THE CHARTER AND ELECTION LAW IN CANADA:
TOWARDS A UNIFIED THEORY OF JUDICIAL REVIEW?

by

EMILY SUSAN LETKEMAN

B.A., University of Victoria, 1999

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE DEGREE

MASTER OF ARTS

in

THE FACULTY OF GRADUATE STUDIES

(Department of Political Science)

We accept this thesis as conforming to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

October 2001

© Emily Susan Letkeman, 2001
In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of Political Science

The University of British Columbia
Vancouver, Canada

Date 5 OCT 01

DE-6 (2/88)
ABSTRACT

The advent of the Charter of Rights and Freedoms signaled a new and vastly expanded role for the judiciary. By entrenching our civil liberties into the Canadian Constitution, the courts were given the express authority to override inconsistent statutes. Due to the inherent overlap between law and politics, election law is an area that is particularly sensitive to this recent enlargement of judicial power. Despite this, the courts have scrutinized many areas of election law and many federal and provincial statutes have been fundamentally altered. The purpose of this thesis is to determine whether the courts have developed a uniform theory of judicial review where election law is concerned via four case studies: electoral boundary redistribution, prisoner voting rights, the publication of opinion polls during campaigns and third party spending limits. Through an extensive review of the relevant case law and literature, I conclude that the courts have failed to develop a coherent and consistent theory judicial review regarding the application of the Charter to election law. My analysis reveals that the inconsistencies stem largely from three main sources: first is the failure of the courts to adopt a single vision of what constitutes a fair electoral system; second is that the case studies are dealing with two different sections of the Charter (ss. 2(b) and 3); and third is the Oakes test which has expanded judicial discretion along with the potential for disparity. If consistency is ever going to be achieved, the courts need to adopt a single vision of democracy in Canada. Until then, we are left to guess when our political rights may be justifiably restricted under the Charter.
### TABLE OF CONTENTS

Abstract .......................................................................................................................... ii

Table of Contents .......................................................................................................... iii

Acknowledgements ....................................................................................................... iv

**CHAPTER I**

<table>
<thead>
<tr>
<th>Introduction</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1 The Political Questions Doctrine</td>
<td>4</td>
</tr>
<tr>
<td>1.2 Interpretivism v. Noninterpretivism</td>
<td>6</td>
</tr>
<tr>
<td>1.3 The Purposive Analysis</td>
<td>8</td>
</tr>
</tbody>
</table>

**CHAPTER II**

<table>
<thead>
<tr>
<th>Electoral Boundary Redistribution</th>
<th>12</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1 The American Experience</td>
<td>14</td>
</tr>
<tr>
<td>2.2 The <em>Dixon</em> Case</td>
<td>17</td>
</tr>
<tr>
<td>2.3 The Saskatchewan Court of Appeal</td>
<td>22</td>
</tr>
<tr>
<td>2.4 The Supreme Court of Canada</td>
<td>25</td>
</tr>
<tr>
<td>2.5 Conclusions</td>
<td>27</td>
</tr>
</tbody>
</table>

**CHAPTER III**

<table>
<thead>
<tr>
<th>Prisoner Voting Rights</th>
<th>31</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1 Provincial Jurisprudence</td>
<td>32</td>
</tr>
<tr>
<td>3.2 Federal Jurisprudence</td>
<td>35</td>
</tr>
<tr>
<td>3.3 Conclusions</td>
<td>42</td>
</tr>
</tbody>
</table>

**CHAPTER IV**

<table>
<thead>
<tr>
<th>Opinion Poll Restrictions During Campaigns</th>
<th>47</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1 The Ontario Courts and s. 322.1</td>
<td>49</td>
</tr>
<tr>
<td>4.2 The Supreme Court of Canada</td>
<td>54</td>
</tr>
<tr>
<td>4.3 Opinion Polls in British Columbia</td>
<td>56</td>
</tr>
<tr>
<td>4.4 Conclusions</td>
<td>57</td>
</tr>
</tbody>
</table>

**CHAPTER V**

<table>
<thead>
<tr>
<th>Third Party Spending Limits During Campaigns</th>
<th>62</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1 The Alberta Courts</td>
<td>64</td>
</tr>
<tr>
<td>5.2 The Supreme Court of Canada</td>
<td>68</td>
</tr>
<tr>
<td>5.3 Limits in British Columbia</td>
<td>69</td>
</tr>
<tr>
<td>5.4 Return to Alberta: Strike 3?</td>
<td>71</td>
</tr>
<tr>
<td>5.5 Conclusions</td>
<td>74</td>
</tr>
</tbody>
</table>

**CHAPTER VI**

<table>
<thead>
<tr>
<th>Conclusion</th>
<th>80</th>
</tr>
</thead>
</table>

Bibliography .................................................................................................................. 89
ACKNOWLEDGMENTS

I would like to thank my thesis supervisor, Dr. Donald Blake, for all of his helpful comments and criticisms. Special thanks go to my parents, Ray and Susan, my sisters, Jeni and Carrie, and also to Oliver Hanson, for providing constant encouragement and support throughout the work on this thesis.
INTRODUCTION

