Canada >> Supreme Court of Canada >>

***Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69**
Docket(s):
Source: http://www.canlii.org/ca/cas/scc/1991/1991scc51.html

The Public Service Commission Appellant
v.
William James Millar Respondent
and
The Attorney General of Quebec,
the Attorney General for Saskatchewan
and the Attorney General of Newfoundland Interveners
and between
The Public Service Commission Appellant
v.
Bryan Osborne Respondent
and
The Attorney General of Quebec,
the Attorney General for Saskatchewan
and the Attorney General of Newfoundland Interveners
and between
The Public Service Commission Appellant
v.
Randy Barnhart, Linda Camponi,
Michael Cassidy, Ken Clavette and
Heather Stevens Respondents
and
The Attorney General of Quebec,
the Attorney General for Saskatchewan
and the Attorney General of Newfoundland Interveners

Indexed as: Osborne v. Canada (Treasury Board)
File Nos.: 21201, 21202, 21203.
1990: October 11; 1991: June 6.
Present: Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin and Stevenson JJ.
ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law -- Constitutional convention -- Political neutrality of Public Service employees -- Whether statutory provision implementing constitutional convention can be inconsistent with Constitution? -- Canadian Charter of Rights and Freedoms, s. 2(b) -- Public Service Employment Act, R.S.C., 1985, c. P-33 , s. 33.

Constitutional law -- Charter of Rights -- Freedom of expression -- Public Service -- Political partisanship -- Federal legislation prohibiting public servants from engaging in work for or against a political party or candidate -- Whether legislation infringes s. 2(b) of Charter -- If so, whether legislation justifiable under s. 1 of Charter -- Canadian

Charter of Rights and Freedoms, ss. 1, 2(b) -- Public Service Employment Act, R.S.C., 1985, c. P-33 , s. 33.

Constitutional law -- Charter of Rights -- Reasonable limits -- Vagueness -- Federal legislation prohibiting public servants from engaging in work for or against a political party or candidate -- Whether legislation too vague to constitute a limit prescribed by law -- Canadian Charter of Rights and Freedoms, s. 1 -- Public Service Employment Act, R.S.C., 1985, c. P-33 , s. 33.

Constitutional law -- Charter of Rights -- Remedies -- Relationship between s. 24(1) of Canadian Charter of Rights and Freedoms and s. 52(1) of Constitution Act, 1982.

These appeals concern the constitutionality of s. 33(1) of the Public Service Employment Act, which prohibits public servants from "engag[ing] in work" for or against a candidate (s. 33(1)(a)) or a political party (s. 33(1)(b)). Under s. 33(2), a public servant does not contravene s. 33(1) by reason only of attending a political meeting or contributing money to the funds of a candidate or of a political party. The respondents, with one exception, are federal public servants who wished to participate in various political activities. They took action in the Federal Court, Trial Division seeking a declaration that s. 33 is of no force or effect in so far as it violates ss. 2(b) and 2(d) of the Canadian Charter of Rights and Freedoms. The court concluded that even if s. 33 infringed the rights of individual public servants guaranteed by the Charter, such limits were justified under s. 1 of the Charter. The Federal Court of Appeal set aside the judgment. The Court of Appeal found that ss. 33(1)(a) and 33(1)(b) infringed ss. 2(b) and 2(d) of the Charter but that s. 33(1)(b) was justifiable under s. 1. Section 33(1)(a) of the Act was declared of no force or effect except as it applies to a "deputy head".

Held (Stevenson J. dissenting): The appeals should be dismissed.

(1) Constitutional Convention

Section 33 of the Act is not immune from Charter scrutiny merely because it may be said to uphold a constitutional convention. While conventions form part of the Constitution of this country in the broader political sense, i.e., the democratic principles underlying our political system and the elements which constitute the relationships between the various levels and organs of government, they are not enforceable in a court of law unless they are incorporated into legislation. Furthermore, statutes embodying constitutional conventions do not automatically become entrenched to form part of the constitutional law, but retain their status as ordinary statutes. Being a provision in an ordinary statute, s. 33 is subject to review under the Charter as any ordinary legislation.

(2) Freedom of Expression

Section 33 of the Act, which prohibits partisan political expression and activity by public servants under threat of disciplinary action including dismissal from employment, infringes the right to freedom of expression in s. 2(b) of the Charter. Where opposing values call for a restriction on the freedom of speech, and, apart from exceptional cases, the limits on that freedom are to be dealt with under the balancing test in s. 1, rather than circumscribing the scope of the guarantee at the outset. In this case, by prohibiting public servants from speaking out in favour of a political party or candidate, s. 33 of the Act expressly has for its purpose the restriction of expressive activity and is accordingly inconsistent with s. 2(b) of the Charter. In light of the conclusion that s. 33 is inconsistent with s. 2(b), it is neither necessary nor appropriate in the circumstances to determine whether there is also a violation of s. 2(d) of the Charter.

(3) Reasonable Limit

Section 33 of the Act is sufficiently precise to constitute a limit prescribed by law under s. 1 of the Charter. Section 33 is not couched in such vague or general language that it does not contain an intelligible standard. The words "engage in work", while capable of very wide import, are ordinary simple words that are capable of interpretation. These words may present considerable difficulty in application to a specific situation, but difficulty of interpretation cannot be equated with the absence of any intelligible standard. Finally, the language of s. 33 does not create a standard which leaves it to the members of the Public Service Commission to ban whatever activity they please.

Per Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory and McLachlin JJ.: Section 33 of the Act is not saved by s. 1 of the Charter. While the legislative objective of maintaining the neutrality of the public service is of sufficient importance to justify a limitation on freedom of expression, the impugned legislation fails to meet the proportionality test. The restriction of partisan political activity is rationally connected to the objective but s. 33 does not constitute a measure carefully designed to impair freedom of expression as little as reasonably possible. The section bans all partisan-related work by all public servants, without distinction either as to the type of work, or as to their relative role, level or importance in the public service hierarchy. The result of the broad general language of s. 33 is that the restrictions apply to a great number of public servants who in modern government are completely divorced from the exercise of any discretion that could be in any manner affected by political considerations. The need for impartiality and indeed for the appearance thereof does not remain constant throughout the civil service hierarchy. Section 33, therefore, is over-inclusive and, in many of its applications, goes beyond what is necessary to achieve the objective of an impartial and loyal civil service.

Per Stevenson J. (dissenting): Section 33(1)(a) of the Public Service Employment Act is justifiable under s. 1 of the Charter. The important objective of s. 33(1)(a) is to secure civil service neutrality in all of its elements. An effective civil service is essential to modern day democratic society and a measure of neutrality is necessary in order to preserve that effectiveness. No civil servant must owe, or be seen to owe, appointment or promotion to partisan activities since visible partisanship by civil servants would severely impair, if not destroy, the public perception of neutrality. In that context, s. 33(1)(a) of the Act is an acceptably proportional response to Parliament's objective. The section does not suffer from overbreadth and meets the "minimal impairment" test. The proposed less restrictive means, which distinguish between various levels of public servants (and thus abandon any restraint on the so-called lower level civil service), would not satisfy the objective of preserving the civil service's political neutrality. Finally, there is an appropriate proportionality between the effects of the measure and the objective. The provision does not deny freedom of expression. It imposes a limitation on that freedom in the context of partisan political activities upon persons who must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints.

(4) Remedy

Per Sopinka, Cory and McLachlin JJ.: In selecting an appropriate remedy under s. 24(1) of the Charter a court's primary concern must be to apply the measures that will best vindicate the values expressed in the Charter and to provide the form of remedy to those whose rights have been violated that best achieves that objective. The court, while it is given an express mandate to declare a law to be of no force or effect to the extent of

its inconsistency with the Charter under s. 52(1) of the Constitution Act, 1982, must be sensitive to its proper role in the constitutional framework and refrain from intruding into the legislative sphere beyond what is necessary to give full effect to the Charter's provisions. In exercising its broad discretion to fashion an appropriate remedy in a Charter case, the court need not resolve the question as to whether there is a presumption of constitutionality. By reason of the diverse and novel problems which it will be called upon to redress, the court must maintain at its disposition a variety of remedies as part of its arsenal. "Reading down" legislation may, in some cases, be an appropriate remedy. The same result may on occasion be obtained by resort to the constitutional exemption. However, it is not necessary in this case to determine whether the Court has the power to apply such remedies in a Charter case since it is preferable to strike out s. 33(1) to the extent of its inconsistency with s. 2(b). To maintain a section that is riddled with infirmity would not uphold the values of the Charter and would constitute a greater intrusion on Parliament's role. Parliament should determine how the section should be redrafted, not the Court. The Federal Court of Appeal's order, which declared s. 33(1)(a) of no force or effect except as it applies to a "deputy head", must stand since the respondents did not cross-appeal or seek a variation of the order.

