CITATION: Canadian Constitution Foundation v. Canada (Attorney General), 2021 ONSC 1224
COURT FILE NO.: CV-19-00627380
DATE: 20210219

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
CANADIAN CONSTITUTION FOUNDATION	)	*Adam Goldenberg* and *Connor Bildfell*, for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
ATTORNEY GENERAL OF CANADA	)	*Michael H. Morris, Gail Sinclair*, *Andrea Bourke* and *Katrina Longo* for the Respondent
	)	
Respondent	)	
	)	
- and -	)	
	)	
PEN CANADA	)	*Justin H. Nasseri* and *Janani Shanmuganathan*, for the Intervener
	)	
Intervener	)	
	)	
	)	**HEARD:** September 14 and 15, 2020

REASONS FOR JUDGMENT

DAVIES J.

A. Overview

[1] The free exchange of political ideas is essential to a properly functioning democracy. Political speech is the most valuable and protected type of expression: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at paras. 11-13. Section 2(b) of the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of expression, ensures that people can participate fully and freely in the political decision-making process in Canada: *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, at para. 32

[2] However, the distribution of false information during elections can threaten our democracy. It can undermine public confidence in our democratic institutions and the

security of our elections. The dissemination of deliberately false statements obstructs the search for the truth and, as a result, it does not enjoy the same level of protection under s. 2(b) of the *Charter* as political speech: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 106; *R. v. Lucas*, [1998] 1 S.C.R. 439, at paras. 91-94.

[3] As part of Canada's overall response to the threat posed by misinformation and disinformation during elections, s. 91(1) of the *Canada Elections Act*, S.C. 2000, c.9 *(CEA*), prohibits a person or entity from making or publishing certain false statements about candidates, prospective candidates, the leader of a political party or any public figure associated with a political party during federal elections with the intention of affecting the results of an election.

[4] The Canadian Constitution Foundation has brought an application for a declaration that s. 91(1) of the *CEA* violates s. 2(b) of the *Charter* and is not a justifiable limit under s. 1 of the *Charter*, and is therefore of no force or effect.

[5] The Attorney General of Canada acknowledges that s. 91(1) of the *CEA* restricts expressive activity that is protected by s. 2(b) of the *Charter*. However, the Attorney General argues that, properly interpreted, s. 91(1) of the *CEA* has a narrow scope and is a justifiable limit under s. 1 of the *Charter.* The Attorney General argues that s. 91(1) only prohibits the deliberate dissemination of information that is known to be false about key political actors during the election and does not capture accidental misstatements of fact, false statements believed to be true or statements of opinion.

[6] CCF concedes that the objective of s. 91(1) of the *CEA* – to protect the integrity of electoral process against the threat of false information – is pressing and substantial. CCF also concedes that the prohibition of false statements in s. 91(1) is rationally connected to that objective. However, CCF argues that s. 91(1) of the *CEA* does not minimally impair the right to free expression because it prohibits the dissemination of accidental and unknown falsehoods, and because it applies to an overly broad category of people and topics. CCF also argues that s. 91(1) is not proportionate in its effect because the benefits of the law are speculative, and it would significantly chill political speech.

[7] PEN Canada intervened in support of the CCF position that s. 91(1) of the *CEA* is not a justifiable limit on freedom of expression.

[8] The constitutionality of s. 91(1) of the *CEA* turns on the scope of political speech expression it prohibits. More specifically, its constitutionality turns on whether the *mens rea* for the offence of contravening s. 91(1) of the *CEA* includes a knowledge component. Prior to 2018, s. 91(1) prohibited anyone from knowingly making or publishing false statements about the personal character or conduct of a candidate before or during an election. In 2018, s. 91(1) of the *CEA* was amended and the word knowingly was removed. The Attorney General argues that the removal of the word knowingly from s. 91(1) was simply a housekeeping change designed to remove redundancy in the provision. The Attorney General argues that despite the removal of the word knowingly from s. 91(1), the *mens rea* of the offence still involves an element of knowledge.

[9] For the reasons that follow, I do not accept the Attorney General's argument. I find that, as currently drafted, the *mens rea* of the offence of contravening s. 91(1) does not include an element of knowledge that the statement in question is false.

