Court of Appeal File No. CA038128

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

ROSE HENRY, CLYDE WRIGHT, HELEN EDDLESTONE

APPELLANTS
(PLAINTIFFS)

AND:

THE ATTORNEY GENERAL OF CANADA AND
THE CHIEF ELECTORAL OFFICER OF CANADA

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(DEFENDANTS)

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PART 1 – STATEMENT OF FACTS

1. The BCCLA relies on the statement of facts set out in the Appellants' factum. The brief descriptions of the facts as found by Justice L. Smith that follow are intended only to establish the context for the larger *Charter* issues raised by this appeal.

PART 2 – ISSUES ON APPEAL

2. The BCCLA confines its submissions to the proportionate effects stage of the s. 1 *Oakes* analysis. The BCCLA makes three arguments:

   A. Where the state puts forward a broadly characterized objective as the purpose for a legislative measure found to infringe the *Charter*, the evidence put forward by the government to justify the measure at the proportionate effects stage of the *Oakes* test must be of a kind and type that reflects and responds to the particular aspect of the right infringed and the nature of the infringement, in light of that broader objective.

   B. Evidence of public support for an impugned measure (for example, by means of opinion surveys) can only in the rarest of circumstances provide a basis for showing the salutary effects of a measure at the proportionate effects stage.

   C. In demonstrating the deleterious effects of an impugned measure, a claimant should be entitled to a relaxed evidentiary standard, and a court should be able to rely on evidence of systemic barriers to the exercise of the right, especially where the affected rights-holder is a member of a vulnerable or marginalized group, where there may be difficulties identifying actual cases of infringement, or where affected parties may be reluctant to come forward.

PART 3 – ARGUMENT

A. Correspondence between objective, right infringed and nature of the infringement

3. Canada took the position below that the objectives of the impugned provisions were "protecting the integrity of the vote and maintaining public confidence in the integrity of the electoral system" (reasons indexed at 2010 BCSC 610 at para. 214). The Plaintiffs conceded that these were pressing and substantial objectives and that the measures were rationally connected to those objectives; the contest on the evidence thus centred on the minimal impairment and proportionate effects stages of the analysis (at para. 220).

4. The most authoritative recent statement by the Supreme Court of Canada on the proportionate effects stage of the *Oakes* analysis was made in *Hutterian Brethren*.[1] The Court described the role and operation of the proportionate effects assessment in this way:

> [73] This leaves a final question: are the overall effects of the law on the claimants disproportionate to the government's objective? When one balances the harm done to the claimants' [rights] against the benefits …, is the limit on the right proportionate in effect to the public benefit conferred by the limit?
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> [74] In *Oakes*, Dickson C.J. explained the function of this third and final step of the proportionality analysis:
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> > Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. [pp. 139-40]
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> …
>
> [76] … Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law. Rather than reading down the government's objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of *Oakes*.

[1] *Alberta v. Hutterian Brethren*, 2009 SCC 37 per McLachlin C.J.C. (for the majority of the Court) at paras. 72-103.

> [77] The final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation. …[2]

The importance of this stage of the *Oakes* test informs the balance of these submissions.

5. The BCCLA submits that where the government chooses to describe the objective of a piece of legislation in the most general terms – and not as a specific object targeted at a specific (and proven) mischief – the type of evidence that the government must put forward to justify the measures at the proportionate effects stage must be of a kind and quality that reflects and responds to the particular aspect of the right infringed and the nature of the infringement, in light of that broader objective.

6. This is not a novel position. The Supreme Court of Canada has held that a government seeking to justify the denial of a right pursuant to s. 1 cannot rest on "vague and symbolic objectives", and must instead resort to "demonstrable justification" to defend the limitation on rights.[3] This was the approach described in *RJR-McDonald* by McLachlin J. (as she was):

> That the s. 1 analysis takes into account the context in which the particular law is situate should hardly surprise us. The s. 1 inquiry is by its very nature a fact-specific inquiry. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the *actual objective* of the law. In determining proportionality, it must determine the *actual connection* between the objective and what the law *will in fact achieve*; the *actual degree* to which it impairs the right; and whether the *actual benefit* which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.[4]

That is, while the state is allowed to assert its objective in expansive and abstract terms at the pressing and substantial objective stage of the *Oakes* analysis, at the subsequent stages the government must still be able to justify that objective with actual evidence that goes beyond bald statements to show concrete and beneficial effects.

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[2] *Hutterian Brethren, supra*. Emphasis added.
[3] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 per McLachlin C.J.C. (for the majority) at paras. 22-23.
[4] *RJR-McDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 (QL) at para. 133. Italics emphasis added.