The advent of the Charter of Rights and Freedoms\(^1\) signaled a new and vastly expanded role for the Canadian judiciary. Until 1982, Canadian politics and constitutional adjudication had revolved around federalism and the division of powers. However, the inclusion of the Charter into the Canadian Constitution further added the protection and scope of our civil liberties to the constitutional responsibilities required of our courts. Prior to the entrenchment of the Charter, the Diefenbaker government attempted to reconcile Canada’s lack of a constitutional guarantee of civil liberties through the enactment of the Bill of Rights\(^2\) in 1960. Due to the Bill’s lack of constitutional entrenchment, however, the judiciary remained hesitant to use it to render statutes of Parliament inoperative.\(^3\) Not only was the Bill simply a statute, it also did not hold a clear constitutional mandate “to qualify the traditional sovereignty of Parliament.”\(^4\)

The ineffectiveness of the Bill of Rights led to the drafting and eventual entrenching of a constitutional guarantee of civil liberties in 1982. Whereas the Bill was merely a federal statute, the Charter is part of the Canadian Constitution and carries with it the express authority to override inconsistent statutes. By entrenching the Charter of Rights and Freedoms in the Canadian Constitution, any doubt regarding the ability of the judiciary to strike down both provincial and federal legislation for violating its guarantees was removed.

---

\(^2\) The Canadian Bill of Rights, S.C. 1960, c. 44.
\(^3\) The Supreme Court of Canada only utilized the Bill once (prior to the Charter) to render a statute inoperative in The Queen v. Drybones [1970] S.C.R. 282.
Unlike the American Bill of Rights\(^5\), the \textit{Constitution Act, 1982} explicitly mandates the power of judicial review in Canada via sections 52(1)\(^6\) and 24(1)\(^7\). Despite this express power, however, the legitimacy of judicial review remains a major source of controversy in both legal and political circles in Canada. As Peter Hogg explains, the fundamental conflict stems from the ability of the non-elected, non-accountable judges to nullify acts of elected legislative bodies and they can do so in “unpredictable ways.”\(^8\) Thus, the power of judicial review threatens the very foundations of democracy in Canada by allowing the judiciary to overrule the decisions of the democratically elected legislatures for reasons that, arguably, the courts have fashioned themselves. Building on this concern, Christopher Manfredi argues that the enactment of the Charter, and the subsequent expansion of judicial review in Canada, has created a “paradox of modern liberal constitutionalism.”\(^9\) This paradox stems from the power of judicial review that is limited only by a constitution whose meaning the courts alone define and, thus, judicial power is no longer itself constrained by constitutional limits.\(^10\)

The inconsistencies that exist between judicial review and democracy are obviously not without foundation. However, an area that is particularly sensitive to this recent enlargement of judicial power is election law. The multitude of laws that provide the basis of our electoral scheme work together to define democracy in Canada. They

\(^5\) Judicial review in the United States was confirmed in \textit{Marbury v. Madison} (1803) 5 U.S. (1 Cranch) 137, rather than an express mandate from the American Constitution.  
\(^6\) s. 52(1) – The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. 
\(^7\) S. 24(1) – Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just under the circumstances. 
\(^10\) \textit{Ibid.} 22.
supply the procedural rules and guidelines for how our representatives are elected to the legislatures and the manner in which they will govern. As a consequence, there exists inevitable and considerable overlap between theambits of electoral law and politics. It is, therefore, arguable that this is an area of the law in which the judiciary ought to be exercising considerable restraint by way of deference to the legislatures. To allow the judiciary to define the parameters of election law through the subversion of the legislative process undermines the fundamental principles of democracy in Canada.

Despite these arguments, the courts have scrutinized many areas of election law and several provincial and federal statutes have been fundamentally altered. The purpose of this thesis is to analyze how the Charter has affected four specific areas of election law via judicial review in Canada: electoral boundary redistribution, prisoner voting rights, the publication of opinion polls during campaigns and third party spending limits.\textsuperscript{11} Through an extensive review of the relevant case law and literature, I intend to fulfill the main goal of this thesis: to evaluate how the courts have approached Charter challenges to election law and, in particular, whether the judgments can be regarded as consistent. In determining the level of judicial intervention in this area, I have taken the approach of Knopff and Morton that, in assessing this, one must not look only at the bottom line outcome of the cases, but also the judicial reasoning employed in these cases.\textsuperscript{12} By identifying (if possible) the theories of constitutional interpretation and application employed in the relevant cases, it will be possible to ascertain whether the courts have been successful in developing a unified theory of judicial review regarding Charter challenges to Canadian election law.

\textsuperscript{11} I specifically chose these four topics because I believe that these are the areas of election law most affected by the Charter.

I will begin my analysis by giving a brief overview of the relevant theories regarding judicial review and constitutional interpretation. Because the Charter is a relative newcomer as a basis for judicial review, much of the theoretical discussion will include a significant American content. This will be followed by a detailed analysis of the four aforementioned case studies. The conclusion will attempt to answer the research question of how the courts have applied the Charter to election law in Canada.