[10] In oral submissions, the Attorney General conceded that if I find that the offence of contravening s. 91(1) does not require proof of knowledge of the falsity of the statement, it is not a justifiable limit on freedom of expression. I, therefore, do not need to address the other issues raised by CCF. I find that s. 91(1) of the *CEA* violates s. 2(b) of the *Charter* and is not a justifiable limit on that right under s. 1 of the *Charter*. Section 91(1) of the *CEA* is of no force and effect.

B. History of Legislative Prohibitions on Disseminating False Information Related to Elections

[11] Before turning to the interpretation s. 91(1) of the *CEA*, it is important to lay out the history and evolution of the prohibition on disseminating false information related to elections in Canada.

[12] There has been a legislative prohibition, in one form or another, against making certain false statements about a candidate in federal elections since 1908: *Dominion Elections Act*, S.C. 1908, c. 26. From 1908 until 1970, it was an offence for any person to make or publish any false statement of fact before or during an election about the personal character or conduct of a candidate for the purpose of affecting the return of a candidate. From 1970 until 2000, it was an offence for anyone to knowingly make or publish a false statement of fact about the personal character or conduct of a candidate before or during an election: Proof of an intention to affect the outcome of an election was not required.

[13] Significant amendments were made to the *CEA* in 2000. At that time, the English version of s. 91(1) prohibited the making or publication of any false statement in relation to the personal character or conduct of a candidate or prospective candidate with the intention of affecting the results of an election. The English version of s. 91(1) did not explicitly refer to any knowledge requirement. The French version of s. 91(1) included the word *sciemment*, which means knowingly. Thus, unlike the English version, the French version of the 2000 *CEA* expressly prohibited anyone from *knowingly* making or publishing a false statement about a candidate or potential candidate with the intention of influencing the election.

[14] The inconsistency between the French and English versions of s. 91(1) was resolved in 2001 by adding the word knowingly to the English text. And from 2001 until 2018, s. 91(1) of the *CEA* prohibited any person from knowingly making or publishing any false statement of fact in relation to the personal character or conduct of a candidate or prospective candidate with the intention of affecting the results of an election.

[15] In 2017, the Standing Committee on Procedure and House Affairs (the Standing Committee) tabled a report in the House of Commons recommending amendments to s. 91(1) of the *CEA*. In particular, the Standing Committee suggested that s. 91(1) be expanded to apply to false statements about the personal character or conduct of "a

candidate, a prospective candidate, leader of a registered party, or of a person closely associated with the campaign of a candidate, prospective candidate, registered party or the leader of a registered party." The Standing Committee also recommended that the phrase "false statement of fact in relation to the personal character or conduct of a person" be defined as a false statement that is "likely to have a significant prejudicial effect on the impression electors have of the person by reason that it falsely ascribes defects and failings to the person." The Standing Committee recommended enumerating several types of failings or defects that would meet this definition. The Standing Committee did not recommend removing the word knowingly from s. 91(1).

[16] Section 91(1) of the *CEA* was last amended in 2018 in Bill C-76, which became the *Elections Modernization Act*, S.C. 2018, c. 31. Bill C-76 incorporated some but not all of the 2017 recommendations of the Standing Committee. Following the passage of Bill C-76, s. 91(1) of the *CEA* reads as follows:

> 91 (1) No person or entity shall, with the intention of affecting the results of an election, make or publish, during the election period,
>
> (a) a false statement that a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party has committed an offence under an Act of Parliament or a regulation made under such an Act — or under an Act of the legislature of a province or a regulation made under such an Act — or has been charged with or is under investigation for such an offence; or
>
> (b) a false statement about the citizenship, place of birth, education, professional qualifications or membership in a group or association of a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party.

[17] Bill C-76 made five significant changes to s. 91(1) of the *CEA*. First, s. 91(1) now includes an enumerated list of false statements that are prohibited. Second, it now prohibits an entity from making false statements. Third, it prohibits false statements about a broader category of people, including the leader of a political party or "a public figure associated with a political party." Fourth, it only prohibits the making or publishing of false statements during the election period. Finally, it no longer includes the word knowingly.

[18] I will return to the legislative history of the 2018 amendments to s. 91(1) in greater detail below.

C. Principles of Statutory Interpretation

[19] There are several principles of statutory interpretation I must apply when deciding whether the *mens rea* of the offence of contravening s. 91(1) of the *CEA* includes a knowledge component notwithstanding the removal of the word knowingly from the prohibition.