7. In practical terms, where an abstract objective presents a challenge for the *Oakes* assessment, then "prudence suggests that [the court] proceed to the proportionality analysis … [which] allows [the court] to determine whether government's asserted objectives are in fact capable of justifying its denial of the right…"[5]

8. The requirement of correspondence between objective, right, nature of infringement and the evidence used to explain and justify this is nowhere expressed or reflected in the trial judge's reasons or in her consideration of the evidence. This failure underlies the grounds of appeal raised by the Appellants regarding the misapplication of the proportionality test (as set out at paras. 62, 103-117 of their factum) and the next sections of this argument. This foundational principle should also guide this Court's review of the decision under appeal.

B. Evidence of public support is not sufficient to demonstrate salutary effects

9. In assessing the salutary effects of the Bill C-31 amendments, Justice Smith reviewed the evidence put forward by Canada. She concluded that "[t]he evidence shows no history of systemic electoral fraud in Canadian federal elections and, indeed, no history of a problem of any magnitude with respect to electoral fraud or mistaken double voting" (at para. 398). Despite the absence of any manifest harm to be remedied, the judge inferred that the evidence of public support for the new voter identification rules (at paras. 403, 426, 428, 431, 435 and 441) indicated a public concern about the integrity of the voting process (at para. 403). This concern, she found, would be alleviated by the Bill C-31 amendments, and was thus an important salutary effect.

10. There are two problems with this analysis: first, on the facts, there was no evidence of "any public perception of abuse under the former identification regime" (at para. 393). The court

[5] *Sauvé*, *supra* at para. 26.

accepted there was "very little direct empirical evidence of any kind about public attitudes toward electoral fraud in Canada", but drew from this that "while there is no evidence of that there *is* a public perception of abuse, it is equally correct to say that there is no evidence that the public *is not* concerned about potential abuse" (at para. 394, original emphasis), and, accordingly, "[t]o the (unknown) extent that members of public at large have been concerned about the integrity of the electoral system, the legislation should have the effect of reducing such concern" (at para. 403). Respectfully, the court's ex post reliance on public support for the identification measures to posit pre-existing public perception of weakness in the voting system in order to find a salutary effect for the impugned provisions is neither a logical nor a sufficient basis on which to justify the infringement of s. 3.

11. More fundamentally, the point for *Charter* jurisprudence is that evidence of public support for impugned measures, whether from legislators or the larger public (by means of opinion survey or other polling) can only in the rarest case demonstrate salutary effects at the proportionate effects stage of *Oakes*. Courts should be even more skeptical when offered statements by politicians, liable to be coloured by partisanship. In addition to the usual cautions about statistical evidence, reliance on such material runs the insidious risk of letting majority approval justify infringement of a minority's rights, based on bare belief and opinion. Justice McLachlin, as she was then, adverted to this risk in *RJR-McDonald*:

> First, to be saved under s. 1 the party defending the law ... must show that the law which violates the right or freedom guaranteed by the *Charter* is "reasonable". In other words, the infringing measure must be justifiable by the processes of reason and rationality. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility.[6]

[6] *RJR-MacDonald*, *supra* at para. 127. Emphasis added.

12. The Ontario Court of Appeal has indicated caution about relying on public opinion evidence at the justificatory stage of the *Oakes* test:

> … In any event, we recognize that attitudinal studies may not be a suitable criterion for assessing the justification of a *Charter* limitation, particularly when the result would have the effect of denying statutory protection to a vulnerable segment of society.[7]

13. Although there may be instances in which public perception – and not empirical evidence of harm – is the primary impetus for legislation to address a perceived problem or an indication as to whether legislation bears on area of concern (e.g. *Peel (Regional Municipality)*),[8] or else where such evidence is relevant to show the pressing and substantial objective of the measure (e.g. *R. v. Bryan*),[9] relying only on evidence of public support after the measure has been implemented to make out salutary effects is tantamount to concluding 'it's popular, so it must be good'.

14. Reliance on such evidence eats away at the need for some form of objective justification for a measure to be a rational one; accepting wholly subjective evidence undermines this standard. If public opinion is to be given any weight at all, the evidence must be clear and cogent and responsive to the stated object of the law and the right infringed (as set out above), and the Court must balance public opinion against any imperilled minority interest at stake.