**The Political Questions Doctrine**

The Charter’s expansion of judicial review to include the protection of individual rights and freedoms has forced the courts to tackle a wide range of previously unlitigable issues. Although this draws major criticism from opponents of judicial review, Justice McLachlin (as she then was), correctly points out that the courts cannot avoid the new responsibilities and powers that the legislatures have placed upon them. It is inescapable that some of these responsibilities include making value judgments concerning the meaning of the rights and freedoms in the Charter. The duty of the judiciary of defining the scope of Charter rights leaves the distinction between law and politics often blurred. As Peter Hogg argues, “[b]y denying government the power to do something it wants to do, or even by affirming the existence of the power, the courts are inescapably important parties to political controversies.”

This argument rings especially true when the subject of judicial review is election law. The statutes that govern elections in Canada form the basis of our political system and are the result of a careful balancing of political interests performed within the

---

legislatures. Due to the political bargaining associated with electoral law, it is arguable that this is an inappropriate area for the courts to tread. This criticism stems from the well-established principle in American constitutional law that there are certain kinds of "political questions" that a court ought to refuse to decide.\textsuperscript{15} More specifically, many issues such as those concerning elections should be found nonjusticiable because of a lack of judicially discoverable and manageable standards for resolving them.\textsuperscript{16} Despite the existence of the political questions doctrine, the Supreme Court of the United States has continuously intervened in many areas of law where the distinction between law and politics is not always clear.

The Supreme Court of Canada rejected the importation of the political questions doctrine in \textit{Operation Dismantle v. Canada}.\textsuperscript{17} Justice Bertha Wilson rejected the argument of the Attorney General of Canada that a statute regarding American cruise missile testing involved a political question and was, thus, immune from judicial review. Conversely, the Supreme Court held that by virtue of ss. 32(1)(a), 24(1) and 52(1), any enactments of the executive are subject to review by the courts. Furthermore, Justice Wilson emphasized that "the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state."\textsuperscript{19} The judgment clarified that the courts must never question the

\textsuperscript{16} \textit{Ibid.} 217. Justice Frankfurter argued in dissent that the reapportionment of electoral districts should be found nonjusticiable based on the political questions doctrine for the lack of manageable standards for the judiciary.
\textsuperscript{17} [1985] 1 S.C.J. No. 22 (S.C.C.), online: QL (C.J).
\textsuperscript{18} s. 32(1)(a) of the \textit{Charter, supra} note 1, states "This Charter applies to the Parliament of Canada in respect of all matters within the authority of Parliament including all matter relating to the Yukon Territory and Northwest Territories.
\textsuperscript{19} \textit{Operation Dismantle v. Canada, supra} note 17, at para. 62.
wisdom or appropriateness of legislation but only whether it violates the rights enshrined in the Charter.

Therefore, to argue that the courts should avoid judicial review of election law due to its inherent political nature is without foundation in light of the decision given in *Operation Dismantle*. For the Court is not determining the political issue of whether the particular piece of legislation is sound, but whether it violates the rights of citizens protected by the Charter. Justice Wilson argued that in the latter instances, "it is not only appropriate that we answer the question; it is our obligation under the Charter to do so."\(^{20}\)

Thus, when a law pertaining to elections impinges upon a Charter right, the issue is not whether the courts will intervene, but rather, to what degree of judicial activism the court will choose and to what extent they will defer to the legislature. The level of judicial activism or restraint exercised by the courts depends in large part on the theories of judicial review and constitutional interpretation that the court believes is most appropriate. For a better understanding of this matter, the following sections provide a brief overview of the relevant theories from both the United States and Canada.

*Interpretivism versus Noninterpretivism*

As previously mentioned, whether a court will act in an activist or restrained manner will largely depend upon the theory of constitutional interpretation employed in the particular case. In the United States, the debate surrounding constitutional interpretation has settled into a theoretical dichotomy between interpretivism and noninterpretivism. Interpretivist theorists contend that the basis of judicial review can

\(^{20}\) *Ibid.* at para. 64.
only be found in the specific language of the constitution. Instead of reaching for meaning from outside of the “four corners” of the Constitution, the judiciary must focus on the original intent of each provision for a better understanding of its function. Interpretivists argue that limiting judicial review to this method avoids the crises that occur when the judiciary strays from the original understanding of the constitutional text.²¹

Conversely, noninterpretivists argue that to confine judicial review to the original intent of the constitutional drafters is to be “shackled by the past and to allow long dead generations to govern living ones.”²² They contend that it is impossible to define the meaning of rights exclusively from the text due to the vague and ambiguous language. Based on this, the courts are, by necessity, forced to draw on outside sources when interpreting the constitution.