[20] First, I must apply the modern contextual approach to statutory interpretation that the words of an act are to be read "in their entire context and in their grammatical and ordinary sense harmonious with the scheme of the Act, the object of the Act and the intention of Parliament": E.A. Driedger, *Constructions of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87. To apply this principle, I must read s. 91(1) in the context of the *CEA* as a whole. I must also attempt to discern Parliament's intent when it removed the word knowingly from the s. 91(1) prohibition.

[21] If legislation is reasonably open to more than one interpretation – one that is constitutional and another that is not – I must adopt the interpretation that is constitutional: *R. v. Shape*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 33. The Supreme Court of Canada explained this principle in *Slaight Communications Inc. v. Davidson*, [1987] 1 S.C.R. 1038, at p. 1078, as follows:

> 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.

[22] To be clear, there is no presumption that legislation is constitutional. In fact, the Supreme Court has held that there is no room for such a presumption in the context of constitutional adjudication: *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at 122. The principle that I should prefer a *Charter* compliant interpretation of legislation only applies if the provision is open to "differing, but equally plausible, interpretations": *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 62. The real question here is whether s. 91(1) of the *CEA* is capable of more than one equally plausible interpretation.

D. Ordinary Meaning of the Language used in s. 91(1) of the *CEA*

[23] Section 486(3)(c) of the *CEA* creates the offence of contravening s. 91(1). It is, therefore, an offence to make or publish certain false statements about a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party during the election period with the intention of affecting the results of an election. Read together, ss. 486(3)(c) and 91(1) create an offence that requires proof of both *actus reus* and *mens rea*.

[24] The *actus reus* of any offence is the act that the accused must commit as the basis for the charge. The *mens rea* is the accused's intent in relation to the prohibited act. An offence may have more than one aspect to the *actus reus*. An offence may also have more than one aspect to the *mens rea*.

[25] Sometimes the *mens rea* of an offence is simply the intent to commit the prohibited act. These offences are described as general intent offences. General intent offences do not require proof that the accused intended to bring about any particular result or consequence. As the Supreme Court of Canada explained in *R. v. Tatton*, 2015 SCC 33,

[2015] 2 S.C.R. 574, at para. 35, assault is an example of a general intent offence: “The accused must intentionally apply force; however, there is no requirement that he intend to cause injury.”

[26] Some offences – specific intent offences – require a heightened *mens rea* and the Crown must prove more than an intention to commit the *actus reus*. The heightened *mens rea* for specific intent offences can take various forms: it may require proof that the accused intended to bring about a specific result or consequence; it may require proof that the accused had actual knowledge of certain circumstances; or it may require proof that the accused committed the *actus reus* for an ulterior purpose: *R. v. Tatton*, at para. 39. Some offences require proof of more than one type of heightened *mens rea*. A few examples from the criminal law may be useful to illustrate the distinction between the various forms of the heightened *mens rea* required for specific intent offences.

[27] Section 423.1(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46 makes it an offence to engage in any conduct with the intent to provoke fear in a justice system participant in order to impede the performance of his or her duties. The *actus reus* of this offence is engaging in any conduct. The *mens rea* requires proof that the accused’s conduct was intentional. It also requires proof of an ulterior purpose, namely to provoke fear in a justice system participant to impede the performance of his or her duties. The *mens rea* for this offence involves an intention to bring about a particular consequence.

[28] Section 57(1)(b) of the *Criminal Code* makes it an offence for anyone to use, deal with or act on a forged passport knowing that the passport is forged. The *actus reus* of this offence is using, dealing with or acting on a forged passport. The *mens rea* requires proof that the accused person intentionally used, dealt with or acted on the forged passport and that the accused knew the passport was forged.

[29] Section 57(2) of the *Criminal Code* makes it an offence for anyone to make a written or an oral statement that he knows is false or misleading for the purpose of procuring a passport for himself or another person. The *actus reus* of this offence is making a false or misleading statement. The *mens rea* requires proof an ulterior purpose of obtaining a passport and proof that the person knew the statement made was false or misleading.

[30] Similarly, s. 83.18 of the *Criminal Code* makes it an offence to knowingly participate in or contribute to the activities of a terrorist group for the purpose of enhancing the ability of any terrorist group to carry out a terrorist activity. The *mens rea* for this offence requires proof that the accused knew the group he or she was participating in was a terrorist group. The *mens rea* also requires proof that the accused participated in the terrorist group for an ulterior purpose of enhancing the capacity of any terrorist group to carry out a terrorist activity.