15. If the state wishes to rely on public opinion evidence to show the salutary effects of a measure, then it should come prepared to show evidence of public concern before the measure was introduced, and evidence of public concern having lessened after the measure was put in place. Without these necessary corollaries – and without evidence that public perception was in fact a paramount consideration behind the development of the impugned

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[7] *R. v. Paul Magder Furs* (1989), 69 O.R. (2d) 172 (QL) at para. 28 (C.A.). Emphasis added.
[8] *Peel (Regional Municipality) v. Great Atlantic & Pacific Co.* (1990), 73 O.R. (2d) 289 (QL) per Southey J. at para. 33 (HCJ), overturned on appeal, but with no discussion of this aspect of the decision (1991), 2 O.R. (3d) 65 (C.A.) (regarding public support for Sunday shopping).
[9] *R. v. Bryan*, 2007 SCC 12 at para. 25 (regarding public support for limits on broadcasting election results).

measure – courts should be extremely reluctant to rely on public opinion evidence proffered by the state to justify the infringement of a *Charter* right at the proportionate effect stage of the *Oakes* test.[10]

C. A relaxed evidentiary standard for showing deleterious effects should be permitted

16. In evaluating the deleterious effects of the Bill C-31 amendments, Justice Smith reviewed the evidence from both the Plaintiffs and the Chief Electoral Officer, and held that "the deleterious effects of the voter registration requirements to date have been very modest" (at para. 470). This conclusion was based on the fact that there was "no clear evidence that any individual Canadian has actually been impeded from casting a ballot as a *sole* result of the voter identification requirements" (at para. 471, emphasis in original), and was reached in spite of the court's acceptance that, "for a small number, the voter identification requirements played some role in deterring them from voting" (at para. 473).

17. The Plaintiffs sought to show that broader "systemic impacts of the impugned measures", which might not cause "absolute prevention of voting but that still discourage participation in the electoral process", are nevertheless deleterious effects (at paras. 409, 412).

18. After assessing the Plaintiffs' reliance on the Elections Canada survey evidence and the affidavit and other materials relied on, and Canada's challenges to this evidence (at paras. 413-420, 423-469), Justice Smith assigned little weight to the Plaintiffs' proof (at paras. 469-470). This conclusion rested on the absence of information regarding the methodology of the survey evidence, and the personal nature and limited scope of the other "circumstantial"

[10] Although these issues do not seem to have received in-depth judicial consideration, the Supreme Court of Canada has previously expressed concerns over adjusting the approach to *Charter* rights in response to public opinion, albeit in the context of the exclusion of evidence and community standards under s. 24(2): see *R. v. Burlingham*, [1995] 2 S.C.R. 206 (QL) at paras. 140-142 (Sopinka J., for the majority) *cf.* para. 74 (L'Heureux-Dubé J., dissenting in part); *R. v. Collins*, [1987] 1 S.C.R. 265 (QL) at paras. 30-34 (Lamer J., as he was then, for the majority) and 49-51 (McIntyre J., dissenting); and *R. v. Therens*, [1985] 1 S.C.R. 613 (QL) at para. 74 (Le Dain J., dissenting).

evidence (first-hand accounts and non-expert opinion). The judge concluded that, despite evidence and the unavoidable inference that there must have been deterrence from voting (at paras. 471-475), and the finding that "for a small number of electors … there may be … preclusion from voting" (at para. 480), the salutary effects outweighed the deleterious effects (at paras. 477-483), and the provisions were thus saved by s. 1 (at para. 484).

19. The judge's holding that the "salutary effects of the legislation are modest" must be contrasted with her acknowledgement that some voters' exercise of their franchise might be completely precluded by Bill C-31. With respect, her scrutiny of the Plaintiffs' evidence of systemic barriers to the exercise of the voting right was too strict, and led her to assign too little weight to key evidence at the balancing stage of the analysis.[11]

20. The underlying question for *Charter* rights analysis that flows from this determination is whether – at the proportionate effects stage – claimants should be entitled to have a relaxed evidentiary standard in demonstrating the deleterious effects of an impugned measure in circumstances where the direct evidence of infringement may not be available because the affected rights-holder is a member of a vulnerable or marginalized group, and where, as here, there may be difficulties identifying actual cases of infringement or where injured parties may be reluctant to come forward. Courts should be permitted to find deleterious effects of a measure where there is some evidence of direct infringement of a right in a particular case, or, where such evidence is not available, to infer it from plausible evidence of systemic barriers to the exercise of the right. At both the deleterious effects and balancing stages, that evidence should be assigned weight commensurate with what it reveals about systemic harm.

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[11] It is interesting that the language of the trial judge echoes that in *Sauvé*, where the court reached the opposite conclusion: "In the final analysis, even if there were merit in the Court of Appeal's view that the trial judge relied too heavily on the absence of concrete evidence of benefit, it is difficult to avoid the trial judge's conclusion, at p. 916, that 'the salutary effects upon which the defendants rely are tenuous in the face of the denial of the democratic right to vote, and are insufficient to meet the civil standard of proof'." *Sauvé*, *supra* at para. 61 (emphasis added).

