Sex Party Battles with Canada Post

The Federal Court of Canada reserved judgment on October 17, 2007 regarding the Sex Party's lawsuit against Canada Post. The Sex Party, registered as a political party in British Columbia, claims that Canada Post's refusal to deliver their pamphlet during the 2006 federal election campaign violated their section 2(b) right to freedom of expression under the Charter of Rights and Freedoms. Canada Post argued that their refusal was justified under s. 1 of the Charter because of the sexually explicit nature of the material and the potential for it to psychologically harm children.

Section 2(b) of the Charter recognizes the role of freedom of expression as an instrument of parliamentary democracy, the attainment of truth, and personal fulfillment. The jurisprudence under s. 2(b) is derived from Irwin Toy Ltd. v. Quebec (Attorney General), a 1989 decision of the Supreme Court of Canada. In that case, the Court established the legal test for determining whether there is an infringement of s. 2(b):

- Does the activity fall within the sphere of conduct protected by freedom of expression?
    - Activity which (i) does not convey or attempt to convey meaning or (ii) conveys meaning but through a violent form of expression is not protected.
- Whether the purpose or effect of the government action in issue was to restrict freedom of expression?
    - If the legislation is aimed to control attempts to convey meaning by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee.
    - If the purpose was not to restrict expression, the claimant can still claim that the effect of the government's action was to restrict expression.

In the present case, the Federal Court could find an infringement of the Sex Party's s. 2(b) right. At this stage of the analysis, the content of the expression (that is, whether the content is "good" or "bad") is not considered. Because the Supreme Court has rarely failed to find a section 2(b) infringement, these sorts of cases are usually decided on the basis of section 1.

For the section 1 balancing analysis, the onus shifts to Canada Post to show that the infringement of the Sex Party's Charter right was reasonably justified. When balancing the competing interests under section 1, the Court may consider such factors as:

- The sexually explicit content of the pamphlet;
- The fact that political discourse lies at the core of freedom of expression under the Charter;
- The lack of positive duty on the state to provide a platform for freedom of expression;
- The fact that Canada Post agreed to mail out a "homophobic religious tract" in 2006 [1]; and
- The fact that the Charter does not confer the right to use private property (such as homes and mailboxes) as a forum for freedom of expression [2].

Freedom of expression jurisprudence typically focuses on whether the expression in question (in this case, the Sex Party's pamphlet) undermines the values that section 2(b) seeks to protect.

The Court could hand down their judgment in the next few weeks.

[1] Neal Hall, "Sex Party challenges Canada Post over erotic political flyer," Canada.com (12 October 2007).
[2] Tamara Letkeman, "Canada Post censored us: Sex Party" Xtra West (24 October 2007).