[31] These examples show that a *mens rea* requiring proof of an ulterior purpose is distinct from a *mens rea* requiring proof of knowledge. Proof of an ulterior purpose addresses the intent of the accused in relation to the consequences or result of the

prohibited act. Proof of knowledge addresses the accused's state of mind in relation to the circumstances in which the prohibited act was committed.

[32] Returning to the *CEA*, ss. 91(1) and 486(3) must be read together to ascertain the *actus reus* and *mens rea*. The *actus reus* of the offence under s. 486(3) is making or publishing a false statement about one of the enumerated issues (citizenship, place of birth, education, professional qualifications, membership in a group or association or involvement in the commission of an offence or an investigation into the commission of an offence) concerning one of the enumerated categories of people (a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party).

[33] The offence created by s. 486(3) is a specific intent offence that requires proof of an ulterior purpose. To be found guilty under s. 486(3) an accused must have made or published a false statement for the specific purpose of affecting the outcome of an election. The *mens rea* articulated in s. 91(1) relates to the consequences of making the false statement. The *mens rea* of the offence as currently drafted does not contain any knowledge component.

[34] To be sure, the *Criminal Code* and other offence creating legislation do not always specify all aspects of the *mens rea* for each offence. Judges are sometimes left to determine the *mens rea* requirements for a specific offence: *R. v. Tatton*, at para. 22. However, on the plain reading of ss. 91(1) and 486(3), the offence does not require proof of knowledge.

[35] This is not the end of the analysis. I must also look at the provision in the context of the *CEA* as a whole and consider Parliament's intention in amending s. 91(1) to decide whether knowledge is an implicit element of the *mens rea* of the offence of contravening s. 91(1) of the *CEA* or should be read into the section.

E. Section 91(1) in the context of the *CEA* as a whole

[36] The *CEA* contains several prohibitions on false or misleading statements, which have different *actus reus* and *mens rea* requirements. A comparison of a few of these prohibitions supports the conclusion that the offence of contravening s. 91(1) does not require proof of knowledge as part of its *mens rea.*

[37] Section 92 of the *CEA* prohibits any person or entity from publishing a false statement that a candidate has withdrawn from an election. Section 486(3)(d) makes it an offence for a person to knowingly contravene s. 92. The *mens rea* for contravening s. 92 requires proof of knowledge but does not require proof of any ulterior purpose.

[38] Similarly, s. 408(1) prohibits the leader of any political party from making any statement in an application to register the political party that the leader knows is false or misleading. Section 497.2(3)(d) makes it an offence to contravene s. 408(1). The *mens rea* for contravening s. 408(1) requires proof of knowledge that the statement made was false or misleading but does not require proof of any ulterior purpose.

[39] Section 482.1 makes it an offence to hinder the Commissioner of Canada Elections by knowingly making a false or misleading statement. This offence requires proof of knowledge of the falsity of the statement but does not require proof of an ulterior purpose.

[40] Section 56(a) of the *CEA* prohibits anyone from knowingly making a false or misleading statement about his or her qualification as an elector. Section 56(b) prohibits anyone from knowingly making a false or misleading statement about another person's qualifications "for the purpose of having that other person's name deleted from the Register of Electors". Section 485(2) makes it an offence to contravene ss. 56(a) or (b).

[41] The *mens rea* for the offence of contravening s. 56(a) only requires proof that the person knows the statement is false or misleading. However, the *mens rea* for contravening s. 56(b) requires proof of knowledge of the falsity of the statement and proof of an ulterior purpose of having the elector's name deleted from the registry.

[42] A review of the *CEA* as a whole suggests that Parliament has clearly articulated the *mens rea* requirement for each offence. When proof of knowledge is required, that is explicit in the prohibition or offence provision. When proof of an ulterior purpose is required, that is also specified. And when proof of both knowledge and an ulterior purpose are required, that is explicitly stated.

[43] It would, therefore, be inconsistent with the structure of the *CEA* as a whole to interpret ss. 91 and 486(3)(c) as requiring proof of knowledge when that is not explicit in either the prohibition or offence.

