Can the Government Prohibit the Spread of Falsehoods in an Election?

Recently – both within and outside Canada – candidates and their supporters have been making grievously false statements about their opponents during elections. In 2019, for example, Conservative communications director Brock Harrison claimed on Twitter that Justin Trudeau was under RCMP investigation, despite this being completely untrue.[1] There is little doubt, of course, that such falsehoods have the potential to unjustly influence electoral outcomes. But in a society that values free speech, should spreading false information during an election be illegal?

That was the central theme in Canadian Constitution Foundation v Canada ("CCF"), a case heard by the Ontario Superior Court in September 2020.[2] The case dealt with section 91(1) of the Canada Elections Act (CEA), which restricts the dissemination of certain types of false information during elections.[3] The Canadian Constitution Foundation — a registered charity and advocacy group — challenged the constitutionality of section 91(1), arguing it unjustifiably breached individuals' freedom of expression as guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms.[4] This article will examine the Ontario Court's response to this claim.

Section 91(1) of the *Canada Elections Act*

Section 91(1) of the *CEA* prohibits the dissemination of "certain false statements"[5] about particular public figures "associated with a political party during federal elections with the intention of affecting the outcome of an election."[6] This includes, for example, falsehoods about a candidate or public figure's commission of a criminal offence.[7] When combined with other *CEA* sections, section 91(1) creates a criminal offence.[8] The offence carries a maximum punishment of $50,000 in fines or a 5-year prison sentence.[9]

Section 91(1) has existed in some form since 1908, having been amended in 1970, 2000, and 2018.[10] However, 2018's amendments significantly overhauled the law, crucially deleting the word "knowingly" from the provision. Before 2018, section 91(1) stated:

No person shall, with the intention of affecting the results of an election, **knowingly** make or publish any false statement of fact in relation to the personal character or conduct of a candidate or prospective candidate.[11]

To be convicted of the pre-2018 offence, then, the offender had to *know* that they were disseminating falsities.[12] The removal of the word "knowingly" in 2018 made it unclear whether the offence now required false election "information to be knowingly disseminated or just merely disseminated."[13] This was the key issue in *CCF*.

Section 91(1) Infringes Section 2(b) of the *Charter*

When a court addresses a *Charter* challenge, the first step is to determine if there is a *Charter* infringement. In this case, all parties agreed that section 91(1) of the *CEA* "restricts expressive activity that is protected by s[ection] 2(b) of the *Charter*,"[14] so the Court did not need to determine if the provision was an infringement. However, the Court took the opportunity to comment on the importance of political speech under section 2(b). The Court reaffirmed that political speech is "the most valuable and protected type of expression"[15] since it enables "the free exchange of political ideas … [to ensure] a properly functioning democracy."[16] At the same time though, the Court acknowledged that the spread of false information during elections can "threaten our democracy … and undermine public confidence in our democratic institutions and the security of our elections."[17] Thus, the Court asserted that deliberate propagation of false information during elections "does not enjoy the same level of protection under s[ection] 2(b) of the *Charter* as [other forms of] political speech."[18]

Is This Infringement Justified Under Section 1 of the *Charter*?

Finding that a law infringes the *Charter* is not the end of the case, because *Charter* protections are not absolute; they are subject to reasonable limits under the *Charter*'s section 1. To determine if a limit on a *Charter* right is reasonable, courts apply a special test known as the "*Oakes* test." Under this test, any law that violates the *Charter* may be "saved under [s]ection 1"[19] (and will remain in force) if it meets two criteria:

- Objective: The law's objective must be to respond to a pressing and substantial problem;
- Proportionality: The law must limit rights in a way that (a) is rationally connected to its pressing and substantial objective, (b) impairs the right or rights as minimally as possible, and (c) is "proportionate" in the sense that the law is sufficiently important to justify such a violation (the more severe the violation, the more important the law must be).[20]

The parties in *CCF* agreed that the "objective of s[ection] 91(1) — to protect the integrity of the electoral process against the threat of false information — [was] pressing and substantial."[21] However, the parties disagreed as to whether section 91(1) minimally impaired[22] freedom of expression (and passed the *Oakes* test) in light of the removal of the word "knowingly." The CCF argued that section 91(1) could capture accidental misstatements and was therefore too broad to be minimally impairing.[23] By contrast, the Attorney General argued that the law, when interpreted properly, only captured deliberate false statements.[24] In this regard, the Attorney General suggested that the removal of "knowingly" was simply to eliminate legislative redundancy in drafting, and that the provision still implied that the offender would have to know that their statement was false.[25]

Why is the Word "Knowingly" So Important?

For conviction of most criminal acts, the Crown must prove two separate elements of the offence, the *actus reus* (AR) and the *mens rea* (MR).[26] The AR is the illegal act itself while the MR is the individual's intent to commit said act.[27] The MR requirement means that an accused must possess a certain degree of knowledge in order to be found guilty of an offence.[28]

The Court confirmed that the AR of the section 91(1) offence was the actual spread of falsehoods during an election.[29] However, it was not clear how removing the word "knowingly" affected the MR.[30]

How Does the Rest of the *Canada Elections Act* Address the "Knowledge" Element?

