Harvey v. New Brunswick (1996) – The Right to be Qualified for Membership in the House of Commons or a Legislative Assembly

New Brunswick's *Legislative Assembly Act* provides that a member of the province's Legislative Assembly (MLA) who is found guilty of "any offence that is a corrupt or illegal practice" will be forced to vacate his or her seat and will be disqualified from election for a period of five years.[1] In 1993, an MLA was ousted from his seat after he was convicted of unlawfully encouraging a sixteen year-old to cast a ballot in an election.[2] In response, the MLA brought a constitutional challenge against the legislation, claiming it infringed the right of Canadian citizens "to be qualified for membership" in the House of Commons or a legislative assembly, as protected by section 3 of the *Canadian Charter of Rights and Freedoms*.[3] In 1996, the case reached the Supreme Court of Canada, where all nine judges ruled that the legislation is constitutional. Justice La Forest was joined by six other judges in concluding that the legislation is a reasonable limitation on a *Charter* right. The remaining two judges – Justices McLachlin and L'Heureux-Dubé – saw the legislation as a matter of parliamentary privilege and thus not subject to review by the courts.

Section 3 of the Charter:

Every citizen of Canada has the right to vote in an election of the members of the House of Commons or of a legislative assembly and to be qualified for membership therein. Justice La Forest considered the two opposing positions on the nature of the rights prescribed by section 3. The ousted MLA argued that the rights protected by section 3 are special "preferred" rights. Unlike most other *Charter* rights, the democratic rights in section 3 are not subject to the "notwithstanding clause," section 33 of the *Charter*. In other words, neither Parliament nor legislatures may pass legislation that overrides court rulings on the right to be qualified to sit in a legislature.[4] The former MLA argued on this basis that exceptional deference should be given to this right. The Government of New Brunswick argued that the *Charter's* democratic rights imply "inherent limitations."[5] In other words, there is a historical context behind the bare text of section 3 that must be considered in interpreting the guarantee. Good moral character, in the government's view, is an inherent limitation on the right to be qualified for membership in a legislature. Justice La Forest accepted that there may be some inherent limitations on the right to be qualified for membership in a legislative assembly, but he did not see any such limitations arising in this case.[6]Furthermore, it is well established that courts will give a "broad and purposive"

reading of *Charter* rights. That is, rather that tending to find internal limitations on rights, courts will look to section 1 to weigh the reasonableness of a limit on a right.[7]

Section 1 of the Charter:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Legislation that infringes a *Charter* right may be valid as a reasonable limit on that right. This analysis is guided by the Oakes test, which has four steps. The first step in the Oakes test is to determine the objective of the legislation and decide whether it is directed at a pressing and substantial concern. In this case, Justice La Forest accepted that the goal of "maintaining and enhancing the integrity of the electoral process" is pressing and substantial.[8] The second step is to find a rational connection between the objective and the legislation in question. Because the five-year disqualification "acts as a strong deterrent and helps to promote confidence in the electoral system," Justice La Forest concluded that it is rationally connected to the goal of maintaining the integrity of the electoral process.[9] The third step is to ensure that the legislation impairs the *Charter* right no more than necessary to achieve its objective. In this case, the period of disqualification could have been any number of years. Justice La Forest considered what period of time would constitute a minimal impairment of the *Charter*right while still ensuring that the integrity of the electoral process is maintained.[10] The five-year period provides that the offender will be barred from at least one subsequent election. This allows for "a time of cleansing, thus ensuring the integrity of the electoral process is renewed in both real terms and in the mind of the electorate."[11] There may be competing ideas about the proper time period needed to achieve this objective. Justice La Forest, however, reiterated the Court's long-standing principle of not replacing the rational opinion of a legislature with a court's different rational opinion.[12] In the final step in the Oakes test, Justice La Forest concluded that the negative effects of the legislation are proportional to the pressing objective.[13] Thus, the legislation is a reasonable limit on*Charter* rights and not unconstitutional.[14]

Parliamentary Privilege

Justice McLachlin agreed with the majority that the legislation must stand, but for very different reasons. She took the view that the case dealt with "the historical privilege of the legislature and is hence immune from judicial review."[15] Thus, she chose "not to engage in hypothetical analysis of the*Charter* issue."[16] Parliamentary privilege enjoys constitutional status in Canada. The preamble of the *Constitution Act, 1867* affirms a parliamentary system of government similar to that of the United Kingdom. Canada's constitution likewise recognizes a separation of powers whereby the courts should not trench on the domain of Parliament.[17] Justice McLachlin stressed the importance of reconciling parliamentary privilege and section 3 of the*Charter*. She stated that these two important parts of Canada's constitution must be read as consistent with one another. In practical terms, this means that courts have the role of determining whether a particular act of a legislature is a legitimate exercise of parliamentary privilege. If it is, then the courts

lack the authority to review the act any further.[18] In this case, Justice McLachlin was satisfied that the ability to expel a member is a proper exercise of parliamentary privilege. It is a historically established power that is necessary to enforce discipline within legislatures and to remove members whose behavior has made them unfit to remain as members.[19] In Justice McLachlin's opinion, whether or not the legislature made the right choices when it crafted the law is irrelevant, as it is not a matter for a court to rule on.[20]

Chief Justice Lamer on Parliamentary Privilege

Chief Justice Lamer added a brief explanation of why he did not accept the reasoning of Justice McLachlin. The preliminary question that Justice McLachlin overlooked, in his opinion, was what sort of parliamentary privilege is being exercised.[21] The two types identified by the Chief Justice are: 1. Privilege embodied in, or being exercised pursuant to legislation enacted by the legislature. 2. Privilege pursuant to the internal and inherent "rules" or "resolutions" used to govern proceeding of the legislature. He said that the case clearly dealt with the first type. And, because section 32 of the *Charter* clearly states that the *Charter* applies to legislation, the challenged provisions of New Brunswick's *Elections Act* are subject to *Charter* scrutiny by the courts.[22] Jim Young (June 29, 2010)

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[1] *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876. at para 6. [2] *Ibid* at para 5. [3] *Ibid* at para 7. [4] *Ibid*. [5] *Ibid* at para 22. [6] *Ibid* at para 31. [7] *Ibid* at paras 23, 30. [8] *Ibid* at para 38. [9] *Ibid* at para 41. [10] *Ibid* at para 46. [11] *Ibid*. [12] *Ibid* at para 47. [13] *Ibid* at para 51. [14] *Ibid* at para 53. [15] *Ibid* at para 55. [16] *Ibid* at para 56. [17] *Ibid* at para 68. [18] *Ibid* at paras 70-71. [19] *Ibid* at paras 76-78. [20] *Ibid* at para 79. [21] *Ibid* at para 2. [22] *Ibid* at para 3.