F. Did Parliament intend to substantively change s. 91(1) by removing the word knowingly?

[44] The Attorney General acknowledges that Parliament made a deliberate decision to remove the word knowingly from s. 91(1) of the *CEA* but argues that Parliament did not intend to substantively change the *mens rea* of the offence by doing so. The Attorney General argues that the removal of the word knowingly was a housekeeping measure to remove redundancy and avoid confusion. In support of its position, the Attorney General relies on statements made by politicians and government officials during the legislative process. The Attorney General also relies on evidence adduced on this application from the Director of Investigations at the Office of the Commissioner of Canada Elections about the intent and meaning of the amendments to s. 91(1) in Bill C-76.

a. Hansard and Committee Debates

[45] Hansard evidence and committee debates are admissible to assist in determining the intention of Parliament or the purpose of challenged legislation. They can provide context to the provision in question or explain an amendment. They might articulate the policy rationale for the legislation. However, the Supreme Court has repeatedly cautioned that comments and speech made during the debates are of limited weight: *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at para. 51; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at

para. 106. And while the debates may provide some insight into Parliament's intent, they cannot replace an analysis of the actual language of the provisions. The intent of Parliament as a whole cannot be ascertained from the statements of individual members or government officials.

[46] The Honourable Karina Gould, then Minister of Democratic Institutions, described the amendments to s. 91(1) before the Standing Committee as follows:

> There are some planned amendments or parts of the bill that make misleading information illegal in some cases…. If individuals or organizations were to disseminate misleading information about how to vote or about party candidates, and it could be proven that this did not comply with the rules, these individuals or organizations could be investigated and punished.

The Minister did not make any comments about the removal of the word knowingly from the prohibition in s. 91(1) or the *mens rea* for the offence during her comments.

[47] The General Counsel to the Commissioner of Canada Elections, Marc Chénier, also appeared before the Standing Committee. Mr. Chénier testified that while the Commissioner generally supports any amendment that would provide additional tools for dealing with false statements during an election, the Commissioner was of the view that the new version of s. 91(1) being proposed in Bill C-76 was "not sufficient to protect the integrity of our elections against false claims that can have a devastating impact on a campaign." Mr. Chénier took the position that the proposed amendments to s. 91(1) would weaken, not strengthen, the Commissioner's ability to respond to false statements and fake news during an election. Mr. Chénier recommended that the Standing Committee consider adding a prohibition against false statements that are likely to injure the reputation of a candidate. Mr. Chénier did not comment on the removal of the word knowingly from s. 91(1).

[48] During the clause-by-clause debate on Bill C-76 before the Standing Committee, the Conservative Party proposed an amendment that would have kept knowingly in s. 91(1) of the *CEA*. A senior policy advisor from the Privy Council Office, Jean-François Morin, responded to the proposed amendment as follows:

> [I]t's often considered bad practice in criminal law to include an intent provision such as "knowingly" in the prohibition itself, especially where there's already an element of intent that is expressed. In this case, we already have two: the intent to affect the election as well as the false nature of the statement.

Mr. Morin then testified as follows:

> The "knowingly" is a *mens rea* element that is associated with the offence. When we try to craft legislation, we want to make sure that every offence that Parliament wants a mental element associated with has at least one of

> those mental elements – so it's dual procedure offences versus strict liability offences, which don't have a huge intent criterion.
>
> What I am saying is that in many prohibitions we already have an intent criterion. For example, in section 91 we already have the intent to affect the results of the election, and of course the person making the publication would need to know that the information that is published is false.
>
> We already have two intent requirements.

Mr. Morin went on to say that if a person republished something on Facebook or on Twitter mistakenly believing it was true, that would not be sufficient to support a conviction: "These charges will really be laid when the person knows that the information is false." Mr. Morin also testified that it is unnecessary to include the knowingly in s. 91(1) "because we already have the requirement to intend to affect the results of the election with false information." Finally, Mr. Morin testified that including the word knowingly in s. 91(1) could cause confusion because a judge might mistakenly think that there was a requirement to prove that the person knows "that he or she committed this specific infraction."

[49] The Conservative Party proposed a similar amendment to add the word knowingly to the offence creating provision. In response to this proposed amendment, Mr. Morin reiterated that including the word knowingly in either ss. 91(1) or 486(3)(c) is unnecessary and would cause confusion:

> [T]he intent requirement is already reflected in the intent to affect the results of the election, and of course, the person committing the offence would also need to be aware that the information that is published is false. I think that adding in "knowingly" here would be adding some uncertainty in the level of proof that would be required to successfully convict someone under that provision.

[50] Both amendments proposed by the Conservatives that would have retained the word knowingly in s. 91(1) or 486(3)(c) of the *CEA* were defeated.

