A Law to Stop Politicians From Lying

With an upcoming federal election, Canadians are preparing to decide who deserves their vote. A 2019 poll conducted for The Globe and Mail found that the biggest issue for voters is ethics in government.[1] This concern is not uniquely Canadian either. In the UK, a man sued recently selected Prime Minister Boris Johnson for "misconduct in public office."[2] The claim against Johnson was that he deliberately misled the public during the EU referendum, and again during the general election, with the claim that "the UK gave the EU £350m a week."[3] Just how false was this claim? The chairman of the UK Statistics Authority was so appalled that he wrote a letter to Mr. Johnson decrying the "clear misuse of official statistics"."[4] Nevertheless, a judge refused to let the lawsuit proceed.[5]

What if there were a law that prevented politicians from lying? Surely charges levelled under such a statute would assist voters in their assessment of a political candidate's ethics. Could such a law be constitutionally valid despite encroaching on a politician's right to freedom of expression, which is protected by section 2 of the *Charter*?[6] This article discusses the relevant existing regulations, and previous decisions by the Supreme Court of Canada ("SCC") about laws regarding democratic fairness, protecting vulnerable groups, and prohibiting false news.

Some would argue that we do not need a law of this sort. "Lying about their views is just part of the game that candidates play."[7] Others would argue that, as a Globe and Mail editorial puts it, "politicians need to be able to speak freely without fear of judicial reprisal." According to this view, it should be left to the politicians and the media to draw attention to lies, and the voters to determine whom to trust.[8]

But laws and courts do regulate speech in a variety of other contexts. For example, food labels have to be truthful about ingredients.[9] Elon Musk found himself in trouble with the U.S. Security Exchange Commission for fraud because of a tweet that suggested Tesla might be going private; he was fined $20M.[10] If we are willing to go this far to protect the interests of potential consumers and shareholders, one would think we would try to protect voters at least equally, if not more.

Ad Standards Canada handles the regulation of advertising and is guided by the priorities of truth, accuracy, and fairness.[11] However, the Code the ASC follows explicitly excludes application to political or election advertising.[12] They do not want to "govern or restrict the free expression of public opinion or ideas."[13]

Freedom of Expression

The *Charter* guarantee of freedom of expression protects "freedom of thought, belief, opinion and expression." The SCC ruled that there are three underlying values guiding its

purpose:

1. promotion of the "free flow of ideas essential" to democracy;
2. promotion of the "marketplace of ideas" where truth can be found through the competition of ideas; and
3. the "intrinsic value to the self-realization of both speaker and listener."[14]

If a court finds there has been a restriction on freedom of expression, it must decide if the restriction is justifiable as a reasonable limit in a free and democratic society, a qualifier found in section 1 of the *Charter*.[15] To determine whether a restriction is a reasonable limit the courts conduct a balancing exercise. They consider the underlying objective of the action (which must have a pressing and substantial reason) and the benefits of the action and weigh those against the harmful effects.[16] If the government can prove these, among other considerations, a limitation of a *Charter* right is constitutional.

The purpose of a law preventing politicians from lying clearly limits freedom of expression; therefore, a section 1 analysis would be required. An older, and unconstitutional law similar to what this article is discussing, lacked the pressing and substantial objective required to restrict a *Charter* right. Below, this article will explain that law against 'fake news', and discuss how a pressing and substantial objective might now exist.

Crafting a Law Against Political Lies and Fake News

In 1992 the SCC struck down a law that prohibited the publication of any news, statement, or tale that the publisher knew to be false, "and that causes or is likely to cause injury or mischief to a public interest."[17] The wording of the *Criminal Code* section as drafted was found to be too broad and, its objective was not pressing and substantial because it lacked any apparent purpose.[18]

Our plan to devise a law against lying seems to be off to rough start. However, the SCC did leave us some hope. They did note that "this is not to say that words cannot properly be constrained by the force of the criminal law."[19] The law "could support criminalization of expression only on the basis that the sanction was closely confined to situations of serious concern."[20]

But perhaps the biggest problem to overcome is determining what constitutes a lie. In 1992, the SCC observed that "the question of falsity of a statement is often a matter of debate, particularly where historical facts are at issue."[21]

Determining the validity of facts is one thing, but it gets even more complicated when we begin to engage in epistemology: "the distinction between justified belief and opinion."[22] The belief in the science around climate change is a great example. Is human caused climate change the truth if only 97% of scientists agree, or is a unanimous consensus required?

A Pressing and Substantial Reason

Nevertheless, the SCC has upheld limiting freedom of expression in the past in order to protect a vulnerable group from manipulation. In 1989, the SCC upheld a law that banned advertising directed at children under the age of 13 "for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising."[23]

In a 1990 decision where the vulnerable group was high school students, the SCC noted that "even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth."[24] They also found that they should not "overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas."[25]

The SCC historically seems more willing to uphold laws that limit *Charter* rights when the law is to protect a vulnerable group.

Voter Vulnerability

Have voters become a vulnerable group? With the rise of fake news, the growing difficulty of fact checking, and increased manipulation through the use of personal data and foreign interference, the electorate appears to be growing more and more vulnerable by the day.