The Court began by examining the text of section 91(1) in the context of the *CEA*. It noted that because the word "knowledge" was removed from section 91(1), "the offence as currently drafted does not contain any knowledge component."[31] The Court noted that the portion of the law requiring an intention to affect election results is not relevant because it does not address knowledge of whether the statements made were false.[32]

After reviewing other *CEA* election offences, the Court noted that "Parliament ha[d] clearly articulated"[33] an MR requirement in all of the other offences, and that "[w]hen proof of knowledge is required, that is explicit in the prohibition or offence provision."[34] For example, the Court referred to section 408(1) of the *CEA*, which states that "no leader of a political party shall provide the Chief Electoral Officer with information under section 385 that the leader **knows** is false or misleading"[35] when registering political parties.[36]

The Court further observed that the offence created by section 91(1) was starkly different from the rest of the offences under the *CEA*, and that it would therefore "be inconsistent with the structure of the *CEA* as a whole to interpret [section] 91(1) … as requiring knowledge when … [it was] not explicit in either the prohibition or offence."[37]

The text of the *CEA*, then, suggested that removing "knowingly" from section 91(1) removed the requirement for an offender to know that their statement was false. But was this Parliament's intent?

Did Parliament Intend to Change the MR Requirement?

To determine Parliament's intention, the Court examined parliamentary debates and standing committee sessions on the law, acknowledging that such evidence is by itself "of limited weight."[38] However, this evidence can provide context about the matters that Parliament considered when discussing the legislation. For this reason, such evidence is admissible to assist courts in determining Parliament's intention, although it should not be determinative.[39]

First, the Court noted that there was little mention of deleting "knowingly" in the parliamentary debates.[40] Then, it examined the standing committee sessions, which briefly considered whether "knowledge" of a statement's accuracy remained a component of the MR for the section 91(1) offence.[41] The Conservative Party proposed an amendment to

keep the word “knowingly” in the law at a committee session, but the General Counsel to the Commissioner of Elections Canada stated that the inclusion of the phrase “with the intention of affecting the results of an election”[42] in the law implied that the “person making the publication would need to know that the information that is published was false.”[43] The amendment was ultimately rejected on this basis.[44]

For the most part, discussions during the standing committee hearings focused on how keeping the word “knowingly” in the provision could be misinterpreted and create confusion.[45] For example, Jean-Francois Morin, a senior policy advisor from the Privy Council Office, speculated that a judge could misinterpret the word “knowingly” to mean that the Crown must prove that the offender knew that they violated that specific portion of the *Elections Act*.[46] The Court, though, rejected Morin’s statements as “incorrect and potentially misleading.”[47]

The Court concluded that the legislative proceedings were “not helpful” and could not be interpreted “as [reflective] of Parliament's true intention.”[48] There was therefore insufficient evidence to show whether Parliament intended to retain the MR knowledge requirement.

The Court also considered an affidavit from Mylene Gigou, the Director of Investigations with the Office of the Elections Commissioner, which argued that section 91(1) contained an implied knowledge component[49] because Parliament intended it “to be an intentional offence, not a strict liability offence.”[50] A strict liability offence does not have an MR requirement — committing the illegal act alone is sufficient to be found guilty, whereas an intent offence always requires some form of MR.[51] However, the Court rejected this statement as legally wrong, since “[c]ategorizing an offence as an intent offence does not [automatically] imply or require any *particular* form of *mens rea*.”[52]

Additionally, the Court found that Gigou contradicted herself; she stated that section 91(1) “only targets knowingly false statements,” but later that the provision could also capture statements made by a “person or entity [who is] willfully blind or reckless about the [statement’s] truthfulness.”[53] The Court accordingly found Gigou’s evidence of little use in outlining Parliament’s intentions and suggested instead that it “demonstrate[d] the confusion that arises when Parliament does not clearly articula[te] the *mens rea*” for an offence.[54]

To sum up, the original version of section 91(1) included the word “knowledge,” which means that full knowledge of the statement’s falsity was required to secure a criminal conviction. By removing that word, Parliament potentially expanded the MR to include recklessness, which would be a significant change to the law.[55] An accused is reckless when they are aware of the relevant risks — in this case the risk that their statement may be false — but engage in the conduct regardless.[56] In contrast, full knowledge is a heightened standard, requiring awareness of falsity.[57] In the absence of indications to the contrary, the Court concluded that Parliament’s removal of the word “knowingly” was intended to expand the MR of the offence beyond full “knowledge.”