[51] Bill C-76 passed third reading on October 30, 2018 and was sent to the Senate for its consideration. The Commissioner of Canada Elections, Yves Côté, appeared before the Senate when it was considering Bill C-76. Commissioner Côté repeated the same concerns that Mr. Chénier raised before the Standing Committee. Commissioner Côté took the position that the enumerated categories of false statement that would be prohibited by s. 91(1) leave out "some very hurtful or injurious statements that someone can make about somebody else." While the Commissioner urged the Senate to pass Bill C-76, he suggested that further amendments to expand the scope of the prohibited false statements under s. 91(1) should be considered at a later point. Commissioner Côté did not make any comment about the removal of the word knowingly from the prohibition.

[52] Bill C-76 received Royal Assent on December 13, 2018.

[53] In my view, the evidence from the Standing Committee hearings is not helpful in determining Parliament's intent in removing the word knowingly from s. 91(1). The comments by Minister Gould and Commissioner Côté do not address the removal of the word knowingly. More importantly, the advice given to the Standing Committee by Mr. Morin that the inclusion of the word knowingly in s. 91(1) was unnecessary, redundant and confusing was, for several reasons, incorrect and potentially misleading.

[54] First, the inclusion of the word knowingly in the pre-2018 prohibition was not redundant. As set out above, proof of an ulterior purpose – an intention to affect the outcome of an election – is distinct from proof of knowledge. The fact that an offence requires proof of an ulterior purpose does not mean that it also requires proof of knowledge. Those are two different types of intent: one speaks to the consequences of the prohibited act and the other speaks to the circumstances in which the prohibited act is committed.

[55] In some circumstances, an element of knowledge might be necessarily implied by the ulterior purpose specified. For example, s. 481(1)(b) of the *CEA* makes it an offence to publish material, without necessary authorization, "with the intent of misleading the public into believing that it was made, distributed, transmitted or published by or under the authority of the Chief Electoral Officer, or a returning officer, political party, candidate or prospective candidate." The requirement to prove an intention to mislead the public into believing the published document was authorized would necessarily require proof that the person knew they did not have authorization to publish it. A person cannot intend to mislead someone without knowing the statement they are making is untrue or misleading. However, the ulterior purpose of s. 91(1) is different. It is the intent to affect the result of an election. Knowledge that the statement is false is not necessarily implied by the ulterior purpose in s. 91(1). One can seek to affect the outcome of an election by publishing statements that are, in fact, false without necessarily knowing or believing them to be false.

[56] Second, including two *mens rea* requirements is neither bad drafting nor confusing. There are several federal offences, including the the *Criminal Code* and the *CEA* offences detailed above, that contain multiple specific intent components. In fact, the Supreme Court of Canada has noted that the failure on the part of Parliament to clearly articulate all elements of the *mens rea* of offences is the source of significant difficulty and confusion. In *R. v. Tatton*, at para. 25, the Supreme Court calls on Parliament to specify the required *mens rea* for every offence in the legislation.

[57] Finally, there is no merit to suggest that including the word knowingly in s. 91(1) would lead a court to conclude that the *mens rea* for contravening s. 91(1) includes knowledge that the conduct in question constitutes an offence. Ignorance of the law is not a recognized defence or excuse for breaking the law in Canada. The Supreme Court of Canada has ruled that this principle applies in the context of both criminal and regulatory offences: *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420, at para. 22.

[58] While Hansard evidence and committee debates can, in some cases, assist a court in discerning Parliament's intent, in this case they are not helpful. The Minister and

Commissioner made no mention of the removal of the word knowingly in their comments about Bill C-76. To the extent Mr. Morin testified about the import of removing knowingly from s. 91(1), his comments were inaccurate and cannot be taken as reflecting Parliament's true intention.

b. Commissioner's Interpretation of s. 91(1)

[59] In support of its position that removing the word knowingly did not change the *mens rea* of the offence of contravening s. 91(1), the Attorney General also relies on evidence from Mylène Gigou, the Director of Investigations with the Office of the Commissioner of Canada Elections. Ms. Gigou swore an affidavit on the application and was cross-examined.

[60] Ms. Gigou testified that despite the removal of the word knowingly from s. 91(1) of the *CEA*, the Commissioner interprets ss. 91(1) and 486(3)(c) as still requiring proof that the person knew the statement was false. There are several problems with Ms. Gigou's evidence on this point.