Both the interpretivist and noninterpretivist theories have been largely criticized for their apparent shortcomings. Interpretivism’s emphasis on original understanding fails to address the problem associated with ascertaining uniform intention considering the number of people involved in the drafting of the Charter. Additionally, it assumes that the drafters themselves had clear views about the meaning of the words they were adopting.²³ Furthermore, there is evidence that “the original understanding of the framers of the Canadian Charter was not that the Charter should be frozen in the shape that seemed good in 1982, but that the rights should be subject to changing judicial interpretations.”²⁴ Although the original intent of the drafters may be helpful (if it can be

²² Knopff & Morton, Charter Politics, supra note 12, 110.
²³ P. Hogg, The Charter of Rights and American Theories of Interpretation, supra note 8, 96.
ascertained), treating it as conclusive would be to freeze the Charter and the Constitution in time while denying it the flexibility to adapt to changing circumstances and needs. Scott Fairly correctly points out that pure interpretivism should only be of limited use because “constitutions are by necessity, if not always by design, evolving documents, a living tree.”

The main criticism of noninterpretivism is that it permits the judiciary to reach beyond the “four corners” of the constitution in order to define the scope of our civil liberties. Although it allows for a more flexible interpretation than interpretivism, Manfredi argues that noninterpretivism gives the judiciary too much discretion to confer meaning on the text rather than from the text. Knopff and Morton agree that noninterpretivism is a device utilized to justify the judicial creation of new rights that may not have been intended by the framers of the Charter. In light of these valid criticisms, how is the Canadian judiciary to reconcile the interpretivist and noninterpretivist theories with regards to Charter application?

The Purposive Analysis

The Canadian courts recognized early that it would be inappropriate to adopt only one of the two theories of interpretation. As an alternative, the Supreme Court of Canada developed the “purposive” method of interpretation. Justice Dickson explained in *R. v. Big M Drug Mart Ltd.*, that the purposive analysis would refer to the language of the

---

particular provision, the historical origins of the concepts utilized, and where applicable, to the meaning and purpose of other specific rights and freedoms with which it is associated within the Charter.\textsuperscript{30}

Sharpe and Swinton argue that the Supreme Court of Canada’s embracing of the purposive method of interpretation is “indicative of the most significant effect of the Charter upon the role of the judiciary.”\textsuperscript{31} More specifically, the purposive method essentially permits the courts to look beyond the text and its original meaning in order to determine its overall purpose. As to whether this is possible is open to debate. However, the adoption of the purposive scheme by the Supreme Court indicates that many of the Charter questions that the judiciary are called upon to answer, cannot be addressed adequately by reference only to traditional legal sources.\textsuperscript{32}

Even prior to the enactment of the Charter, judicial review in Canada recognized that the constitution is to be regarded as a “living tree capable of growth and expansion within its natural limits.”\textsuperscript{33} To place too much emphasis on the original intent of the framers is to “stunt” the growth of the newly planted Charter tree.\textsuperscript{34} Peter Hogg points out that the only way for the courts to avoid this is to give the constitution a “progressive” interpretation so that it applies to contemporary conditions that could not have been foreseen by the framers.\textsuperscript{35}

The development of the purposive method of interpretation by the Supreme Court of Canada carries with it both interpretivist and noninterpretivist qualities. This mode of

\textsuperscript{30} Ibid. 344.
\textsuperscript{32} Ibid.
\textsuperscript{33} Edwards \textit{v.} Canada (Attorney General) [1930] 1 D.L.R. 98.
\textsuperscript{34} \textit{Reference Re Motor Vehicle Act (British Columbia)} s. 94(2) [1985] S.C.J. No. 73 at para. 52 (S.C.C.), online: QL (C.J.).
\textsuperscript{35} P. Hogg, \textit{The Charter of Rights and American Theories of Interpretation}, supra note 8, 113.
analysis allows the judiciary to pick from a variety of criteria when deciding constitutional issues. Consequently, the discretionary powers of the courts have been vastly expanded. And along with this has come the increased possibility of judicial contradictions and inconsistencies.

The level of discretion exercised by the courts has also been enlarged by s. 1 of the Charter, which permits legislative limits on Charter rights if they can be "reasonably and demonstrably justified in a free and democratic society." Although the Supreme Court formulated guidelines in *R. v. Oakes*[^36] to determine whether a Charter breach can be constitutionally justified, the process has inevitably forced the judiciary into the role of policy maker. However, as will be seen in the subsequent case studies, the *Oakes* test is subject to many methods of interpretation and application, thus, providing another potential area for judicial unpredictability.

It also must be recognized that the case studies I have selected involve two different sections of the Charter. The chapters regarding electoral boundary redistribution and prisoner voting rights deal with the right to vote under s. 3 and those concerning opinion poll restrictions and third party spending limits deal primarily with the freedom of expression under s. 2(b). Through my analysis, I will show that although all of the four case studies concern election law, this has not necessarily guaranteed uniform treatment under the Charter. More specifically, I will consider whether any inconsistencies that exist can be attributed to the differing sections of the Charter or whether they are the result of other extrinsic factors.