Per Wilson and L'Heureux-Dubé JJ.: Once the Court has found that the impugned legislation on its proper interpretation is over-inclusive, infringes on a Charter right, and cannot be justified as a reasonable limit under s. 1, the Court has no alternative under s. 52(1) of the Constitution Act, 1982 but to strike the legislation down or, if the unconstitutional aspects are severable, to strike it down to the extent of its inconsistency with the Constitution. It is not open to the Court in these circumstances to create exemptions to the legislation (which presupposes its constitutional validity) and grant individual remedies under s. 24(1) of the Charter.

Per La Forest J.: The interplay between s. 24(1) of the Charter and s. 52(1) of the Constitution Act, 1982 does not really arise in this case. Wilson J. may well be right on this issue, but it should be left for consideration in a more appropriate case where its implications could be more fully assessed.

Cases Cited

By Sopinka J.

Applied: Irwin Toy Ltd. v. Quebec (Attorney General), >[1989] 1 S.C.R. 927; R. v. Oakes, >[1986] 1 S.C.R. 103; **considered**: Reference re Resolution to amend the Constitution, [1981] 1 S.C.R. 753; OPSEU v. Ontario (Attorney General), >[1987] 2 S.C.R. 2; Fraser v. Public Service Staff Relations Board, >[1985] 2 S.C.R. 455; **referred to**: Luscher v. Deputy Minister, Revenue Canada, Customs and Excise, [1985] 1 F.C. 85; Reference re Bill 30, An Act to amend the Education Act (Ont.), >[1987] 1 S.C.R. 1148; R. v. Big M Drug Mart Ltd., >[1985] 1 S.C.R. 295; R. v. Hebert, >[1990] 2 S.C.R. 151; Reference re Public Service Employee Relations Act (Alta.), >[1987] 1 S.C.R. 313; R. v. Keegstra, >[1990] 3 S.C.R. 697; R. v. Jones, >[1986] 2 S.C.R. 284; United States of America v. Cotroni, >[1989] 1 S.C.R. 1469; R. v. Beare, [1988] 2 S.C.R. 387; Canada (Human Rights Commission) v. Taylor, >[1990] 3 S.C.R. 892; R. v. Rowley (1986), 31 C.C.C. (3d) 183; City of Montréal v. Arcade Amusements Inc., [1985] 1 S.C.R. 368; Slaight Communications Inc. v. Davidson, >[1989] 1 S.C.R. 1038; McKay v. The Queen, [1965] S.C.R. 798; Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110; *R. v. Seaboyer* (1987), 35 C.R.R. 300.

By Wilson J.

Referred to: R. v. Big M Drug Mart Ltd., >[1985] 1 S.C.R. 295; Singh v. Minister of Employment and Immigration, >[1985] 1 S.C.R. 177.

By Stevenson J. (dissenting)

Fraser v. Public Service Staff Relations Board, >[1985] 2 S.C.R. 455; OPSEU v. Ontario (Attorney General), >[1987] 2 S.C.R. 2; United States of America v. Cotroni, >[1989] 1 S.C.R. 1469; Canada (Human Rights Commission) v. Taylor, >[1990] 3 S.C.R. 892; Committee for the Commonwealth of Canada v. Canada, >[1991] 1 S.C.R. 139; United States Civil Service Commission v. National Association of Letter Carriers, AFL--CIO, 413 U.S. 548 (1973); R. v. Edwards Books and Art Ltd., >[1986] 2 S.C.R. 713; Irwin Toy Ltd. v. Quebec (Attorney General), >[1989] 1 S.C.R. 927; Stoffman v. Vancouver General Hospital, >[1990] 3 S.C.R. 483.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), (d), 24(1).

Constitution Act, 1982, s. 52(1).

Public Service Employment Act, R.S.C. 1970, c. P-32 , s. 32.

Public Service Employment Act, R.S.C., 1985, c. P-33 , s. 33.

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Shorter Oxford English Dictionary, 3rd ed. Oxford: Clarendon Press, 1987, "work".

Vaughn, Robert G. "Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond" (1976), 44 Geo. Wash. L. Rev. 516.

APPEALS from judgments of the Federal Court of Appeal, [1988] 3 F.C. 219, 52 D.L.R. (4th) 241, 87 N.R. 376, 43 C.R.R. 351, 22 C.C.E.L. 98, setting aside judgments of the Trial Division, [1986] 3 F.C. 206, 30 D.L.R. (4th) 662, 5 F.T.R. 29, 25 C.R.R. 229, 14 C.C.E.L. 230. Appeals dismissed, Stevenson J. dissenting.

Duff Friesen, Q.C., for the appellant.

John P. Nelligan, Q.C. and Dougald E. Brown, for the respondents Millar and Osborne.

Jeffry A. House, for the respondents Barnhart et al.

Jean Bouchard and Isabelle Harnois, for the intervener the Attorney General of Quebec.

Robert G. Richards, for the intervener the Attorney General for Saskatchewan.

Gale Welsh, for the intervener the Attorney General of Newfoundland.

//Wilson J.//

The reasons of Wilson and L'Heureux-Dubé JJ. were delivered by

WILSON J. -- Subject to the comments which follow I agree with the reasons for judgment of my colleague Justice Sopinka and would dispose of these appeals as he proposes. I do not share his views, however, as to the recourse open to the Court once it has found that the impugned legislation on its proper interpretation is over-inclusive, infringes on a Charter right, and cannot be justified as a reasonable limit under s. 1. Once these findings have been made I believe that the Court has no alternative but to strike the legislation down or, if the unconstitutional aspects are severable, to strike it down to the extent of its inconsistency with the Constitution. I do not believe that it is open to the Court in these circumstances to create exemptions to the legislation (which, in my view,

presupposes its constitutional validity) and grant individual remedies under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. In other words, it is not, in my opinion, open to the Court to cure over-inclusiveness on a case by case basis leaving the legislation in its pristine over-inclusive form outstanding on the books.

Section 52(1) of the Constitution Act, 1982, in my view, contemplates the exercise by the Court of its interpretive function as a first step. Once it has interpreted the impugned legislation it must decide on the basis of that interpretation whether the section is consistent or inconsistent with the citizen's Charter right. If it is consistent, there is no problem: the legislation is constitutional and the citizen must abide by it. If it is inconsistent, then the Court must declare it of no force or effect to the extent of the inconsistency. Section 52(1), in my view, mandates this result.

The purpose of s. 24(1), in my view, is to provide an appropriate and just remedy to an individual whose guaranteed rights or freedoms have been infringed or denied. As was stated by this Court in R. v. Big M Drug Mart Ltd., >[1985] 1 S.C.R. 295, at p. 313:

Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the Charter have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.

Similarly in Singh v. Minister of Employment and Immigration, >[1985] 1 S.C.R. 177, it was stated at p. 221:

I turn now to the issue of the remedy to which the appellants are entitled. Sections 24(1) of the Charter and 52(1) of the Constitution Act, 1982 both apply. Section 52(1) requires a declaration that s. 71(1) of the Immigration Act, 1976 is of no force and effect to the extent it is inconsistent with s. 7. The appellants who have suffered as a result of the application of an unconstitutional law to them are entitled under s. 24(1) to apply to a court of competent jurisdiction for "such remedy as the court considers appropriate and just in the circumstances".

I believe also that a distinction has to be made between creating exemptions from the legislation under s. 24(1) which presupposes its constitutionality and "reading down" the legislation which is a process of interpretation so as to restrict the scope of its application. In the latter case the legislation is held as a matter of interpretation not to apply to X and no intervention by the Court under s. 24(1) is required. In the former case the legislation is found on its proper interpretation to apply to X but the Court intervenes to give him or her relief under s. 24(1).

With these reservations I would dismiss the appeals as my colleague suggests.

