Q&A with Leonid Sirota: The Working Families Case and the Trouble with the SCC's Voting Rights Jurisprudence

In this latest Q&A session, CCS summer student Stephen Raitz interviews Professor Leonid Sirota (University of Reading, School of Law) about the recent Ontario Court of Appeal judgment in *Working Families* — a case about whether Ontario-based spending limits on third party political advertising unjustifiably violate the "informational component" of the right to vote.

Q: Could you briefly summarize what was at issue in the Ontario Court of Appeal's recent *Working Families* decision?

A: *Working Families* concerns the constitutionality of Ontario legislation limiting spending by anyone except political parties and candidates on advertisements for or against parties or candidates or addressing issues "that can reasonably be regarded as closely associated with" a party or candidate to (now) roughly $700,000 in the year before an election campaign is due to begin. The main argument, which the Court accepted by 2-1, was that this legislation was contrary to section 3 of the *Charter*, which protects the right to vote, as (mis)interpreted by the Supreme Court in *Harper v Canada (Attorney General)*. One might think that this would naturally have been a section 2(b) freedom of expression claim, but that was foreclosed because the legislation invokes section 33 of the *Charter*, aka the "notwithstanding clause," which ousts the application of section 2(b) — but not section 3. There was also an argument to the effect that section 33 was not properly invoked, but the court rejects it out of hand, and unanimously.

Q: How did the majority and dissenting opinions differ in the way

they approached section 3 of the *Charter*?

A: First, it's important to note that the ONCA isn't really interpreting section 3 of the *Charter*, but rather the Harper majority's gloss on that provision. One might think that section 3 deals with voting (which isn't an expressive activity in any meaningful way, whatever the Supreme Court of Canada may have thought of that in *Baier*) and section 2(b) with electoral campaigning (which obviously is). These are two different provisions addressing different things. But in *Harper*, the Court confused matters by saying that section 3 also deals with campaigning, albeit through the lens of voters receiving information that will help them decide whom to vote for, rather than by considering the rights of those (parties, candidates, and civil society groups) who would like to persuade the voters. Specifically, Harper reinterprets the section 3 right to vote as a "right to meaningfully participate in the electoral process" (this is consistent with misbegotten SCC precedent) and stipulates that "[t]he right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner" (this is new). To add to the confusion, the discussion in *Harper* is very cursory, indeed impressionistic. As a result, both ONCA opinions in *Working Families* — the majority and the dissent — struggle to make sense of it and to place it within the broader framework of *Charter* case law.

To decide whether "a citizen's right to exercise his or her vote in an informed manner" is impaired by the legislation at issue, the ONCA majority seizes on what it sees as two "proxies" identified by Bastarache J in *Harper* (though he doesn't describe them in this way): first, whether "[s]pending limits [are] carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters," and second, whether such limits "allow third parties to engage in 'modest, national, informational campaigns.'" Much of the majority opinion in *Working Families* is devoted to arguing that the impugned law fails these two tests. It points, in particular, to the fact that there was never a justification given for expanding the limits on political advertising from six months before an election campaign to a whole year (without the expenses ceiling being raised at all), which speaks to a lack of "careful tailoring," and to the trial judge's lack of an explicit finding that a "modest informational campaign" was possible within the confines of the law (though the trial judge made no finding to the contrary either). The dissent both disagrees with the majority's analysis on these specific points and also, perhaps more importantly, rejects reliance on the alleged "proxies" for a section 3 violation identified by the majority. The dissent would instead engage in a more global assessment of whether informed participation is impaired. The dissent also accuses the majority of conflating its section 3 analysis (especially careful tailoring) with what should be happening under section 1, while the majority tries very hard to draw distinctions between these two stages.

To my mind, the dissent's approach is more in line with what Bastarache J did in *Harper*, but the majority's way of dealing with the case is understandable insofar as it tries to inject, if not objectivity, then at least tractability into the analysis. The dissent's conflation criticism

is warranted, but the bigger conflation is in *Harper*, between section 2(b) and section 3. Everything else flows from there. If the "careful tailoring" language means something, then should we blame the majority for using it? In their different ways, the two opinions are trying to make the best of the very difficult situation the *Harper* majority opinion put them in.

Q: The media landscape has evolved immensely since the SCC's *Harper* decision. How do you think these changes — the free spread of misinformation on social media, for example — should impact the way that courts interpret and apply section 3 (if at all)?

A: Part of the premise of the question is misconceived: we know enough about the social media companies' moderation practices now to tell that they often actively, if seldom successfully, suppress what they regard — rightly or wrongly — as misinformation. But be that as it may, I don't think the (real) changes in media landscape are relevant to the interpretation of section 3, which — on the *Harper* approach — includes a very general, and really quite limited, "right to exercise [one's] vote in an informed manner" (or more accurately, given that the *Charter* is only concerned with state action, a right not to be prevented by the government from exercising one's vote in an informed manner). Profound though they may be, changes in the media landscape occur in spite of the government's attempt to stand athwart history and yell stop, so it is difficult to see how they affect this right. If indeed the right not to be prevented by the government from being an informed voter was protected in 2004, then there is no reason why section 3 would not protect the same right in 2023. That said, it would be interesting to see how the courts would deal with an argument to the effect that C-18, which predictably resulted in news becoming less available on key online platforms, impairs this right in much the same way as certain provisions of the Criminal Court impaired sex workers' right to the security of the person in *Bedford*.

Q: You've provided comments on a similar Australian case (*Unions NSW v New South Wales* [2019] HCA 1). What could the

SCC glean from that decision, if anything, when it hears the *Working Families* case on appeal?

A: Nothing much, I would guess. Unions NSW logically enough addressed the implied freedom of political communication under the Australian Constitution. Since in this case Canadian courts cannot consider the freedom of expression issues due to the operation section 33, the SCC will be confined to revisiting the section 3 framework it made up in *Harper* — whether to discard it altogether (as I hope, but doubt, it will), or to expound it beyond the cursory explanation given by Bastarache J. In doing so, the SCC, like the ONCA, will probably be at pains to show that it is not simply replicating a section 2(b) analysis. Hence it will probably not find any freedom of expression cases, whether its own, those decided by other Canadian courts, or those from other jurisdictions, helpful. There are comments about the value of civil society campaigns to informing voters in the plurality opinion in *Unions NSW*, but the SCC already pays lip service to this idea. I do not think it can really go any further under the section 3 framework — otherwise this will become a duplication of section 2(b), which should be avoided both on principle and, more to the point, in light of the judgment in *Toronto (City) v Ontario (Attorney General)*. If the SCC has occasion to revisit these issues in a more natural way, under a section 2(b) claim, then it should follow the Australians' rejection of deference to the evidence-free claims made by the government on behalf of legislation that muzzles civil society for the benefit of political parties. But don't hold your breath for it to happen.