The following case studies will take a closer look at how the courts have approached the judicial review of the aforementioned areas of election law. In particular,

I will assess how consistent the judiciary has been in applying the Charter. I will show that while some of the judicial variances can partially be attributed to the fact that the cases concern two different sections of the Charter, many of the inconsistencies are better explained via conflicting methods of constitutional interpretation as well as a failure of the Canadian judiciary to adopt a uniform application of s. 1 to election law.
CHAPTER 2: ELECTORAL BOUNDARY REDISTRIBUTION

Prior to the enactment of the Charter of Rights and Freedoms in 1982, Canada did not have a constitutionally guaranteed right to vote. The authority for setting the guidelines and standards surrounding the voting process lay solely within each legislature. With the entrenchment of the right to vote in section 3 of the Charter, however, the last word on our democratic rights now rests with the Canadian judiciary. Shortly before the implementation of the Charter, Donald Smiley referred to section 3 as "one of the rights contained in the Charter that are stated so explicitly that there is little doubt as to their meaning or effect."

Despite the seemingly unequivocal language utilized, Smiley's portrayal of this provision as unambiguous would prove to have been made prematurely. Once its definition was questioned before the courts, it was determined that the right to vote in section 3 governs not only the scope of who can vote, but also the extent to which electoral boundaries conform to its underlying principles. As Professors Knopff and Morton point out, the fundamental difficulty lies in the question of whether section 3 guarantees only the "equal right to vote" or also the "right to an equal vote." The effect of adopting the latter definition would cause the electoral boundary schemes in many jurisdictions to be constitutionally suspect due to wide population variances between the constituencies.

37 Section 3 states "[E]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."
The practice of electoral boundary redistribution in Canada has traditionally focused on regional representation as the guiding principle at the inevitable expense of numeric equality. The enactment of the Charter, and the consequent entrenchment of the right to vote, has permitted these inequities to be scrutinized by the courts. The arguments for a more stringent standard of equality find their roots in the American principle of one man, one vote which had been accepted decades earlier in a series of Supreme Court decisions regarding electoral apportionment, *infra*. The contribution of the constitutional entrenchment of the right to vote is the new force behind such arguments, for they can now be made before the courts. Consequently, the judiciary now has the authority to address the fundamental underlying tension raised by electoral boundary redistribution: regional representation, based on federalism, versus one person, one vote based on the Charter.

The purpose of this chapter is to assess how the courts have approached the judicial review of electoral boundary distribution legislation. Through an examination of the reasoning behind the decisions, I will evaluate how the various approaches utilized in each case relate to the degree of judicial activism or restraint that has been exercised in this area of election law. Since the push for a more stringent standard of constituency equality, as well as a greater judicial presence in the apportionment process, stems in large part from U.S. jurisprudence, I will begin with a brief overview of the series of cases that sparked the "reapportionment revolution" south of the border.


The American Experience

Prior to 1962, the Supreme Court of the United States refused to entertain constitutional challenges involving electoral boundary reapportionment. This was an area of law traditionally regarded as an inherently political matter reserved for the legislatures. Robert Dixon explained that, indeed, one of the most active categories of "political questions" has been "the general judicial disposition to reject suits questioning apportionment of seats in legislative assemblies."42 This policy of judicial restraint was most famously echoed in the plurality judgment delivered by Justice Frankfurter in Colegrove v. Green.43 In refusing to consider a challenge to the Congressional state districts in Illinois, he explained that- "nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests"44..."and courts ought not to enter this political thicket."45 The Court believed that deference to the legislatures in matters of apportionment was in keeping with the spirit of the Constitution.46

However, the end of the Second World War sparked major population shifts resulting in the depletion of rural areas paralleled by the expansion of the urban centres. This resulted in what has been called the "silent gerrymander" whereby many states, particularly in the segregated South, failed to adjust their electoral boundary schemes in order to reflect the demographic changes. In response, residents of Tennessee

43 Colegrove v. Green et al. [1946] SCT-QL 817; 328 U.S. 549.
44 Ibid. at para. 9.
commenced a constitutional challenge against their state legislative constituencies that contained population disparities as high as 20 to 1 in favour of rural areas. Instead of refusing to decide the case based on the political questions doctrine, the Supreme Court took an about face from their previous decision in *Baker v. Carr* by finding the issue to be justiciable. Speaking for the majority, Justice Brennan reasoned that “if discrimination is sufficiently shown, the right to relief under the Equal Protection Clause is not diminished by the fact that the discrimination relates to political rights.”

In dissent, Justice Frankfurter reiterated his argument laid out in *Colegrove* that reapportionment is undeniably a matter of legislative jurisdiction. He emphasized the lack of “legal standards or criteria or even reliable analogies to draw upon for making judicial judgments.” Frankfurter built his arguments on an interpretivist theory of constitutional interpretation by stressing the evidence that “the framers of the Constitution persistently rejected a proposal that embodied this assumption.” Despite the powerful and lengthy dissent in what Dixon described as “Frankfurter’s last tour de force”, the effect of the majority judgment in *Baker v. Carr* was to spark a reapportionment revolution in the United States.