//La Forest J.//

The following are the reasons delivered by

LA FOREST J. -- I am in general agreement with the reasons of my colleague, Justice Sopinka, except as they relate to his discussion of s. 24(1) of the Canadian Charter of Rights and Freedoms and its interplay with s. 52(1) of the Constitution Act, 1982. I suspect my colleague, Justice Wilson, may well be right on this issue, but since the point does not really arise in this case, I prefer to leave it for consideration when it does arise and its implications can be more fully assessed.

//Sopinka J.//

The judgment of Sopinka, Cory and McLachlin JJ. was delivered by

SOPINKA J. -- These appeals concern the constitutionality of s. 33 of the Public Service Employment Act, R.S.C., 1985, c. P-33 (the "Act"), which prohibits public servants from engaging in work for or against a political party or candidate. The Public Service Commission (the "Commission") appeals from judgments of the Federal Court of Appeal allowing appeals from the judgments of the Federal Court, Trial Division, dismissing the actions of the respondents for declarations that s. 33 of the Act is void by reason of its conflict with ss. 2(b) and 2(d) of the Canadian Charter of Rights and Freedoms.

Facts

P.S.C. v. Barnhart, Camponi, Cassidy, Clavette and Stevens

The respondents Barnhart, Camponi, Clavette and Stevens are all public servants within the meaning of the Act. They wished to work after working hours on behalf of the fifth respondent, Cassidy, who was, at the time the action was brought, a candidate for election to Parliament and, at the time of trial, a Member of Parliament.

Barnhart and Camponi are both employed by the Department of Indian Affairs and Northern Development. Barnhart claims that he does not meet the public in his job which involves monitoring the environment in the Indian reserves. Camponi, whose job entails research in the archives of the Department, maintains that she is particularly concerned with the place of women in Canadian society and would like to communicate her opinion as to which political party has the best policy on women's issues to her friends and neighbours. Clavette, who is employed as a clerk in the Department of National Defence, is also the President of the Ottawa Labour Council and would like to work for candidates who support positions which enhance the rights of working people. Stevens, employed in the Public Archives of Canada, wishes to participate in activities such as envelope stuffing and addressing of correspondence from her own home or from the campaign offices of the party she supports.

The respondents commenced proceedings in the Federal Court of Appeal, Trial Division, seeking a declaration that s. 33 of the Act is of no force and effect in so far as it violates ss. 2(b) and 2(d) of the Charter and an injunction enjoining the Commission from enforcing it.

P.S.C. v. Osborne; P.S.C. v. Millar

The respondents Osborne and Millar are public servants who were elected to be delegates to the 1984 leadership convention of the Liberal Party. They were both forced to resign as delegates after being advised by their employers, the Superintendent of Insurance and the Regional Director General of Indian and Inuit Affairs, respectively, that they would suffer disciplinary action if they failed to do so.

In the case of Osborne, who is employed in the Actuarial Branch of the Department of Insurance, he was advised by his supervisor shortly after his election as a delegate that he would incur a disciplinary penalty if he did not resign his position. When a federal by-election was called in his riding, Osborne sought and obtained a leave of absence without pay pursuant to s. 33(3) of the Act to become a candidate for the party nomination. He admitted that his motive in so doing was to enable him to participate in the leadership convention. Following the convention, Osborne requested that his leave be terminated on the basis that there was insufficient support for his nomination, and this was granted.

The respondent Millar is a commerce officer in the Indian and Inuit Affairs Branch of the Department of Indian and Northern Affairs. Following his election as a delegate to the leadership convention, he was given written permission to attend. However, this

permission was subsequently revoked by the Regional Director General of Indian and Inuit Affairs who gave Millar twenty-four hours notice to resign.

The respondents Millar and Osborne initiated actions in the Federal Court, Trial Division, seeking declarations that their respective employers had no authority or basis in law to order them not to attend the convention as delegates and that s. 33 of the Act is of no force and effect in so far as it violates ss. 2(b) and 2(d) of the Charter.

Judgments of Courts Below

The three actions and the ensuing appeals were heard together.

Federal Court, Trial Division, [1986] 3 F.C. 206

Walsh J. accepted that there is in Canada, as in other democratic countries, a "convention of political neutrality" in the public service which necessitates the placing of some restraints on partisan political activity. However, these restraints should be as few as possible and no more than are necessary to attain the objective of political neutrality. He was of the view that this is what s. 33 of the Act attempts to do although the general language requires some judicial interpretation when applied to specific instances of political activity.

Walsh J. rejected the argument, based on Luscher v. Deputy Minister, Revenue Canada, Customs and Excise, [1985] 1 F.C. 85 (C.A.), that the words "engage in work" are sufficiently vague as to justify a finding that the impugned section is of no force and effect as being contrary to the Charter. He reasoned that such a finding would have the consequence of removing all restrictions on political activity on public servants "when it has been accepted that some limitation is desirable and necessary" (p. 236).

Walsh J. was of the opinion that in the absence of amending legislation or defining regulations, judicial interpretation of the provision was required. However, he declined to generalize as to which activities are permissible under the provision, choosing to leave this to be decided on a case-by-case basis. The trial judge applied the provision to the facts of the cases noting that the degree of restraint which must be exercised is relative to the position and visibility of the public servant.

With respect to the respondents Millar and Osborne, Walsh J. found that their election as delegates to the leadership convention did not infringe s. 33 of the Act. With respect to the respondent Cassidy, who had argued that the provision infringed his freedom of association under the Charter, Walsh J. observed that he was indeed restricted in his desire to employ public servants to work in connection with his election campaign, but chose to consider this question from the perspective of whether the other respondents' rights of association with him were infringed.

Walsh J. then set out the permissible activities of the other respondents. In the case of the respondent Barnhart, Walsh J. found that, as s. 33 specifically permitted the attending of political meetings and contribution of money for candidates, it implicitly allows participation in discussion relating to the development of policies. However, this permission does not extend to any statements of a partisan political nature. He concluded that Barnhart should not act as a scrutineer at a polling station. With respect to the respondent Camponi, Walsh J. noted that in publicly stating her opinion as to which political party has the best policy on women's issues, she would undoubtedly be engaging in work on behalf of a political party. While her freedom to express her personal views is unrestricted, she should not identify herself as supporting them on behalf of any given political party. Similarly, Walsh J. noted that the respondent Clavette is free to express his views on issues of interest to him but would violate s. 33 of the Act if he were to

publicly support a political party which he feels expresses his views and to work for it in election campaigns in such a manner as to identify himself publicly as a member of that party. In the case of the respondent Stevens, he was of the view that it would be giving too wide an interpretation to s. 33 to find that the stuffing of envelopes and the addressing of correspondence would be prohibited as she would not be directing public attention to herself as working on behalf of a given political party.

Walsh J. did not discuss whether s. 33 of the Act constituted a violation of ss. 2(b) and 2(d) of the Charter, but went directly to the discussion under s. 1 of the Charter. He concluded that even if s. 33 of the Act infringed the rights of individual public servants guaranteed by the Charter, such limits (on the basis of the section as "judicially interpreted") are reasonably prescribed and can be justified under s. 1.

Federal Court of Appeal, [1988] 3 F.C. 219

The Federal Court of Appeal overturned the judgment of Walsh J. on the basis that the impugned provision is vague and wide open to discretionary application and, as such, fails to meet the test of "reasonable limit" as set out in *Luscher, supra*. Mahoney J.A. considered the evidence showing that the Commission itself had difficulty in interpreting the expression "engage in work" to be determinative in this regard. Accordingly, he was of the view that the trial judge erred in limiting the remedy to a declaration as to which of the activities engaged in by the respondents was permissible under the Act.

In reaching this conclusion, Mahoney J.A. accepted the existence of a constitutional convention of political neutrality, but rejected the submission that the public right arising out of the convention pre-empts the respondents' rights under the Charter or that the provision in question is thereby exempt from review under the Charter. He noted, however, that the existence of a constitutional convention supporting a limitation may "go a long way toward demonstrating its justification" under s. 1 of the Charter.

Furthermore, while the activities affected by s. 33 of the Act may be addressed as a violation of the guarantee of freedom of expression, Mahoney J.A. was of the view that such rights are protected independently by the guarantee of freedom of association. He found that s. 33 of the Act infringed the right to freedom of association on the basis that the right to associate with others is fundamental to a process whose essence is that conflicting interests be advanced and opposed by electoral means.

