COURT OF APPEAL

PROVINCE OF QUEBEC
MONTREAL REGISTRY

NO: 500-09-001593-920
(760-05-000252-898)

CORAM: THE HONOURABLE McCARTHY
MAILHOT, JJ.A.
MOISAN, J.A. ad hoc

ATTORNEY GENERAL OF CANADA

APPELLANT – Respondent

v

MONIQUE BARRETTER,
DANIEL PAYETTE,

RESPONDENTS – Petitioners

and

JEAN-MARC HAMEL

MIS EN CAUSE – Mis en cause

***Elections** – Reimbursements of expenses – Limited of 15% of valid votes cast for non-elected candidates – Whether limitation was in breach of Charter of Rights and Freedoms.*

Background facts

The Attorney-General of Canada appealed against a judgement which declared that certain sections of the Canada Elections Act were inconsistent with the Canadian Charter of Rights and Freedoms and of no force or effect. The impugned section of the Act contained words which, with the exception of elected candidates, limited to those candidates who have obtained at least 15% of the valid votes cast the right granted by the Act to reimbursements of one-half of allowable election expenses.

Held

That he was granted and the respondents' motion for a declaratory judgment was dismissed.

Cases cited in Judgement

Andrew v *Law Society of British Columbia, (1989) 1 SCR 143*
R. v *Turpin (1989) 1 S.C.R. 1296*

OPINION OF McCARTHY, J A

This is an appeal by the Attorney General of Canada from a judgement which declared "inconsistent with sections 3 and 2(b) of the *Canadian Charter of Rights and Freedoms* and of no force or effect" certain words in sections 241(1)(a) and 242 of the *Canada Elections Act* R.S.C. Chap. E-2 ("the Act"). The words are those which, with the exception of elected candidates, limit to those candidates who have obtained at least 15% of the valid votes cast the right granted by the Act to the reimbursement of one-half of allowable election expenses. The judge also held that the infringement of sections 3 and 2(b) had not been shown to be justified under section 1 of the Charter.

Section 3 of the Charter reads as follows:

> "3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

The judge in the first instance pointed out that the right to vote necessarily means the right to vote "in an informed and rational manner, after the citizen has had an opportunity to know the political options and programmes supported by the candidates". Similarly, the right to stand for election necessarily means with the electorate....". Legislation which, either in its purpose or in its effect, interferes with such rights is unconstitutional. The *purpose* of the 15% threshold for reimbursement is "to discourage the proliferation of parties and candidates unable to attract an important following", parties and candidates that are "ephemeral, marginal, frivolous or insignificant". No one suggests that that purpose as such interferes with the rights guaranteed by section 3. However, the judge concluded, the *effect* of the 15% threshold renders it unconstitutional:

> "The evidence shows that effective communication of information to the citizenry by a candidate for election involves expenses. In theory, each candidate should be afforded an equal opportunity to communicate his views to the electorate; otherwise there is the danger that the latter will be given a distorted or incomplete view of the issues. Of course, perfect equality is impossible. Much will depend upon the capacity of each candidate to use effectively and persuasively the opportunities afforded to him, but the law should not contribute to or aggravate inequalities.
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> A candidate who is not independently wealthy and who anticipates receiving electoral support near to or below the 15% threshold will be naturally apprehensive about his budget for election expenses. Since it is an all or nothing proposition, the 15% threshold produces the curious anomaly that the truly marginal candidate who has no real hope of attracting more than, say, 5% of the

vote may be less inhibited than the candidate who is at or near the 15% level; the latter does not know how much can be safely spent, whereas the former understands that he or she will not receive the government subsidy, and budgets accordingly.

In the Court's opinion, the effect of the limitation in sections 241 and 242 tends to discourage some serious candidates for election from conducting an effective campaign, for fear of incurring costs that may or may not be subsidized by the government. The uncertainty of their situation serves to distract them from what should be their primary concerns during an election campaign. If all candidates were equally distracted or inhibited, the likelihood of a violation of section 3 is diminished, but equality of opportunity is essential to fairness in elections, and an unfair election is an infringement of the citizen's right to vote.

The Court concludes that the limitation of the reimbursement of election expenses to those candidates receiving 15% of the vote is inconsistent with section 3 of the Charter."

Section 2(b) of the Charter reads as follows:

"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;

....."

The judge concluded that the *effect* of the 15% threshold also inhibits "public debate on the part of some candidates for election" and thus violates the freedom of expression guaranteed by section 2.

Respondents also argued that the 15% threshold constitutes discrimination prohibited by Article 15 of the Charter, which reads as follows:

"15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

However, the judge rejected this argument, saying that the alleged discriminatory *effect* in favour of the Progressive-Conservative and Liberal parties at the expense of the New Democratic Party was far from being proved. Furthermore, said the judge, unsuccessful NDP candidates (the respondent Payette was one, his official agent being the respondent Barrette) do not form a group members of which can be subject to discriminating within the meaning of section 15 as interpreted in *Andrews* v *Law Society of British Columbia 1989* 1 S.C.R. 143.