Two years following *Baker*, the Supreme Court employed its recently acquired authority to establish the principle of one-man, one-vote as the overriding consideration when redistributing electoral boundaries. In *Wesberry v. Sanders*, The Court ruled the congressional districts in Georgia that had not been altered since 1931 to be in violation

---

of the Constitution. Justice Warren explained that “the Constitution requires that “as nearly as practically possible, one man’s vote should be worth as much as another’s.” Like Frankfurter in his dissent in *Baker*, Warren J. considered the intent of the framers regarding apportionment, however, he reached a different conclusion: “We do not believe that the Framers of the Constitution intended to permit the same vote diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants.”

During that same year, the Court employed similar reasoning to find the state legislative districts in Alabama in violation of the Constitution in *Reynolds v. Simms.* Chief Justice Warren recognized that it is a “practical impossibility” to arrange legislative districts so as to contain a perfectly equal number of residents, however, the principle of equality must be the guiding criterion. This is because “citizens, not history or economic interests cast votes. Considerations of area alone provide an insufficient justification for deviation from the equal population principle. Again, people, not land or trees or pastures, vote.”

What is also remarkable about the acceptance, and eventual requirement, of the one man, one vote principle is that the Supreme Court justices utilized the Framers’

---

34 377 U.S. 533 (1964), [1964] SCT-QL 1203, online: QL.
37 Although *Baker*, *Wesberry* and *Reynolds* emphasize the importance of voter parity between districts, the decisions still left room for the consideration of other factors. It was the cases that followed which made population numbers the only consideration to be taken into account. For example, in *Kirkpatrick v. Priesler* 394 U.S. 526 (1969), the Missouri congressional districts allowing for a total variation of 5.97 percent were found to be unconstitutional. Similarly, in *Karcher v. Daggett* 462 U.S. 725 (1983), the Court struck down the law establishing the New Jersey congressional districts that allowed for only a 1 percent total deviation. From these later decisions, Scarrow argues “it is clear that the vote worth approach to redistricting has submerged other theories of representation which may have argued for the preservation of traditional geographic, community and political boundaries...Congressional districts are now totally artificial creations.” *Supra* note 46, 104.
intentions to justify both rejecting the principle as well as accepting it. This apparent contradiction, thus, reveals a major shortcoming of the interpretivist and originalist methods of constitutional interpretation. It guarantees neither consistency nor predictability.

Nevertheless, the judicial activism sparked by Baker, and confirmed in subsequent decisions, has made the one person, one vote principle a constitutional requirement for electoral boundary redistribution. As Kent Roach points out, “American courts had asserted a responsibility to scrutinize apportionment decisions and, in the quest for manageable standards of review, had devised a constitutional standard which left no room to defer to the legislature’s balancing of interests.” With the entrenchment of the right to vote in the Canadian Constitution, the issue would now be whether the Canadian judiciary would assume the same activist role as the United States Supreme Court where electoral boundary reapportionment is concerned.

The Dixon Case: Electoral Boundary Redistribution and the Right to Vote in British Columbia

Although Canada has been moving in a general trend toward greater equality of voting power pertaining to electoral boundary schemes, many jurisdictions, including British Columbia, were slow in following suit. In 1986, deviations in B.C. ranged from -86.8 percent below the population average to +63.2 percent above the norm. These vast inequalities led the British Columbia Civil Liberties Association to launch the first

---

59 See R.K. Carty, The Electoral Boundary Readjustment in Canada (1985) 15:3 American Review of Canadian Studies, 273. Carty's study concluded that although prior to the Charter, much of changes in Canadian constituency boundary readjustment patterns were procedural in an attempt to eliminate gerrymandering, the “modest improvement” in constituency equality has been “a subsidiary benefit.”
Canadian constitutional challenge to an electoral boundary scheme before the British Columbia Supreme Court.\textsuperscript{61} The question before the Court was simply stated: what is meant by the right to vote in s. 3?\textsuperscript{62}

However, before this could be answered, the Court had to first settle the issue of justiciability. Using language similar to the “political questions doctrine” advocated by Justice Frankfurter in the American apportionment cases, the Attorney General for British Columbia argued that ruling on this issue would require the Court “to depart dramatically from its traditional judicial role and to enter into fundamental questions of social and institutional policy where it does not belong.”\textsuperscript{63} However, the Supreme Court of Canada had previously rejected the existence of the political questions doctrine in Canadian constitutional law in \textit{Operation Dismantle v. The Queen.}\textsuperscript{64} Justice McLachlin explained that “[i]f in giving substance to this right to vote, the Court interprets s. 3 as granting citizens the right to a certain degree of proportionate representation, then Legislative efforts must be measured against this standard and if they fall short, be declared unconstitutional.”\textsuperscript{65}

In constructing the scope of the right to vote in s. 3, McLachlin emphasized that it must be given a generous interpretation. This would prevent the right from being read too narrowly so as to limit it to guaranteeing only the procedural right to cast a ballot. In

