KEEPING CURRENT

March 15, 2021

A Victory for Freedom of Speech

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

Stephen Thiele
Partner
416.865.6651
sthiele@grllp.com

The framers of the U.S. Constitution wrote that government "shall make no law…abridging the freedom of speech." Although these words were written in the context of the American Revolution, the right to freely express political ideas is widely accepted as the backbone of any democracy. Thus, we value that whether a person agrees or disagrees with a position advocated by others, freedom of speech in Canada also cannot be easily suppressed despite the attempts of governments to do so.

Indeed, in the debate between freedom of political speech and government attempts to try to limit that fundamental freedom through provisions like third party advertising restrictions or other provisions, I am always reminded of the following words from the movie The American President, where fictional President Andrew Shepherd said:

> You want free speech? Let's see you acknowledge a man whose words make your blood boil, who's standing at centre stage and advocating at the top of his lungs that which you would spend a lifetime opposing at the top of yours.

In Canada, the right to free speech is protected under section 2(b) of the *Charter of Rights and Freedoms*. However as has been determined on countless occasions, the right to freedom of speech is not absolute. Limiting the right to speak freely in a free and democratic society is sometimes justified.

In *Canadian Constitution Foundation v. Canada (Attorney General)*, 2021 ONSC 1224, the rights and limits of this fundamental freedom were tested in a case where the court was required to determine whether section 91(1) of the *Canada Elections Act* (**"CEA"**) unduly limited freedom of speech as it related to the making or publication of false statements. In the end result, freedom of speech won.

Section 91(1) had been introduced into Canada's federal election legislation in 2000. At the time, it prohibited anyone from knowingly making or publishing false statements about the personal character or conduct of a candidate

Continued on page 2

before or during an election with the intention of affecting the results of an election. Previously, from 1970 to 2000, our federal election law made it an offence for anyone to knowingly make or publish a false statement or fact about the personal character or conduct of a candidate before or during an election. There was no requirement to prove an intention to affect the outcome of an election.

In 2018, the government amended s. 91(1) by, among other things, removing the word "knowingly" from the provision.

The applicant contended that this amendment represented a significant change to the offence by now capturing within the offence, punishable under s. 486(3) of the CEA, an overly broad category of people who might accidentally or unknowingly disseminate falsehoods about a candidate or a prospective candidate, the leader of a political party or a public figure associated with a political party.

Although the applicant acknowledged that protecting the integrity of the electoral process against the threat of false information was a pressing and substantial concern, s. 91(1) cast such a wide net over the dissemination of false information that the offence did not minimally impair the right of freedom of expression and was disproportionate in its effect because the benefits of the law were speculative and would significantly inhibit political speech.

In contrast, the Crown argued that the removal of the word "knowingly" was merely a matter of housekeeping and that the *mens rea* element of the offence (the accused's intent in relation to the prohibited act) still required an element of knowledge. The removal of the word "knowingly" was simply done to eliminate redundancy and avoid confusion. Justice Davies disagreed.

In assessing the constitutionality of s. 91(1), Justice Davies applied principles of statutory interpretation which required that the words of an act were to be read "in their entire context and in their grammatical and ordinary sense harmonious with the scheme of the Act, the object of the Act and the intention of Parliament." Her Honour also noted that there was no presumption that legislation was constitutional and that the principle that a court should prefer a Charter compliant interpretation of legislation only applied if a provision was open to "differing, but equally plausible interpretations."

In the context of the CEA, many provisions articulated a *mens rea* requirement for each offence and explicitly expressed when proof of knowledge or an ulterior motive was required. Accordingly, the removal of the word "knowingly" from s. 91(1) demonstrated that this *mens rea* element was no longer needed in order to prove the offence.

Justice Davies rejected the contention that the word "knowingly" in the previous version of s. 91(1) was redundant and that confusion in *mens rea* offences often arose because Parliament failed to clearly articulate all elements of these kinds of offences.

By removing the word "knowingly" from the provision, the free speech of a larger group of Canadians was significantly impacted in a manner, which the Crown conceded, was not justified under s. 1 of the Charter. Justice Davies agreed that without knowledge as an element of the *mens rea* for contravening s. 91(1), the prohibition under the section could not meet the minimal impairment test under s. 1.

This case is important because it once again demonstrates that courts place a high value on freedom of political speech in Canada and that

© 2016 Gardiner Roberts LLP

political speech more than any other form of expression lies at the heart of the s. 2(b) right under the Charter. Although freedom of political speech is not absolute and it is recognized that there has been mischief in recent elections because of the spread of false information through social media, legislation cannot be cast so wide that in attempting to legitimately control the dissemination of blatantly false information unsuspecting citizens face charges for simply expressing their political ideas or dislikes about a candidate or a leader. Such a result would necessarily mean that we no longer live in a free and democratic society and would ignore the reality that political discourse is often imperfect and, in many cases, is based on filtered facts obtained through entire mainstream media, through the imperfections of the political grapevine or through misinterpretations of what someone else has said.

Democracy isn't easy, and where there is not a knowing intent to deceive or spread false information, we must tolerate the perfect with the imperfect and the good with the bad.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele**, at 416.865.6651 or via email at sthiele@grllp.com.

(This newsletter is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP.)