With deference, I have difficulty in following to its conclusion the reasoning in first instance. Quite properly the judge emphasises the right of the voter to know, and of the candidate to make known, the candidate's views. Quite properly the judge, on the other hand, avoids saying the section 3 (or section 2(b)) of the Charter obliges the legislator to supply candidates with the means necessary to make known their views. Nor do the respondents argue that the legislator has such an obligation. What the respondents do argue, and the judge appears to accept the argument, is that *if* the legislator does supply such means, in whole or in part, he must supply them without discrimination in purpose or in effect (subject to the possible application of section 1 of the Charter). Discriminating in this sense is supposedly something different from discrimination under section 15, which the judge, at least, concludes is not present here. However, I see nothing in the Charter to support the supposition that there are two kinds of prohibited discrimination, one explicitly prohibited and one implicitly prohibited. In other words, if the portions of the Act here in question are unconstitutional it must be because they infringe not section 3 or section 2(b) but section 15. They do not impede the right to vote or to stand for election or to express oneself freely; the question is whether they encourage with discriminatory purpose or effect the exercise of any of those rights.

In *Andrews,* although a minority concluded that it was nonetheless justified under section 1, the Supreme Court of Canada held unanimously that a provincial legal provision making Canadian citizenship a requirement for admission to the bar involved discrimination within the meaning of section 15 of the Charter. McIntyre J (all his colleagues concurring on this point) described such discrimination as follows (page 174):

> "I would say then that discriminating may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society."

Referring to various approaches adopted with regard to section 15, he said (pages 179–180):

> "A third approach, sometimes described as an 'enumerated or analogous grounds' approach, adopts the concept that discrimination is generally expressed by the

> enumerated grounds. Section 15(1) is designed to prevent discrimination based on these and analogous grounds."

and (page 182):

> "The third or 'enumerated and [sic] analogous grounds' approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above...."

McIntyre J concluded, page 183, that non-citizens lawfully permanent residents of Canada constitute "a good example of a 'discrete and insular minority' who come within the protection of s. 15".

In *R* v *Turpin* 1989 1 S.C.R. 1296 the Supreme Court quoted the above passages from *Andrews* and added (pp. 1331–1332):

> "In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. McIntyre J emphasised in *Andrews (at p.167):*
>
> > 'For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.'
>
> Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrary wise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from the independent of the particular legal distinction being challenged."

In *Turpin* the Court also referred to the opinion of Wilson J in *Andrews* to the following effect (p 1332):

> ".....the determination of whether a group falls into an analogous category to those specifically enumerated in s. 15 is 'not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society'."

The Court held unanimously that a section of the Criminal Code requiring, except in Alberta, that an accused charged with certain offences be tried by judge and jury did not involve discrimination within the meaning of section 15. "Persons resident outside Alberta and charged with section 427 offences outside Alberta" said the Court at p 1333, "do not constitute a disadvantaged group in Canadian society within the contemplation of section 15". At the same time, the Court suggested that *in some circumstances* a person's province of residence or place of trial *could* be "a personal characteristic of the individual or group capable of constituting a ground of discrimination". It should perhaps also be noted that in *Andrews,* although he approved the "enumerated and analogous grounds" approach, McIntyre J at a previous point (p 175) had suggested that there might possibly be *no* limits on the grounds for discrimination.

Applying to the present case as best I can, the comments of the Supreme Court in *Andrews* and *Turpin* I am unable to see in the 15% threshold for partial reimbursement of elections expenses any discriminatory purpose or effect within the meaning of section 15 of the Charter. Unsuccessful candidates who do not obtain at least 15% of the valid votes cast are not, in my view, a "discrete and insular minority". Nor are they a "disadvantaged group in Canadian society". If the 15% threshold discriminates against them, such discrimination is not based on any of the grounds enumerated in section 15 or on any analogous ground. For the same reasons, the 15% threshold involves no prohibited discrimination against voters who, if they are more fully informed, might vote differently. As for persons who, if they are more assured of being supplied with the means necessary to make their conduct a different kind of campaign, the same considerations apply. Turning to the argument that the 15% threshold has in practice the *effect* of discriminating against the NDP or, more correctly, against members of that party, I agree with the judge that that argument is not proved. Nor do the results of the federal election held while the present case was under advisement in this Court, to the extent that we may take judicial notice of such results, support the argument that the 15% threshold has the effect of discriminating against members of new political formations or against voters who might vote for candidates representing such formations or against persons who might become such candidates. True, the judge expressed the view that the 15% threshold "tends to discourage some serious candidates for election from conducting an effective campaign" (see page 3 above) but that view was not expressed in the context of section 15, in the context of discrimination. In the context of discrimination this is what the judge said:

> "Petitioners [respondents] suggest that the effect of the legislation under attack is to favour the Progressive Conservation and Liberal parties, at the expense of the New Democratic Party. The Court is satisfied that this was not intended by the legislation, and it is not convinced that the Act has produced an effect unfavourable to the NDP. Prof. Boily in this report proposes the contrary and shows in a persuasive way that at the national level at least, the NDP has benefited financially more than any other party from the electoral reform effected in 1974."

As I have indicated, I agree.

In the light of all the foregoing, it is not necessary to deal here with possible justification of the 15% threshold under section 1 of the Charter.

I would grant the appeal and dismiss respondents' motion for a declaratory judgement. I would order the parties to pay their own costs in both courts, the appellant having advised us that such an order would be acceptable.

Gerald McCarthy J A