23 January 2012

Cathryn Cummins

Committee Secretariat

Legislative Council of NSW

Dear Cathryn

'Question on Notice' - reply for Dr Peter Phelps

In committee hearings last Wednesday (18 January), Dr Phelps asked after any examples of Canadian courts (particularly the Supreme Court) not following a 'liberal', in the US sense of 'progressive', philosophy.

At the time, I could only think of examples from general electoral law. One is *Figueroa v Canada* [2003], a ballot access case. It is 'liberal' in the classical sense of limiting parliamentary power to pass law that restricts liberty or participation. Similar is *Sauvé v Chief Electoral Officer* [2002], expanding prisoner voting. (Conservatives might see both decisions as liberal in either sense, but retrograde). On the other side of the coin is *R v Bryan* [2007] upholding a conviction for publishing east coast election results to the west coast when polling was continuing.

Specifically in the realm of political finance, one example is *Libman v Québec (Attorney-General)* [1997] 3 SCR 569. There, whilst the Supreme Court agreed that restrictions on freedom of communication in expenditure limits - specifically in a provincial referendum – could be justified, it held the specific limits were unreasonably tight in the case of independent third parties. Also, in the *Reform Party of Canada v Attorney-General (Canada)* [1995] a provincial appeal court partly struck down a political finance measure. (Specifically, the court permitted a federal law allocating free air-time differentially between parties, but did not allow a ban on broadcasters otherwise selling electoral air-time, given that the system otherwise limited total expenditures).

Put against that of course is the Court's deferential/lee-way approach to parliament in the key case of *Harper v Canada (Attorney-General)* [2004] (upholding expenditure limits). *Harper* is one of about five cases lost by third or small parties in the political finance domain.

The way I would characterise it is that, whilst Canadian benches are typically split to reflect different liberal visions, there is a pattern in political cases generally and political finance cases especially of preferring egalitarian and integrity arguments over libertarian ones.

It's worth noting that the Canadian equivalent of the Keneally contribution limits was only introduced in 2003; the Canadian equivalent of the O'Farrell proposal to ban organisational donations was only introduced in 2006.

Yours

Graeme Orr

University of Queensland,

Ps Dr Phelps may be interested in the work of Colin Feasby, a lawyer and political finance author, who has been sceptical of the constitutionality of Canadian restrictions on contributions, and third party expenses. Eg 'Constitutional Questions about Canada's New Political Finance Regime' [2007] 45 *Osgoode Hall Law Journal* 513 and *'Continuing Questions in Canadian Political Finance' [2010] 47 Alberta Law Review* 993.