Finally, Mahoney J.A. stated in obiter that the limitation on candidacy was expressed in adequately definitive terms. Following the analysis advocated in R. v. Oakes, >[1986] 1 S.C.R. 103, he reached the conclusion that the scheme of s. 33(1)(b) constitutes a "rational, reasonable and fair basis upon which a federal public servant may seek a Parliamentary or legislative seat" (p. 233).

Relevant Legislation

Public Service Employment Act, R.S.C., 1985, c. P-33

33. (1) No deputy head and, except as authorized under this section, no employee, shall

(a) engage in work for or against a candidate;

(b) engage in work for or against a political party; or

(c) be a candidate.

(2) A person does not contravene subsection (1) by reason only of attending a political meeting or contributing money for the funds of a candidate or of a political party.

(3) Notwithstanding any other Act, on application made to the Commission by an employee, the Commission may, if it is of the opinion that the usefulness to the Public

Service of the employee in the position the employee then occupies would not be impaired by reason of that employee having been a candidate, grant to the employee leave of absence without pay to seek nomination as a candidate and to be a candidate for election, for a period ending on the day on which the results of the election are officially declared or on such earlier day as may be requested by the employee if the employee has ceased to be a candidate.

The above provision is a revised version of the section which was in force at the time of the trial and appeal. The former provision read as follows:

32. (1) No deputy head and, except as authorized under this section, no employee, shall

(a) engage in work for, on behalf of or against a candidate for election as a member of the House of Commons, a member of the legislature of a province or a member of the Council of the Yukon Territory or the Northwest Territories, or engage in work for, on behalf of or against a political party; or

(b) be a candidate for election as a member described in paragraph (a).

(2) A person does not contravene subsection (1) by reason only of his attending a political meeting or contributing money for the funds of a candidate for election as a member described in paragraph (1)(a) or money for the funds of a political party.

(3) Notwithstanding any other Act, upon application made to the Commission by an employee the Commission may, if it is of the opinion that the usefulness to the Public Service of the employee in the position he then occupies would not be impaired by reason of his having been a candidate for election as a member described in paragraph (1)(a), grant to the employee leave of absence without pay to seek nomination as a candidate and to be a candidate for election as such a member, for a period ending on the day on which the results of the election are officially declared or on such earlier day as may be requested by the employee if he has ceased to be a candidate.

The minor changes to the section as a result of the recent revision do not have an effect on this appeal and all references will be to the new provision.

Canadian Charter of Rights and Freedoms

1. 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.

2. Everyone has the following fundamental freedoms:

(a)freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Issues

The issues raised by these appeals are the following:

1 Can a statutory provision, such as s. 33 of the Act, that implements a constitutional convention be considered to be inconsistent with the Constitution?

2 If the response to the first question is in the affirmative, are the provisions of s. 33 of the Act inconsistent with ss. 2(b) or 2(d) of the Charter?

3 If the response to the second question is in the affirmative, does s. 33 of the Act establish such reasonable limits as can be demonstrably justified in a free and democratic society?

1 The Effect of the Constitutional Convention of Political Neutrality

The existence of a convention of political neutrality, central to the principle of responsible government, and the upholding of that convention in s. 33 of the Act, is not seriously disputed. Rather, the debate centres around the effect of the convention in assessing the validity of the impugned provision. The appellant contends that because s. 33 of the Act gives expression to the constitutional values embodied in the convention of public service neutrality, it forms "a part" of the Constitution and cannot therefore be "inconsistent" with the Constitution. Relying then on the words of Wilson J. in Reference re Bill 30, An Act to amend the Education Act (Ont.), >[1987] 1 S.C.R. 1148, that "[i]t was never intended . . . that the Charter could be used to invalidate other provisions of the Constitution" (p. 1197), the appellant argues that there cannot be a breach of the Charter where there is a competing constitutional provision. The appellant's argument, which I may state at the outset to be untenable, is based on the decision of this Court in Reference re Resolution to amend the Constitution, [1981] 1 S.C.R. 753 (the "Patriation Reference"), and on the decision of Beetz J. in OPSEU v. Ontario (Attorney General), >[1987] 2 S.C.R. 2.

In the Patriation Reference, this Court explored the nature of constitutional conventions and recognized that in contradistinction to the variety of statutes and common law rules which make up the "law of the constitution", conventions are not enforceable by the courts unless they are crystallized into laws by way of statutory adoption. Underlying this distinction between constitutional law and constitutional conventions is the contrast between legal and political constitutionalism. The Court stated (at pp. 883-84):

It should be borne in mind however that, while they are not laws, some conventions may be more important than some laws. Their importance depends on that of the value or principle which they are meant to safeguard. Also they form an integral part of the constitution and of the constitutional system. They come within the meaning of the word "Constitution" in the preamble of the British North America Act, 1867 . . . .

That is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence. But the words "constitutional" and "unconstitutional" may also be used in a strict legal sense, for instance with respect to a statute which is found ultra vires or unconstitutional. The foregoing may perhaps be summarized in an equation: constitutional conventions plus constitutional law equal the total constitution of the country.

Therefore, while conventions form part of the Constitution of this country in the broader political sense, i.e., the democratic principles underlying our political system and the elements which constitute the relationships between the various levels and organs of government, they are not enforceable in a court of law unless they are incorporated into legislation. Furthermore, statutes embodying constitutional conventions do not automatically become entrenched to become part of the constitutional law, but retain their status as ordinary statutes. If that were not the case, any legislation which may be said to embrace a constitutional convention would have the effect of an amendment to the Constitution which would have escaped the rigorous requirements of the constitutional amendment process.

In support of its argument, the appellant also draws attention to the decision of Beetz J. in *OPSEU, supra.* That case, which was argued and decided on the basis of the division of powers, dealt with the validity of provisions in the Ontario Public Service Act, R.S.O.

1970, c. 386, similar to those in the present case. Beetz J. found the provisions to be constitutional in nature, but I believe he made it clear (at p. 41) that the term "constitutional" in that context was not to be equated with constitutional law:

It is clear to me that those provisions are constitutional in nature in the sense that they bear on the operation of an organ of government in Ontario and that they impose duties on the members of a branch of government in order to implement a principle of government. [Emphasis added.]

Beetz J. thus recognized that the constitution of Ontario is composed of ordinary statutes which are susceptible to being amended or repealed by ordinary statutes (at p. 46):

In my opinion, the impugned provisions constitute an ordinary legislative amendment of the constitution of Ontario, within the meaning of s. 92(1) of the Constitution Act, 1867.

In my view, there is nothing in his analysis which reveals an intention to confer on such ordinary statutes the status of constitutional entrenchment in the legal sense. Based on the foregoing, I am unable to agree with the appellant that s. 33 of the Act is immune from Charter scrutiny merely because it may be said to uphold a constitutional convention. Being a provision in an ordinary statute, it is subject to review under the Charter as any ordinary legislation. While the existence of a constitutional convention does not pre-empt scrutiny of the provision under the Charter, it is an important consideration in determining whether, in enacting s. 33, Parliament was seeking to achieve an important political objective.

2 Is s. 33 of the Act Inconsistent with ss. 2(b) or 2(d) of the Charter?

In my view, there is little doubt that s. 33 of the Act, which prohibits partisan political expression and activity by public servants under threat of disciplinary action including dismissal from employment, violates the right to freedom of expression in s. 2(b) of the Charter.

The appellant submits that the freedom of expression under s. 2(b) of the Charter is "not absolute, or so extensive that it goes beyond its traditional meaning to apply to situations involving interests it was not intended to protect." The appellant maintains that this freedom has not been considered to extend to include a full range of partisan political expression and activity by public servants. In support of its argument, the appellant places particular emphasis on the decisions of this Court in *OPSEU, supra*, and in Fraser v. Public Service Staff Relations Board, >[1985] 2 S.C.R. 455.