[61] First, Ms. Gigou asserts that the Commissioner's interpretation that the offence of contravening s. 91(1) requires proof of knowledge is the only reasonable one because Parliament meant for s. 91(1) to be an intentional offence, not a strict liability offence. This statement is legally wrong. Knowledge does not need to be read into the offence of contravening s. 91(1) to make it an intentional offence, as opposed to a strict liability offence. Requiring proof of *mens rea* in any form, be it general or specific intent, ensures an offence is not a strict liability offence. Categorizing an offence as an intent offence does not imply or require any particular form of *mens rea.* Contravening s. 91(1) is an intentional offence by virtue of the fact that it requires proof of an ulterior purpose regardless of whether knowledge is also a required element of the *mens rea*.

[62] Second, Ms. Gigou evidence is internally inconsistent on how the knowledge component is understood by the Commissioner. In one paragraph of her affidavit, Ms. Gigou asserts that s. 91(1) only targets knowingly false statements. She states that the Commissioner is of the opinion "that a false statement must have been made knowingly to be caught by the prohibition at section 91." In another paragraph, however, she suggests s. 91(1) also captures false statements that were made recklessly. Ms. Gigou states that to prove a contravention of s. 91(1), the prosecutor must show that the person or entity "knew that the statement was false, or else that the person or entity was willfully blind or reckless about the truthfulness of the statement." She also states that the Commissioner does not believe that s. 91(1) captures "statements that are based on reasonable interpretations of credible information from a source reasonably expected to be knowledgeable in the matter." In cross-examination, Ms. Gigou confirmed that the Commissioner could prosecute someone for breaching s. 91(1) of the *CEA* if they were reckless as to the truthfulness of the statement even if they did not know it was false.

[63] To the extent the Commissioner is of the view that the offence of contravening s. 91(1) can be made out if the individual was reckless as to the truthfulness of the statement, that interpretation is inconsistent with the Government's position that the *mens*

rea for contravening s. 91(1) has not changed with the passing of Bill C-76 and continues to only capture statements that are known to be untrue. If an offence includes knowledge as an element of the *mens rea*, proof of recklessness will not suffice: *R. v. Zundel* (1987), 58 O.R. (2d) 129 (Ont. C.A.), at para. 188; *R. v. Sandhu*, 1989 CanLII 7102 (ON CA), at paras. 15-16.

[64] When knowledge was an express element of the *mens rea* for contravening s. 91(1), the prosecutor had to prove that the individual subjectively knew the content of the statement made or published was not true or that the individual was willfully blind to the truthfulness of the statement. Willful blindness is not a different *mens rea*; it is an alternate way to prove knowledge. As the Supreme Court of Canada held in *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 21, willful blindness "imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries." Willful blindness is equivalent to knowledge because the accused made a decision to remain deliberately ignorant.

[65] Recklessness, on the other hand, is distinct from knowledge. Recklessness involves an accused person being aware that there is some risk involved in his or her conduct and deciding to act in the face of that risk: *R. v. Sansregret*, [1985] 1 S.C.R. 570, at para. 16. If recklessness were the *mens rea* for contravening s. 91(1), the prosecutor would not have to prove subjective knowledge or willful blindness. The prosecutor would only have to prove that the person understood there was a *risk* that the statement was false but published it anyway. This is not the same as making a deliberate decision to publish a statement knowing that it is false.

[66] The Court of Appeal for Ontario addressed the distinction between knowledge and recklessness directly in 1987 in *R. v. Zundel.* Mr. Zundel was convicted of the *Criminal Code* offence of knowingly spreading false news. He published a pamphlet denying the Holocaust occurred. The trial judge instructed the jury that the Crown must prove beyond a reasonable doubt that Mr. Zundel had no honest belief in the truth of the pamphlet. The Ontario Court of Appeal held that absence of an honest belief in the truth of a statement is not the same thing as knowledge that the statement is false: "The state of mind of one who publishes a false document with no honest belief in its truth, not caring whether it is true or false, is recklessness with respect to its falsity, not knowledge of its falsity." The Court further held that recklessness as to the truth or falsity of the statement is not enough because the *mens rea* expressly required proof of knowledge.

[67] Prior to 2018, when s. 91(1) included the word knowingly, proof of recklessness would not have been sufficient to establish the *mens rea* of the offence of contravening s. 91(1). If the Commissioner's interpretation is correct that the *mens rea* s. 91(1) can now be satisfied with proof of recklessness, Bill C-76 substantively changed the *mens rea* requirement and actual knowledge is no longer requred. Alternatively, if the Attorney General's position that the offence of contravening s. 91(1) still requires proof of knowledge is to be accepted, the Commissioner's interpretation is legally wrong. The Commissioner's interpretation of s. 91(1) is not, of course, determinative or binding on

the court. Nonetheless, Ms. Gigou's testimony demonstrates the confusion that arises when Parliament does not clearly articular the *mens rea* in the prohibition or the offence.

