people. For example, the law prevents them from hiring bodyguards, drivers, or other people who could help keep them safe. The Court held that while the provision is aimed at protecting sex workers from harm, it actually prevents them from taking measures that could reduce harm.

The Court found that neither the bawdy-house provision nor the living on the avails provision could be justified as a reasonable limit under s.1 of the *Charter*.

In contrast, the ONCA was divided on the question of whether the infringement posed by the communicating provision violated the principles of fundamental justice.

Majority Opinion

The majority (three of the five judges on the panel) held that the communicating provision did not violate these principles. In their view, the communicating provision was meant to eliminate forms of social nuisance arising from the public display of the sale of sex. The majority noted that the provision is not arbitrary or overbroad – it is rationally related to the objective of protecting neighbourhoods from the harms often linked to prostitution, such as drug possession, organized crime and public intoxication. The majority rejected the argument that the law increased danger to sex trade workers by forcing them to rush negotiations with customers. While face-to-face communications was an important aspect, it was not the only method sex trade workers use to assess the risk of harm.

Minority Opinion

According to the minority, the communicating provision did violate s. 7, not because it is broad or arbitrary, but rather because it is grossly disproportionate to the provision's intended aim of combating social nuisance. To support its finding, the minority referenced the Superior Court judge's conclusion that the communicating provision has the effect of endangering many sex workers because those who work on the street are at a high risk of becoming victims of physical violence.

This decision was appealed to the Supreme Court of Canada and heard in June 2013. Current case information is available at http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=34788

DISCUSSION

1. Were you surprised to learn that prostitution is legal in Canada? If so, why do you think you had a different impression?

2. One of the arguments put forth by the government was that the *Criminal Code* provisions do not create a risk to sex workers; rather the risk is inherent in the nature of prostitution itself. Do you agree with this argument? Why or why not?

3. The Court found that the bawdy-house and living on the avails provisions were too broad because they targeted sex workers and their support workers. Who do you think they were intended to target??

4. Do you agree with the majority or the minority's conclusion about the constitutionality of the 'communicating provision' (s. 213(1)). Explain your answer?

5. Although it is legal, prostitution is a profession that often attracts people who have been victims of violence and sexual abuse and who are vulnerable to manipulation by people who exploit them. How should governments address this fact: by increasing the legal protection of sex workers as working people or by creating supportive social programs for at-risk people to give them safer alternatives for earning a living?