In my view, the appellant's arguments must fail. First, even assuming that freedom of expression traditionally did not extend to partisan political expression and activity by public servants, this is in no way determinative in defining the scope of the rights under the Charter. The appellant seeks to restrict the extent of the rights under s. 2(b) by relying on the words of Dickson J. in R. v. Big M Drug Mart Ltd., >[1985] 1 S.C.R. 295, at p. 344, that such rights are to be understood in light of the interests they were meant to protect. In my view, it is clear that the purposive approach propounded by Dickson J. cannot be interpreted, as the appellant suggests, to mean that the Charter did no more than to freeze the rights which existed at the moment of its coming into force. The respondents Millar and Osborne correctly point out that this analysis of rights is narrowly historical and tautological and would justify the denial of Charter protection to other groups to whom rights have historically been denied. Furthermore, this approach to the Charter has been explicitly rejected by this Court. (For example, see McLachlin J., in R. v. Hebert, >[1990] 2 S.C.R. 151, at p. 163, and in Reference re Public Service Employee

Relations Act (Alta.), >[1987] 1 S.C.R. 313, at p. 359.) Therefore, while the historical origins of the concept are to be taken into account in ascertaining the scope of a Charter right, the "traditional" meaning ascribed to such rights is not conclusive for the purposes of the Charter.

Second, I do not agree that the two previous decisions of this Court in *OPSEU, supra*, and in Fraser, supra, dealing with the right to freedom of expression enjoyed by public servants are conclusive for the purposes of this case. The appellant invites the Court to limit the reach of the guarantee provided for in s. 2(b) of the Charter and relies on the following passage of Beetz J. in OPSEU, supra, at p. 51:

. . . the political activities contemplated by the impugned provisions are not made unlawful. These provisions are in the nature of detailed regulations. Failure to comply with them is a ground for dismissal. No other sanction is prescribed. The public servant who is not prepared to accept them can resign. Nor do I think that such a public servant is thereby deprived of any "right" unless it be thought that he has a right to his office. But at common law, and apart from statute, a civil servant holds office during pleasure.

It is clear that OPSEU is not binding in so far as it was decided on the basis of the division of powers without consideration of the Charter. As Beetz J. himself cautioned (at p. 57):

I should perhaps add that issues like the last will in the future ordinarily arise for consideration in relation to the political rights guaranteed under the Canadian Charter of Rights and Freedoms, which, of course, gives broader protection to these rights and freedoms than is called for by the structural demands of the Constitution.

In my view, OPSEU is of limited application in this case, given that the right to freedom of expression is now constitutionally entrenched, without exception for public servants.

In Fraser, supra, the Court dealt with the extent of permissible criticism of government by public servants. Central to that question was the proper legal balance between the right of an individual to speak freely on important public issues and the duty of an individual, qua federal public servant, to fulfil properly his or her functions as an employee of the Government of Canada. In that case, this Court upheld the suspension and eventual dismissal of Neil Fraser, an employee of Revenue Canada who had openly and repeatedly made vicious attacks on the Government with respect to its metrification policies and the adoption of the Charter. In reaching this conclusion, Dickson C.J. confirmed that freedom of expression was not an absolute value and brought to the fore the competing values at stake (at pp. 467-68):

The act of balancing must start with the proposition that <u>some</u> speech by public servants concerning public issues is permitted. Public servants cannot be, to use Mr. Fraser's apt phrase, "silent members of society". I say this for three reasons.

First, our democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion.

Secondly, account must be taken of the growth in recent decades of the public sector -- federal, provincial, municipal -- as an employer. A blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democratic rights to far too many people.

Thirdly, common sense comes into play here. An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit . . . .

On the other side, however, it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one. Thus, for example, we have laws dealing with libel and slander, sedition and blasphemy. We also have laws imposing restrictions on the press in the interests of, for example, ensuring a fair trial or protecting the privacy of minors or victims of sexual assaults. [Emphasis in original.]

Fraser is clearly significant in identifying freedom of speech as a deep-rooted value of our democratic system, but it did not consider the scope of that right either under the Canadian Bill of Rights, R.S.C., 1985, App. III, or under the Charter. In my view, Dickson C.J.'s discussion of the competing values supports the view that enjoyment of the right to freedom of expression is subject to reasonable limits under s. 1 which I will consider later in these reasons.

Therefore, where opposing values call for a restriction on the freedom of speech, and apart from exceptional cases, the limits on that freedom are to be dealt with under the balancing test in s. 1, rather than circumscribing the scope of the guarantee at the outset. In this respect, the decision of the Court in R. v. Keegstra, >[1990] 3 S.C.R. 697, is illuminating. In Keegstra, Dickson C.J. referred to the test articulated in Irwin Toy Ltd. v. Quebec (Attorney General), >[1989] 1 S.C.R. 927, and said (at p. 729) with respect to a finding of breach of s. 2(b):

Apart from rare cases where expression is communicated in a physically violent form, the Court thus viewed the fundamental nature of the freedom of expression as ensuring that "if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee" (p. 969). In other words, the term "expression" as used in s. 2(b) of the Charter embraces all content of expression irrespective of the particular meaning or message sought to be conveyed (Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), *supra*, at p. 1181, per Lamer J.).

The second step in the analysis outlined in Irwin Toy is to determine whether the purpose of the impugned government action is to restrict freedom of expression. The guarantee of freedom of expression will necessarily be infringed by government action having such a purpose.

Applying the criteria expounded above, I cannot see how it may be said that the oppugned section in the present case does not constitute a violation of the right to freedom of expression. By prohibiting public servants from speaking out in favour of a political party or candidate, it expressly has for its purpose the restriction of expressive activity. As McLachlin J. points out in *Keegstra*, the inherent limitations of the right to freedom of expression are restricted to exceptional cases involving violence (at p. 827):

At the same time, the Court has affirmed that freedom of speech is not absolute. It may properly be limited. There are several ways in which it can be limited. First, there are forms of expression which can be distinguished from content and which may be excluded from the scope of s. 2(b) of the Charter. In Dolphin Delivery it was suggested, in obiter dicta, that violence and threats of violence would be excluded from the protection offered by s. 2(b). And in Irwin Toy, at p. 970, this Court stated that "a

murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen".

Clearly, the appellant's suggestion that the scope of the right should be limited because of the particular status of the holder of the right, i.e., a public servant, does not find support. I am accordingly of the view that s. 33 is inconsistent with s. 2(b) of the Charter.

Having reached the conclusion that s. 33 of the Act is inconsistent with freedom of expression under s. 2(b) of the Charter, I do not consider it necessary or appropriate to determine whether there is also a violation of freedom of association under s. 2(d) of the Charter. The parties have devoted their arguments almost entirely to the discussion of freedom of speech, and while it would appear that there is an infringement of s. 2(d) independently of the violation of s. 2(b), the nature of the analysis to be undertaken, as well as the considerations to be taken into account, are not necessarily the same, and I would prefer to consider this question separately on another occasion having the benefit of the full submissions of the parties.

3 Section 1 Analysis

The general criteria for the application of s. 1 are: a limit, prescribed by law, that is reasonable and can be demonstrably justified in a free and democratic society.

(a) Limit Prescribed by Law

The respondents contend that s. 33 of the Act is so vague that it contains no intelligible standard to enable the appellant to resort to the justificatory provisions of s. 1. This argument succeeded in the Court of Appeal. To support their position, the respondents refer the Court to the annual report of the appellant in which it was acknowledged that it had "considerable difficulty" in administering s. 33 of the Act. The respondents submit, further, that a limitation that is so unclear in its application as to require extensive guidelines in the form of non-authoritative views such as are contained in "Dialogue Express", the bulletin of the appellant setting out guidelines of permissible conduct, is ipso facto not a limit prescribed by law.

Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a Charter right within reasonable limits. In this sense vagueness is an aspect of overbreadth.

This Court has shown a reluctance to disentitle a law to s. 1 scrutiny on the basis of vagueness which results in the granting of wide discretionary powers. Much of the activity of government is carried on under the aegis of laws which of necessity leave a broad discretion to government officials. See R. v. Jones, >[1986] 2 S.C.R. 284, United States of America v. Cotroni, >[1989] 1 S.C.R. 1469, and R. v. Beare, [1988] 2 S.C.R. 387. Since it may very well be reasonable in the circumstances to confer a wide discretion, it is preferable in the vast majority of cases to deal with vagueness in the context of a s. 1 analysis rather than disqualifying the law in limine. In this regard, I

adopt the language of McLachlin J. in Canada (Human Rights Commission) v. Taylor, >[1990] 3 S.C.R. 892, at p. 956:

That is not to say that the alleged vagueness of the standard set by the provision is irrelevant to the s. 1 analysis. For reasons discussed below, I am of the opinion that the difficulty in ascribing a constant and universal meaning to the terms used is a factor to be taken into account in assessing whether the law is "demonstrably justified in a free and democratic society". But I would be reluctant to circumvent the entire balancing analysis of the s. 1 test by finding that the words used were so vague as not to constitute a "limit prescribed by law", unless the provision could truly be described as failing to offer an intelligible standard. That is not the case here.