21. After *Hutterian Brethren* (at para. 69), there is no question that evidence of broader social impacts is admissible at the justification phase of the *Oakes* test. The Supreme Court has also relaxed the standard for what constitutes acceptable evidence for the s. 1 analysis in some cases. Where deference has been found to be owed to Parliament's legislative choice, the evaluation of the state's justification in s. 1 must accept that "traditional forms of evidence (or ideas about their sufficiency) may be unavailable in a given case and that to require such evidence in those circumstances would be inappropriate". In the absence of such evidence, "'approximations and extrapolations' as opposed to more traditional forms of social science proof … [and] arguments based on logic and reason will be accepted as a foundational part of the s. 1 case".[12] This relaxed standard gives the government leeway in defending its characterization of pressing and substantial objectives, and it would be unbalanced to deny the same relaxed standard to the question of deleterious effects.

22. In circumstances like the present – where no deference should be shown to the state's absolute denial of a fundamental right – this relaxed standard should be extended to the claimant's ability to demonstrate deleterious effects of an impugned measure.[13] It is a reality, and one amply illustrated by this case, that demanding evidence of direct harm or demanding that evidence of deleterious effects meet some black-letter level of sufficiency not realistic in context, can lead to unjust results. At the s. 1 stage, claimants have already discharged the burden of showing an infringement, so in the one area in which they have some (tactical)

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[12] *R. v. Bryan, supra* at paras. 20-23, 28-29 (reasons of Bastarache J. for four judges, Fish J. concurring on this point at para. 69; Abella J. dissenting for four judges on a different – but not necessarily conflicting – view of this aspect of the reasons at paras. 97-103). See also *Harper v. Canada (Attorney General)*, 2004 SCC 33 esp. at paras. 77, 79.

[13] This has been proposed by commentators: see, e.g., Lokan & Dassios, *Constitutional Litigation in Canada* (Toronto: Carswell, 2006-)(loose-leaf, 2011 release) at 8-12.1 to 12.3. There is also no requirement that evidence of the impact of legislation must be adduced through experts, and the courts must recognize that lay evidence may be used, including evidence of personal experience: see the discussion in *Carter v. Canada (Attorney General)*, 2011 BCSC 1371 at paras. 4-28. The trial judge here appeared to discount the evidence of Ms. Lahn on this ground (at paras. 462-466), and should arguably not have assigned this testimony so little weight.

evidentiary burden (because the state otherwise carries the burden under s. 1), claimants should equally share that lesser burden to contrast the broader, negative societal consequences of a measure with its purported beneficial aspects.

23. Alternatively or in addition, in balancing salutary effects with deleterious effects, evidence of systemic barriers, which reveals the society-wide impacts of broad-based legislation, must be given due weight. This is not a question of the standard of proof, but of the weight to be given to particular types of evidence in the course of a contextual balancing exercise. The balancing aspect of the salutary versus deleterious effects analysis occupies a special place within the *Oakes* test precisely because it is a balancing exercise, and because it is a recognition that – while a claim in defence of a *Charter* right is ordinarily brought by a particular individual with a personal stake – in almost every instance the scope of the impact on *Charter* rights extends across groups and society as a whole. Affording systemic evidence sufficient weight respects this reality.

PART 4 – NATURE OF ORDER SOUGHT

24. The BCCLA takes the position that the impugned provisions infringe s. 3 and are not saved by s. 1, and urges the Court to grant the relief sought by the Appellants.

25. The BCCLA seeks leave of the Court to present oral argument at the hearing of this appeal. The appeal has been set for two and a half days, and the BCCLA asks that it be permitted to present oral argument for up to thirty minutes.

26. The BCCLA seeks no costs and asks that no costs be awarded against it.

Mathew P. Good

LIST OF AUTHORITIES

Case Authorities

Alberta v. Hutterian Brethren, 2009 SCC 37

Carter v. Canada (Attorney General), 2011 BCSC 1371

Harper v. Canada (Attorney General), 2004 SCC 33

Peel (Regional Municipality) v. Great Atlantic & Pacific Co. (1990), 77 O.R. (2d) 289 (H.C.J.) (QL), overturned (1991), 2 O.R. (3d) 65 (C.A.)

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R. v. Therens, [1985] 1 S.C.R. 613 (QL)

Sauvé v. Canada (Chief Electoral Officer), 2002 SCC 68

Commentary

Lokan & Dassios, *Constitutional Litigation in Canada* (Toronto: Carswell, 2006) (loose-leaf, 2011 rel.)