In 2004 the SCC decided that limits on third party spending for election advertising are a constitutionally valid limitation on freedom of expression.[26] The SCC found multiple reasons why spending limits are a pressing and substantial concern; notably, promoting "equality in the political discourse" and ensuring "that voters have confidence in the electoral process."[27] By promoting accessibility and fairness in the electoral system, confidence is bolstered; these outweigh the limit on "unlimited political expression."[28]

In balancing the effects of spending limits, the court emphasized a previous finding that "[P]rotecting the fairness of referendum campaigns is a laudable objective that will *necessarily* involve certain restrictions on freedom of expression" (emphasis in original).[29]

The majority of the court drew on the vulnerability of voters. They emphasized that voters "must be presumed to have a certain degree of maturity and intelligence," however, if third party advertising seeks to systematically manipulate voters, they may be seen as more vulnerable.[30]

The SCC upheld limiting freedom of expression for electoral fairness again in 2007, this time in the name of informational equality. The SCC upheld a law banning the publication of election results from the East coast prior to the closing of polls on the West coast.[31] The law prevented "the perception of unfairness created when some voters have general access to information that is denied to others."[32] The SCC recalled from their earlier decision on third party spending that "ensuring that all voters receive the same information where possible" was an important objective.[33]

One could argue that as long as everyone is receiving the same lies, voters are being ensured access to the same information. However, the issue becomes the voters' ability to educate themselves on what is the truth and what is a lie; which as we have seen is an increasingly arduous task. In the past the court has voiced concern for the vulnerable groups of "the young and the less educated - those segments of the population who are least able to inform themselves … and to protect themselves."[34]

But perhaps the biggest hope comes from a recent Federal Court decision that required 'Product of Israel' labels to be removed from wines made in the West Bank.[35] The Court found that Canadians need to have accurate information about the origin of products in order to express their political views through purchasing.[36] Otherwise, their Charter right to freedom of expression would be limited.[37] It seems plausible then that the courts could uphold as constitutional a law that prevents politicians from lying in order to ensure that voters have access to accurate information, because like expressing political views through purchasing, voting is a protected form of freedom of expression.[38]

Conclusion

Creating a law that prevents politicians from lying would be extremely difficult. It would need to be narrow, specific, and could not handcuff politicians unduly in the pursuit of truth and democracy. Not to mention, it could only catch undisputable facts. But we already regulate lies when it comes to things like food labelling, commercial advertising and publicly traded companies, and in Alberta the United Conservative government is creating a war room to counter "lies and misinformation" about the energy industry.[39] Why not a law that prohibits politicians from lying?.

The SCC has limited freedom of expression multiple times in the past in order to uphold objectives in the furtherance of democracy, and in order to protect a vulnerable group from manipulation. With today's ubiquitous dissemination of fake news and politicians' falsehoods, voters may well be a group deserving of such protection.

[1]Robert Fife & Steven Chase "Canadians view ethics in government as paramount issue in fall election, poll shows", *The Globe and Mail* (16 June 2019), online: <theglobeandmail.com>.

[2]Michael Holden "British judges quash prosecution of PM candidate Johnson over Brexit campaign claim", *The Globe and Mail* (7 June 2019), online: <theglobeandmail.com>.

[3]"Brexit: Boris Johnson ordered to appear in court over £350m claim", *BBC* (29 May 2019), online: <bbc.com>.

[4]"Is that politician lying? In a democracy, only you can decide", Editorial, *The Globe and Mail* (29 May 2019), online: <theglobeandmail.com>.

[5]Holden, *supra* note 2.

[6]*Constitution Act*, 1982, s 2(b), being Schedule B to the Canada Act 1982 (UK), 1982, c11.

[7]CM Melenovsky, "Not All Political Lies Are Morally Equal" (2018) 49:2 J Social Philosophy 294 at 296.

[8]"Is that politician lying? In a democracy, only you can decide", *supra* note 4.

[9]Michael Skapinker "Should politicians get lying privileges?" Opinion, *Financial Times* (3 June 2019), online: <ft.com>.

[10] *Ibid*.

[11]Elizabeth Keith "This Legal Loophole Actually Allows Canadian Politicians To Lie In Their Election Campaigns", *Narcity* (14 April 2019), online: <narcity.com>.

[12]Ad Standards, "The *Canadian Code of Advertising Standards*" (July 2019), online: Ad Standards <https://adstandards.ca/code/the-code-online/>.

[13]*Ibid*.

[14]*R v Keegstra*, [1990] 3 SCR 697 at 802 – 804, 117 NR 1 .

[15]*Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 979, 58 DLR (4^{th}) 577 .

[16]*R v Oakes*, [1986] 1 SCR 103 at 138 – 140, 26 DLR (4^{th}) 200; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 887, 120 DLR (4^{th}) 12.

[17]*R v Zundel*, [1992] 2 SCR 731, 95 DLR (4^{th}) 202 ; *Criminal Code*, RSC 1985, c C-46, s 181.

[18]*Zundel*, *supra* note 17 at 764, 776 (see also 744-746 for a history of s 181).

[19]*Ibid* at 774.

[20]*Ibid* at 776.

[21]*Ibid* at 747.

[22]*Oxford English Dictionary*, (Online: Oxford University Press, 2019) sub verbo "epistemology".

[23]*Irwin Toy*, *supra* note 15 at 987.

[24]*Keegstra*, *supra* note 14 at 747-748.

[25]*Ibid* at 763.

[26]*Harper v Canada (Attorney General)*, 2004 SCC 33 .

[27]*Ibid* at para 92.

[28]*Ibid* at para 120-121.

[29]*Ibid* at para 121.

[30]*Ibid* at para 80.

[31]*R v Bryan*, 2007 SCC 12 .

[32]*Ibid* at para14.

[33]*Ibid*.

[34]*RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at 274, 127 DLR (4^{th}) 1.

[35]Sean Fine "Federal Court orders removal of 'Product of Israel' labels from West Bank wines", *The Globe and Mail* (29 July 2019), online: <theglobeandmail.com>.

[36]*Kattenburg v Canada (Attorney General)*, 2019 FC 1003 at para 117 .

[37]*Ibid*.

[38]*Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para 41.

[39]Michelle Bellefontaine "Alberta energy 'war room' to be based in Calgary", *CBC* (4 June 2019), online: <cbc.ca>.