Irwin Toy Ltd. v. Quebec (Attorney General), supra, is an apt illustration of this approach which is particularly apposite to this case. At issue in this case were ss. 248 and 249 of the Consumer Protection Act which prohibited commercial advertising directed at persons under the age of 13. It was argued that the sections could not be saved pursuant to s. 1 because the provisions were "confusing and contradictory", because they provided insufficient guidance to the courts in determining whether advertising was directed towards children, and because the legislation provided too much scope for discretion to promulgate regulations. The majority opinion written conjointly by Dickson C.J., Lamer and Wilson JJ. rejected out of hand the "regulations" argument. In dealing with the "insufficient guidance" argument, the Court remarked (at p. 983):

Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

Ultimately, it was held that the impugned provisions of the Consumer Protection Act were satisfactory since they could be given a "sensible interpretation" and did not confer a discretion on the courts to ban whichever advertisements they pleased. The fact that guidelines were published by the Office de la protection du consommateur to assist in the administration of the Act did not necessarily indicate that the courts had no intelligible standard to abide by.

Applying the foregoing to this case, I cannot conclude that s. 33 is couched in such vague or general language that it does not contain an intelligible standard. The words "engage in work", while capable of very wide import, are ordinary simple words in the English language that are capable of interpretation. The same is true of the French version which refers to "travailler". They undoubtedly present considerable difficulty in application to a specific situation, as the Report of the Commission attests, but difficulty of interpretation cannot be equated with the absence of any intelligible standard. See R. v. Rowley (1986), 31 C.C.C. (3d) 183, and City of Montréal v. Arcade Amusements Inc., [1985] 1 S.C.R. 368. The language of s. 33 does not create a standard which leaves it to the Commission to ban whatever activity they please, to paraphrase the words used in *Irwin Toy, supra*. I therefore conclude that s. 33 does constitute a limit prescribed by law and it is necessary to proceed to a s. 1 analysis.

In R. v. Oakes, supra, at p. 138, Dickson C.J. explained that to establish a reasonable limit two central criteria must be satisfied: first, the government objective must be "of

sufficient importance to warrant overriding a constitutionally protected right or freedom" and second, the means chosen must be reasonable and demonstrably justifiable in a free and democratic society. It is necessary to test s. 33 against these basic criteria of constitutional validity.

(b)Governmental Objective

The importance of the governmental objective is not contested in this case. It is quite properly conceded to be the preservation of the neutrality of the civil service to the extent necessary to ensure their loyalty to the Government of Canada and hence their usefulness in the public service. The importance of this objective was fully canvassed in *Fraser v. Public Service Staff Relations Board, supra*, and in view of the consensus on this issue it is not necessary to elaborate on it. Its importance is underscored by the existence of the political convention discussed above.

(c) Proportionality

The proportionality requirement has three aspects: (1) the existence of a rational link between the measures under review and the objective; (2) a minimal impairment of the right or freedom; and (3) a proper balance between the effects of the limiting measures and the legislative objective. I shall deal with each of these in turn.

(i) Rational Connection

It is beyond dispute that restricting partisan political activity is rationally connected to the objective of maintaining the neutrality of the public service. Whether the government has chosen a means which is carefully designed to meet its objective is open to serious question. While on a strict application of Oakes this may be an aspect of the rationality test, it overlaps with the second branch of the proportionality test -- minimal impairment. In this appeal in which the main complaint is over-inclusiveness due to the vagueness and generality of the impugned provisions, it is preferable to deal with this ground of attack under the minimal impairment criterion.

(ii) Minimal Impairment

The respondents' main submission is that the provisions of s. 33 are over-inclusive both as to the range of activity that is prohibited and the level of public servant to whom the restrictions apply. The crucial words in s. 33 are, in the English version, "engage in work for or against a political party" or "candidate" and, in the French version, "travailler pour ou contre un candidat" or "un parti politique". In their natural meaning these words in both languages are very comprehensive. The key word "work" is defined in the Shorter Oxford English Dictionary (3rd ed. 1987) as having, inter alia, the following meanings: "**1.** [s]omething that is or was done; . . . [and] **4.** [a]ction involving effort or exertion directed to a definite end". In the French version Petit Robert 1 (1990) defines "travailler" as having the following meaning, among others: "[a]gir d'une manière suivie, avec plus ou moins d'effort, pour obtenir un resultat utile". There is little in the context of the section to indicate that the words should be given a restrictive interpretation. I agree with Walsh J. that the activity proscribed is partisan political activity. This can be attributed to the use of the words "for or against". However, apart from that limitation there is no recognized interpretative basis for confining the words either with respect to activity or personnel.

The result of this broad general language is that the restrictions apply to a great number of public servants who in modern government are employed in carrying out clerical, technical or industrial duties that are completely divorced from the exercise of any discretion that could be in any manner affected by political considerations. The need for

impartiality and indeed the appearance thereof does not remain constant throughout the civil service hierarchy. As stated by Dickson C.J. in *Fraser, supra*: "It is implicit throughout the Adjudicator's reasons that the degree of restraint which must be exercised is relative to the position and visibility of the civil servant" (p. 466). To apply the same standard to a deputy minister and a cafeteria worker appears to me to involve considerable overkill and does not meet the test of constituting a measure that is carefully designed to impair freedom of expression as little as reasonably possible.

In this context, the availability of alternative methods becomes relevant. The expert opinion provided to the trial judge by Professors K. Kernaghan and R. Whitaker, and D. Bean, National President of the Public Service Alliance of Canada, was that a substantial number of public servants neither provide policy advice nor have any discretion with respect to the administration. Moreover, witnesses Whitaker and Bean stated that the line between management and non-managerial employees, already in existence, formed a rough line which would allow the bulk of the public service below the line to be politically freed, while maintaining the neutrality of the public service as an institution.

With respect to the nature of the political activity, the situation is similar. While a public servant may attend a political meeting and contribute money to a candidate or a political party, he or she may not take part in the discussion at the meeting or make a public statement of support for the party which he or she supports financially. Activity such as volunteer work in making telephone calls or stuffing envelopes for a candidate or partisan questioning of candidates at a political meeting are all included in the section's general language. I mention these because Walsh J. would have excluded them in the approach that he took to the construction of the section. In my view, for reasons which I will amplify when dealing with remedy, Walsh J. was not engaging in the normal process of interpretation but, rather, as he candidly acknowledges, was interpreting the section to conform with the Charter which is in essence a form of remedy referred to as "reading down".

To summarize, the impugned legislation bans all partisan-related work by all public servants, without distinction either as to the type of work, or as to their relative role, level or importance in the hierarchy of the public servant. In *Fraser, supra*, Dickson C.J. commented at p. 467 that:

Thirdly, common sense comes into play here. An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit.

In my opinion the minor exclusions from the generality of the activity referred to by Dickson C.J. are insufficient to redeem this legislation. The restrictions on freedom of expression in this case are over-inclusive and go beyond what is necessary to achieve the objective of an impartial and loyal civil service. In this regard we were referred to the legislation in other jurisdictions in which distinctions were made both as to the activity proscribed and the level of civil servant. For example, in Great Britain, public servants are divided into three groups depending on their employment status: a politically free group, an intermediate group and a politically restricted group. Different standards apply to each. Within Canada itself, the provinces of Quebec, Nova Scotia, Manitoba, British Columbia, Alberta and Saskatchewan allow greater political freedom than does the federal government. In this respect, Michael Decter, Deputy Minister in the Executive Council, Government of Manitoba, offered his testimony to the effect that the less restrictive legislation has not resulted either in a weakening of administrative impartiality

within the public service, or in a decrease of public confidence in the independence of the public service.

In conclusion, I am of the view that s. 33 fails the minimum impairment test and it is therefore unnecessary to consider the third aspect of the proportionality test. I now proceed to consider the appropriate remedy.