\textsuperscript{61} \textit{Ibid.}
\textsuperscript{62} \textit{Ibid.} 5. Prior to this decision, a preliminary hearing was held to determine whether the British Columbia Constitution is subject to constitutional scrutiny in \textit{Dixon v. Attorney General (British Columbia)} (1986), 31 D.L.R. (4\textsuperscript{th}) 546. McEachern, C.J.S.C. (as he then was) held that “although the constitutional tree may be immune from Charter scrutiny, the fruit of the constitutional tree is not. If the fruit of the constitutional tree does not conform to the Charter, including s. 1, then it must be to such extent be struck down.” By virtue of s. 32(1)(b) of the Charter, therefore, the impugned legislation is subject to constitutional scrutiny.
\textsuperscript{63} \textit{Ibid.} 17.
\textsuperscript{64} [1985] 1 S.C.J. No. 22 (S.C.C.) online: QL (CJ).
\textsuperscript{65} \textit{Dixon v. British Columbia, supra} note 60, 21.
order to ascertain the extent of the substantive content of the right to vote, McLachlin J.
adopted the purposive method of constitutional interpretation.\textsuperscript{66} This process would
include viewing the provision in the textual and historical context of the document as a
whole.\textsuperscript{67} More specifically, the proper purpose of the right to vote can only be
understood “in the context of an historical consideration of what the right to vote has
meant in Canadian society...s. 3 can only be determined against the backdrop of the
development of Canadian democratic rights.”\textsuperscript{68}

An examination of the history of democratic rights in Canada revealed that
although the concept of representation by population is one of the most fundamental
guarantees, tradition has allowed the accommodation of significant deviation from the
ideals of equal representation.\textsuperscript{69} Consequently, McLachlin denied the importation of the
American notion of strict voter parity into the Canadian system of electoral boundary
apportionment because “it is Canadian, not American, constitutional history, values and
philosophy which must guide this Court.”\textsuperscript{70} She reasoned that, to find to the contrary,
would assume that the Charter was intended to confer new rights on Canadian citizens
and since there was no evidence presented that this was the intention of the framers, she
was unable to accept such a change.\textsuperscript{71} Therefore, McLachlin ruled that the fundamental
principle of representative democracy is not the absolute equality of voting power, but
rather, “the relative equality of voting power.”\textsuperscript{72}

\textsuperscript{66} Ibid. 6.
\textsuperscript{67} Ibid.
\textsuperscript{68} Ibid. 7.
\textsuperscript{69} Ibid. 10. McLachlin repeated the words of Sir John A. MacDonald that “while the principle of population
was considered to a very great extent, other considerations were also held to have weight; so that different
interests, classes and localities should be fairly represented.”
\textsuperscript{70} Ibid. 9.
\textsuperscript{71} Ibid. 11-12.
\textsuperscript{72} Ibid. 12.
The Court refused to set a specific deviation limit under s. 3, instead according deference to the legislatures as they are in a better position than the courts to determine whether deviation is required.\textsuperscript{73} McLachlin explained that “the courts ought not to interfere with the legislature’s electoral map under s. 3 of the Charter unless it appears that reasonable persons applying the appropriate principles – equal voting power subject only to such limits as required for good government – could not have set the electoral boundaries as they exist.”\textsuperscript{74} However, the Chief Justice referred to appropriate deviation limits such as the 25 percent standard recommended by the Fisher Commission, but abstained from choosing a particular ideal.\textsuperscript{75} Although these examples of limits which may be judicially acceptable are a far cry from the strict parity required in the United States, the Court ruled that impugned electoral boundary scheme did not pass constitutional muster. McLachlin found the current electoral map to be in such “gross violation” of representation by population that it could not be saved under s. 1. Instead of finding the legislation to be of no force or effect, McLachlin afforded a temporary time period during which the legislature could bring into force an apportionment scheme that complied with the Charter.\textsuperscript{76}

Unlike the dramatic effects which judicial intervention had on electoral boundary reapportionment in the United States, the Dixon case caused British Columbia’s

\textsuperscript{73} Ibid.
\textsuperscript{74} Ibid. 16.
\textsuperscript{75} Ibid. 13. She explained that it “appears to be a tolerable limit, given the vast and sparsely populated regions to be found in British Columbia…In my opinion, the electoral districts proposed appear to be justified, even though the permitted deviations may be greater than have been accepted in other jurisdictions.” Ibid. 25.
\textsuperscript{76} To have deemed the legislation to be of no force or effect under s. 52(1) of the Constitution Act, 1982 would have left the province “without the machinery necessary to conduct an election in a system where in theory an election can be required at any time.” Therefore, McLachlin afforded the B.C. legislature a temporary time period during which the existing legislation remained valid and during which the legislature could bring into force a Charter compliant apportionment scheme. Ibid. 24.
reapportionment revolution to be "relatively modest and contained."\textsuperscript{77} Although this decision had the ultimate effect of finding B.C.'s electoral map unconstitutional, ironically, it did so in a very cautious and restrained fashion. As Kent Roach points out, although the Court had reached the stage of \textit{Baker} in determining that districting represents a justiciable issue, "they have defined their task of judicial review in more limited terms than the American courts have done."\textsuperscript{78} By not setting a particular deviation limit, the Court afforded the legislature a large window of discretion when devising electoral boundary schemes.