G. Conclusion

[68] Neither the comments made during the legislative process nor the Commissioner's interpretation of the provision assist me in determining the *mens rea* of the offence of contravening s. 91(1) of the *CEA*. I am, therefore, left to infer Parliament's intent from the language of s. 91(1) read in the context of the *CEA* as a whole.

[69] Parliament is presumed to know the legal context in which it introduces legislation: *R. v Summers*, 2014 SCC 26 at para. 54. Parliament must, therefore, be presumed to know the difference between *mens rea* that requires proof of an ulterior purpose and *mens rea* that requires proof of knowledge. Parliament made a deliberate decision to remove the word knowingly from s. 91(1).

[70] Parliament is also presumed to use words consistently throughout a piece of legislation: Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), p. 43. Legislation should be taken to be internally consistent and coherent: *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739, at para. 47. Knowledge is a specific *mens rea* requirement that Parliament chose to remove from s. 91(1). Parliament also chose to leave the word knowingly in other provisions of the *CEA*. The only reasonable interpretation is that Parliament intended the sections of the *CEA* that contain the word knowingly to mean something different than those where that word is omitted or removed.

[71] After a careful consideration of the amendments in the context of the *CEA* as a whole, I am left with only one plausible interpretation that Parliament intended the removal of the word knowingly from s. 91(1) to reflect a substantive change to the prohibition and offence. I find that, as currently drafted, the offence of contravening s. 91(1) of the *CEA* does not require proof that the person or entity knew the statement made was false.

[72] The Attorney General conceded that if I find that knowledge is not an element of the offence of contravening s. 91(1), it is not a justifiable limit under s. 1 of the *Charter*. The Attorney General's argument under s. 1 of the *Charter* was premised on knowledge being an element of the *mens rea*. I agree that without knowledge as an element of the *mens rea* for contravening s. 91(1), the prohibition in s. 91(1) cannot meet the minimal impairment requirement under s. 1 of the *Charter*.

[73] The Attorney General argued that if I find s. 91(1) is not a justifiable limit under s. 1 of the *Charter*, I should suspend the declaration of invalidity for 12 months. To justify suspending the declaration of invalidity, the Attorney General must show that an immediate declaration of invalidity would "pose a danger to the public or imperil the rule of law": *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 98. More recently, the Supreme Court of Canada confirmed that a suspended declaration of invalidity should be rare and should only be granted if an immediately effective declaration would endanger a compelling public interest that outweighs the public interest in enforcing the *Charter*: *Ontario (Attorney General) v. G.*, 2020 SCC 38, at paras. 83, 126-139.

[74] The Attorney General did not address this issue in its written submissions and made no substantive argument about how the public or the rule of law would be endangered if the declaration of invalidity were not suspended. I recognize that if I decline to suspend the declaration of invalidity, there is a risk that a federal election might be called before Parliament can enact a replacement to s. 91 of the *CEA*, should it wish to do so. However, that would not leave false statements during an election completely unregulated. Recourse could still be had to the civil law of defamation or the *Criminal Code* provisions that prohibit defamatory libel. In my view, the Attorney General has not established that there is a compelling public interest that must be protected by a suspension of the declaration of invalidity.

[75] I find that s. 91(1) of the *CEA* violates s. 2(b) of the *Charter* and is not saved under s. 1. Pursuant to s. 52(1) of the *Constitution Act, 1982*, s. 91(1) of the *CEA* is of no force or effect.

[76] I urge the parties to reach an agreement on the issue of costs. If they are unable to do so, CFF may serve and file written submissions on costs of no more than five (5) pages together with its costs outline and any supporting authority no later than March 5, 2021. The Attorney General may serve and file written responding submissions on costs of no more than five (5) pages with supporting authorities no later than March 19, 2021. In the event that I do not receive any written cost submissions by March 23, 2021, I will deem the issue of costs to have been settled.

Davies J.

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

CANDIAN CONSTITUTION FOUNDATION

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

PEN CANADA

Intervener

REASONS FOR JUDGMENT

Davies J.

Released: February 19, 2021