Remedy

This is a case in which I have concluded that s. 33 in many of its applications exceeds what is necessary to achieve the admittedly valid government objective of maintaining the neutrality of the civil service. In a number of cases to which the section applies the restriction is a justifiable limit on freedom of expression and, had it been limited to these, would have been unassailable. In these circumstances, where there exists a less restrictive alternative, the question arises as to whether the overbreadth should be cured by the legislature or by the court. In this case Walsh J. chose to cure the defect rather than leaving it to Parliament. He dealt with the respondents on a case-by-case basis and tailored the legislation to conform with a result that would not involve an unreasonable limit on the freedom of expression. I characterize this approach as "reading down". On the other hand, the Court of Appeal struck out the offending parts of the section leaving it to Parliament to cure the defect by adopting an alternative that will conform to the Charter in its various applications. In these circumstances, assuming that the Court has the power to "read down" legislation, it is necessary to decide which is the appropriate remedy in this case. This Court has not decided whether the remedies of "reading down" and its companion "the constitutional exemption" are remedies which it can apply in a Charter case. I have concluded that, assuming the Court has the power to "read down", it should not be exercised in this case. It is not therefore necessary to decide whether the Court has the power. My discussion of the remedy of "reading down" proceeds on this basis.

It is argued that the course of action taken by Walsh J. was less of an intrusion into the legislative sphere than the remedy employed by the Court of Appeal. This submission is based on the notion that reading down of the statute to conform with the Charter does not involve a determination of invalidity of the impugned provisions. The fallacy in this reasoning is that, in order to determine which interpretation is consistent with the Charter, it is necessary to determine what aspects of the statute's operation do not conform. The latter determination is in essence an invalidation of the aspects of the statute that are found not to conform. This requires not only a finding that a Charter right or freedom is infringed but that it is not justified under s. 1. This so-called "reading down" of a statutory provision operates to avoid a finding of unconstitutionality. In a Charter case, this means not only an infringement of a right or freedom but one that is, as well, not a reasonable limit prescribed by law and justified under s. 1. As Lamer J. (as he then was) put it in Slaight Communications Inc. v. Davidson, >[1989] 1 S.C.R. 1038, at p. 1078:

Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect. [Emphasis added.]

It is to avoid the result of the underlined words in that passage that this interpretative tool is employed. Or, as Walsh J. put it, what was required was a "judicial interpretation" as to "whether the proposed activities of the plaintiffs constitute activities which are permissible under the Charter but which were restricted by the interpretation given by the

Commission to section 32 [now s. 33]" (p. 237). In this respect, I agree with the following comment made by Carol Rogerson in her article "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" contained in R. J. Sharpe, ed., Charter Litigation (1987), at p. 248:

While the courts continue to describe reading down as a technique of interpretation rather than of invalidation, as a practical matter reading down is difficult to distinguish from a remedy which would operate to declare particular applications of a law unconstitutional. Reading down does require an initial determination by the court that particular applications of the statute would be unconstitutional.

The process of interpreting a statutory provision that is susceptible of more than one meaning was traditionally governed by the basic precept that the Court's function is to discover the intention of the legislature. In a case in which the ordinary rules of construction yield two equally plausible meanings, policy considerations are a factor in resolving the conflict. In constitutional cases before the Charter this was reflected in the practice of interpreting statutes by applying a presumption that a legislative body does not intend to exceed its powers under the Constitution. As an example, in McKay v. The Queen, [1965] S.C.R. 798, this Court held that a local ordinance regulating the use of property by prohibiting the erection of unauthorized signs, though apparently without limits, could not have been intended to encroach on federal jurisdiction over elections, and should therefore be "read down" so as not to apply to election signs. The application of the presumption of constitutionality in Charter cases has not been resolved by this Court. In Manitoba (Attorney General) v. Metropolitan Stores Ltd., >[1987] 1 S.C.R. 110, at p. 125, Beetz J., commenting on the presumption of constitutionality, said: "The extent to which this rule of construction otherwise applies, if at all, in the field of the Charter is a matter of controversy . . . ." On the other hand, in Slaight, Lamer J. (as he then was, dissenting in part), although not expressly adopting a presumption of constitutionality, interpreted a general provision down in order to avoid a result that violated the Charter.

The policy of restraint reflected in the presumption of constitutionality arose out of the traditional respect by the judicial branch for the supremacy of the legislative branch. Interpreting a statute by reading it in accordance with the presumed intention of the legislators was regarded as less of an invasion of their domain by the court. In selecting an appropriate remedy under the Charter the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the Charter and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada. The court is given an express mandate to declare invalid a law which, by virtue of s. 52 of the Constitution Act, 1982, is of no force or effect to the extent of its inconsistency with the Charter. There is no reason for the court to disguise the exercise of this power in the traditional garb of interpretation. At the same time, the court must be sensitive to its proper role in the constitutional framework and refrain from intruding into the legislative sphere beyond what is necessary to give full effect to the provisions of the Charter. In exercising its broad discretion to fashion the appropriate remedy that will achieve these objectives in a Charter case, it is unnecessary to resolve the question as to whether there is a presumption of constitutionality. By reason of the diverse and novel problems which it will be called upon to redress, the court must maintain at its disposition a variety of

remedies as part of its arsenal. Reading down may in some cases be the remedy that achieves the objectives to which I have alluded while at the same time constituting the lesser intrusion into the role of the legislature. The same result may on occasion be obtained by resort to the constitutional exemption. This remedy was adopted by the Ontario Court of Appeal in R. v. Seaboyer (1987), 35 C.R.R. 300, a case which is pending in this Court 1 . In such circumstances I see no particular virtue in resorting to the language of presumptions in order to disguise what is to all intents and purposes a remedy. When the values of the Charter are not sacrificed thereby, it is preferable to express deference to the legislature as a factor in fashioning the remedy rather than engaging in a fictitious analysis that attributes to the legislature an intention that it did not have.

This brings me to the appropriate remedy in this case. The language of s. 33 is so inclusive that Walsh J. declined to provide any general definition of its scope but rather preferred to deal with the activity of each of the plaintiffs individually in measuring the restriction imposed by the section against the Charter. The number of instances in which the operation of the section would otherwise have been in breach of s. 2(b) of the Charter is extensive. On this basis there is little doubt that in future other instances will arise which will require a similar reading down of the section. In the final analysis, a law that is invalid in so many of its applications will, as a result of wholesale reading down, bear little resemblance to the law that Parliament passed and a strong inference arises that it is invalid as a whole. In these circumstances it is preferable to strike out the section to the extent of its inconsistency with s. 2(b). To maintain a section that is so riddled with infirmity would not uphold the values of the Charter and would constitute a greater intrusion on the role of Parliament. In my opinion it is Parliament that should determine how the section should be redrafted and not the Court. Apart from the impracticality of a determination of the constitutionality of the section on a case-by-case basis, Parliament will have available to it information and expertise that is not available to the Court.

Disposition

The judgment of the Federal Court of Appeal declared that s. 32(1)(a) (now s. 33(1)(a) of the Act) is of no force and effect except as it applies to a "deputy head". The respondents did not cross-appeal or seek a variation of this order. In the result, this order will stand. Accordingly, for the reasons I have expressed above, the appeals are dismissed with costs.

//Stevenson J.//

The following are the reasons delivered by

STEVENSON J. (dissenting) -- I have had the advantage of reading the judgment of my colleague, Sopinka J., and agree with much that he has said. I agree that the provision in question restricts freedom of speech and expression. I disagree, however, with his conclusion that s. 1 of the Canadian Charter of Rights and Freedoms does not save the legislation. My disagreement is focussed on the discussion of "minimal impairment".

I agree with his conclusion that the language of s. 33(1)(a) of the Public Service Employment Act, R.S.C., 1985, c. P-33, provides an intelligible standard and is thus a limit imposed by law. It is upon this ground, vagueness, that the Federal Court of Appeal, [1988] 3 F.C. 219, reversed the trial judgment, [1986] 3 F.C. 206.

The trial judgment commands careful consideration. The parties offered considerable evidence on the question of the reasonableness of this limitation on freedom of expression. The trial judge thus enjoyed an important advantage in having the

opportunity to hear and assess that evidence. He found the evidence relating to the effectiveness of public service employment limitations in other jurisdictions to be inconclusive. He carefully reviewed the authorities considering s. 1 and found "minimal impairment". I do not see any grounds for disturbing his findings.