The New Law is Not Minimally Impairing

As noted above, for a law to justifiably infringe a *Charter* right it must minimally impair the right. This means that the law interferes with the *Charter* right "as little as possible."[58] In this case, both parties agreed that the MR would need to be "knowledge" for the law to be minimally impairing. The Court found that removing the word "knowledge" from section 91(1) broadened the law unnecessarily to include people who unintentionally or recklessly distributed false information without knowing that it was false.[59] As a result, the law failed the minimal impairment test, was held unconstitutional, and was declared immediately to be of no force and effect.[60]

Law Struck Down: But This Doesn't Mean You Can Spread All the Malarkey You Want

The Court acknowledged that false election information is a threat to democracy, but concluded that this particular law unjustifiably infringed free expression. While the law was struck down, this does not give Canadians a free license to spread false information during an election. It is just that this particular law, as it was written at the time of litigation, was found to limit *Charter* freedoms in an unjustifiable manner. Subsequently, the government placed the word "knowingly" back into the law in May 2021 to render it constitutional.[61] Section 91(1) is therefore valid law once again.[62]

[1] Susan Delacourt, "Are There More People Telling Lies in this Federal Election?" *Toronto Star* (18 September 2019), online: <https://www.thestar.com/politics/political-opinion/2019/09/18/are-there-more-people-telling-lies-in-this-federal-election.html>.

[2] *Canadian Constitution Foundation v Canada (Attorney General)*, 2021 ONSC 1224 .

[3] *Canada Elections Act*, SC 2000, c 9, s 91(1) as it appeared on 20 January 2021 .

[4] *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.

[5] *CCF Canada*, *supra* note 2 at para 3.

[6] *Ibid* at para 3.

[7] *Elections Act*, *supra* note 3, s 91(1)(a).

[8] *Ibid*, ss 463(3)(c) and 500.

[9] Brian Platt, "Liberals Aim to Use Budget Bill to Fix Charter Violation in their Own Election Misinformation Law" *National Post* (12 May 2021), online: <https://nationalpost.com/news/politics/liberals-aim-to-use-budget-bill-to-fix-charter-violation-in-their-own-election-misinformation-law>.

[10] *CCF Canada*, *supra* note 2 at para 12.

[11] *Elections Act*, *supra* note 3 as it appeared on 12 December 2018 (emphasis added).

[12] *CCF Canada*, *supra* note 2 at para 67.

[13] Gregory Tardi, "Including Emerging Litigation Comprenant les Litiges en Voie de Développement" (2021) 15 J Parliamentary & Pol L 441 at 442 (WL) [Tardi].

[14] *CCF Canada*, *supra* note 2 at para 5.

[15] *Ibid* at para 1.

[16] *Ibid* at para 1

[17] *Ibid* at para 2.

[18] *Ibid* at para 2

[19] Patrick Malcolmson & Richard Myers, The Canadian Regime: An Introduction to Parliamentary Government in Canada, 5th ed (North York: University of Toronto Press, 2012) at 90 [Malcolmson].

[20] *Ibid.*

[21] *CCF Canada*, *supra* note 2 at para 6.

[22] "Minimal impairment" means that the "law in question [infringes] the right as little as possible … and [that] there [are no] other ways of achieving the same objective without limiting *Charter* rights" (Malcolmson, *supra* note 19 at 91).

[23] *CCF Canada*, *supra* note 2 at para 6.

[24] *Ibid* at para 5.

[25] *Ibid* at para 8.

[26] Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 10 [Roach].

[27] Manning, Mewett and Sankoff, *Criminal Law*, 4th ed (Markham: LexisNexis, 2009) at 103 [Manning et al].

[28] Roach, *supra* note 26 at 279-282.

[29] *CCF Canada*, *supra* note 2 at para 24.

[30] *Ibid* at paras 19-22.

[31] *Ibid* at para 33.

[32] *Ibid* at paras 24-26, 31.

[33] *Ibid* at para 42.

[34] *Ibid*.

[35] *Elections Act*, *supra* note 3 at s 408(1) [emphasis added].

[36] *CCF Canada*, *supra* note 2 at para 38.

[37] *Ibid* at para 43.

[38] *Ibid* at para 45.

[39] *R v Morgentaler*, [1993] 3 SCR 463 at 484 .

[40] *CCF Canada*, *supra* note 2 at para 46.

[41] *Ibid* at para 58.

[42] *Elections Act*, *supra* note 3 at 91(1).

[43] *CCF Canada*, *supra* note 2 at para 48.

[44] *Ibid* at para 49.

[45] *Ibid* at para 48.

[46] *Ibid* at para 48.

[47] *Ibid* at para 53.

[48] *Ibid* at para 58.

[49] *Ibid* at paras 59-60.

[50] *Ibid* at para 61.

[51] Manning et al, *supra* note 27 at 203.

[52] *CCF Canada*, *supra* note 2 at para 61 [emphasis added].

[53] *Ibid* at para 62.

[54] *Ibid* at paras 67-68.

[55] *Ibid* at para 67.

[56] Roach, *supra* note 26 at 216.

[57] *CCF Canada*, *supra* note 2 at paras 26, 66.

[58] *R v Oakes*, [1986] 1 SCR 103 at para 70, citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR

295 at 352.

[59] *CCF Canada*, *supra* note 2 at para 71.

[60] *Ibid* at paras 74-75

[61] Platt, *supra* note 9.

[62] Elizabeth Thompson, "Trudeau Government Won't Appeal Ruling that Struck Down Part of Elections Law" (23 March 2021), online: *CBC News* <https://www.cbc.ca/news/politics/elections-law-misinformation-disinformation-1.5959693>.