In my view he was perfectly correct in concluding that less restrictive provisions in other jurisdictions were not shown to be effective in meeting the objectives of the legislation. In this conclusion he apparently agreed with the witness Kernaghan who pointed out the difficulty in assessing the efficacy of rules applied in other jurisdictions. For example, of Manitoba's procedures, the witness Kernagham opined that "the jury is still out".

The fact that some other jurisdictions have less restrictive provisions does not, of itself, justify the conclusion that the means chosen by Canada are "over-broad". These restrictions are protective, designed to serve the need for preserving political neutrality in the civil service. We cannot rely on comparisons with other jurisdictions without an appreciation of the objectives that jurisdiction seeks to meet and an evaluation of the extent to which those objectives are met. The fact that some home owners choose not to lock their doors does not demonstrate that securing the home is unnecessary. Nor would the fact that some home owners are satisfied to rely on "no trespassing" signs establish that such means were a suitable alternative method of property security. Similarly, the existence of legislation with less restrictive means does not establish that that scheme better protects the neutrality and integrity of the civil service.

The impugned provision forbids partisan political activity in pursuit of several goals. If the state's sole objective is to control the political activities of those government employees who exercise discretion in dealing with the public, then the section is over-reaching. That control, however, is not the sole objective of placing restraints on the political activities of public servants.

In discussing the necessity for placing restraints on partisan political activities, the trial judge spoke of the "merit principle for appointments and promotions", "confidence of the public in fair and impartial administration", and the confidence of elected ministers "in the advice of subordinate public servants on whose work they must rely" (p. 234). The legislation is aimed at enhancing and preserving these characteristics, according with the comments of Dickson C.J. in Fraser v. Public Service Staff Relations Board, >[1985] 2 S.C.R. 455, where he spoke of "impartiality, neutrality, fairness and integrity" in the tradition surrounding our public service (p. 471).

Professor Kernaghan, in cross-examination was asked to accept, and did accept, the proposition that civil servants "[m]ust not engage in partisan political activities which will jeopardize the political neutrality both real and perceived of the public service".

The legislation could distinguish between various levels of employees, but, in my view, the case against partisan activities at all levels is a strong one. No civil servant must owe, or be seen to owe, appointment or promotion to partisan activities. Activities tend to be overt and they are likely to be known or become known to those within and without the public service. Once allegiances are known, the principles of neutrality, impartiality and integrity are endangered. There is a danger within the service that those seeking appointments or promotions will feel some incentive to cut their cloth to the known partisan interests of those who have influence over appointments and promotions. Visible partisanship by civil servants displays a lack of neutrality, and a betrayal of that

convention of neutrality. The public perception of neutrality is thus severely impaired, if not destroyed.

At the same time we must recognize that the legislation does not forbid membership in or financial support of a party. Nor does it prohibit speaking on all public issues.

An effective civil service is essential to modern day democratic society. This proposition is discussed by Beetz J. in OPSEU v. Ontario (Attorney General), >[1987] 2 S.C.R. 2. At page 44 he describes the findings of MacKinnon A.C.J.O. supporting the convention of political neutrality as unassailable. The passage quoted by Beetz J. incorporates the conclusion of Labrosse J. that "Public confidence in the civil service requires its political neutrality and impartial service to whichever political party is in power". In my view a measure of neutrality is necessary in order to preserve that effectiveness and the state may impose appropriate limits to that end. I do not read my colleague's judgment as denying that proposition. Our difference centres on whether the means chosen offends the "minimal means" test.

The means must, of course, be assessed in the light of the objective, which I take to be to secure civil service neutrality in all of its elements. I must say that to permit overt partisan political activity is to come perilously close to abandoning the principle of neutrality. The government may, of course, decide to abandon or modify that principle, but this legislation is directed towards its preservation and our task is to decide if this means of preservation is justifiable.

Section 1 is a flexible provision and this Court is still engaged in the process of defining and refining the factors to be considered in its application. I am in respectful agreement with the statement of La Forest J. in United States of America v. Cotroni, >[1989] 1 S.C.R. 1469, at pp. 1489-90, that the underlying values of Charter rights and freedoms "must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature". He refers to the need to allow for "the protection of other competing interests in a democratic society" (p. 1490). The need for flexibility is expressed by Dickson C.J. in Canada (Human Rights Commission) v. Taylor, >[1990] 3 S.C.R. 892, at p. 927, where balancing between important collective interests and Charter rights is involved. As he points out, at p. 916, "s. 1 both guarantees and limits Charter rights and freedoms by reference to principles fundamental in a free and democratic society".

I also agree with the observation of McLachlin J. in Committee for the Commonwealth of Canada v. Canada, >[1991] 1 S.C.R. 139, at p. 248, where she points out that the courts must not strike out legislation merely because they can conceive of an alternative which seems to be less restrictive, recognizing that governments must develop rules and policies to apply to many cases.

Before turning to the specific question of "minimal means" I refer briefly to the experience in the United States. That experience is informative and instructive because its efficacy is not in question. It is particularly illuminating because it represents the experience and learning of a country with very strong democratic traditions and a highly developed, vigorous notion of free speech.

The experience in the United States is usefully discussed by Vaughn, "Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond" (1976), 44 Geo. Wash. L. Rev. 516. Prohibitions on active participation in political campaigns are common. Federal restraints are to be found in the Hatch Act. While there is continuing political debate about these restrictions, "the judiciary consistently has upheld such

restraints as within the legislative power to promote the efficiency of the federal civil service" (Vaughn, op. cit., at p. 516).

In discussing the prohibition of partisan political conduct, the majority of the Supreme Court of the United States (White J. for himself, Burger C.J. and Stewart, Blackmun, Powell and Rehnquist JJ.) in United States Civil Service Commission v. National Association of Letter Carriers, AFL--CIO, 413 U.S. 548 (1973), at p. 557, referred to and confirmed the judgment of a long history ". . . that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited." In discussing that history, the majority discussed various factors militating in favour of restrictions protecting the neutrality of the civil service, and, at p. 566, described a concern, "as important as any other" that employment and advancement in the service not depend on political performance and that employees be freed from pressure and express or tacit invitations to perform political chores.

In looking at the "minimal impairment" test I am reminded of the observations of Dickson C.J. in R. v. Edwards Books and Art Ltd., >[1986] 2 S.C.R. 713, at pp. 781-82 of a reasonable limit being one it was reasonable to impose, and his comments in Irwin Toy Ltd. v. Quebec (Attorney General), >[1989] 1 S.C.R. 927, that the Court would not take a restrictive approach to social science evidence in the name of minimal impairment. I recognize, at once, that those were cases where the Court was looking at legislation mediating between competing interests. This case does not fall into any recognized category because here the state is limiting a right in another context, the regulation of the activities of those whose function it is to maintain the democratic society which is integral to the whole of the Charter.

I would not impose an exacting standard upon the state in the circumstances of this case. It is unnecessary, however, for me to define the standard because, in my view, the proposed less restrictive means are flawed. I agree with the trial judge who could not conclude that categorizing the civil service (and thus abandoning any restraint on the so-called lower level civil service) would satisfy the objective of preserving the political neutrality of the civil service. Before we say that other less intrusive means are available, we must also be able to say that those means will meet the objective.

In looking at applying s. 1 of the Charter, I again agree with La Forest J.'s overview of s. 1 as it relates to proportionality in Stoffman v. Vancouver General Hospital, >[1990] 3 S.C.R. 483, at p. 520:

The challenged law is then subjected to a proportionality test in which the objective of the impugned law is balanced against the nature of the right it violates, the extent of the infringement and the degree to which the limitation furthers other rights or policies of importance in a free and democratic society.

In my view, there is an appropriate proportionality between the effects of the measure and the objective. The provision does not deny freedom of expression. It imposes a limitation on that freedom in the context of partisan political activities upon persons who, in the words of Dickson C.J. in Fraser v. Public Service Staff Relations Board, supra, at p. 471, "must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints".

Finally, I am not persuaded that Walsh J. was engaged in reading down the legislation. He upheld it. He gave it a "judicial interpretation" which he described as "liberal" in that

it restricted no more activities than necessary to preserve the tradition of neutrality. To interpret legislation in accordance with Charter concepts is not to condemn it as violative of those concepts.

I would allow the appeal, with costs, and reinstate the trial judgment.

Appeals dismissed with costs, STEVENSON J. dissenting.

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