It is important at this stage to note how the reasoning behind this judgment is directly related to its relatively deferential outcome. Although McLachlin intended to employ the purposive method of constitutional interpretation, her analysis was predominantly interpretivist in practice. More specifically, the Chief Justice avoided reading any new meaning, or more importantly, a higher standard of equality into the right to vote by placing heavy emphasis on the intentions of the framers of the Charter. She did this, ironically, after the Supreme Court of Canada in \textit{Reference Re Motor Vehicle Act}\textsuperscript{79} discredited the use of original intent as a reliable method of constitutional interpretation. Wilson J. explained that "[i]f the newly planted 'living tree' which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials...do not stunt its growth."\textsuperscript{80} Considering that the right to vote in Canada has left one of the most perverted and embarrassing legacies in our


\textsuperscript{78} K. Roach, \textit{One Person, One Vote?}, supra note 58, 36.

\textsuperscript{79} \textit{Reference Re Motor Vehicle Act (British Columbia) s. 94(2) [1985] S.C.J. No. 73 (S.C.C.)}, online: QL (CJ).

\textsuperscript{80} \textit{Ibid.} at para. 52.
history books\textsuperscript{81}, it is remarkable that McLachlin assumed that it must have been explicitly intended by the framers of the Charter that the entrenched rights were not meant to change the laws as they existed.

Despite the heavy interpretivist undertones of McLachlin’s judgment, the important point is that the British Columbia map was deemed to be in violation of the newly defined right to vote in s. 3 of the Charter. As Professor Norman Ruff explained, “the most fundamental lesson to be derived from the B.C. experience is to confirm the paradox that for all their defects, the courts may prove the best and necessarily the ultimate backstop should the political processes fail. In this instance the they did not entirely fail, but they clearly did require a jumpstart.”\textsuperscript{82}

\textit{The Saskatchewan Court of Appeal: A Different Definition of the Right to Vote?}

The \textit{Dixon} decision confirmed that the issues revolving around electoral boundary reapportionment were justiciable and, thus, opened the door to citizens in other jurisdictions to constitutionally challenge their electoral maps. Four years later, the Saskatchewan provincial boundary scheme, guided by the \textit{Saskatchewan Electoral Boundaries Commission Act},\textsuperscript{83} came under attack. Of particular concern was section 14 of the Act that obliged the commission to split the province into 29 urban constituencies, 35 rural constituencies and 2 northern ridings. Section 20 of the legislation set the deviation limit from the provincial average at 25 percent for all of the ridings except the 2 northern districts which were allowed to deviate up to 50 percent. Consequently, some

\textsuperscript{81} Legislation disenfranchising Chinese, Japanese, and Natives was held intra vires by the Judicial Committee of the Privy Council in \textit{Cunningham v. Tomey Homma} (1903) A.C. 151 (P.C.). It was also not until 1960 that the Doukhobors acquired the right to vote in federal elections.

\textsuperscript{82} N. Ruff, \textit{The Right to Vote and the Inequality of Voting Power in British Columbia}, supra note 42, 142.

\textsuperscript{83} S.S. 1986-87-88, c. E-6.1.
groups such as the Society for the Advancement of Voter Equality (SAVE) argued that these provisions worked to erode the principle of representation by population and, therefore, violated their right to vote guaranteed by s. 3 of the Charter. In response to the objections raised, the Saskatchewan government referred the constitutionality of the legislation, and the constituency boundaries established by it, to the Saskatchewan Court of Appeal in 1991.\(^{84}\)

In defining the right to vote, the Court confirmed that it would give the provision a generous interpretation and would be guided by the purposive approach.\(^{85}\) Instead of looking back on the history of the right to vote in Canada as containing positive features, as McLachlin did, the Court of Appeal looked back “with dismay.”\(^{86}\) They explained that “[t]he suppression of fundamental democratic values in earlier times ought not to lead us to a restricted view of the democratic rights enshrined in the Charter... One can readily infer, for example, that s. 3 of the Charter does not contemplate the continuation of past electoral abuses.”\(^{87}\) With reference to *Reynolds v. Sims, supra*, the Court recognized that it is a practical impossibility to arrange constituencies so that each has an identical number of voters on voting day. However, “while some deviation from the concept of equal representation is inherent, any such deviation must interfere as little as possible with the controlling principle of one person, one vote.”\(^{88}\)

The Court was unconvinced that the population disparities displayed by the electoral map contributed to the enhancement of democracy and equality. Conversely,

---


\(^{85}\) Ibid. 8.

\(^{86}\) Ibid. 7. The Court looked back at the legislation which disenfranchised Chinese, Japanese, Natives, and Doukhobors... “to illustrate the obstacles placed in the path of many who sought the basic democratic ‘right to vote’ in our political system.”

\(^{87}\) Ibid. 8.

\(^{88}\) Ibid. 12.
the arbitrary division into rural and urban seats "foreclosed the boundary commission from giving the proper effect to the concept of voting equality."89 In light of these numerical inequalities, the Court concluded that the constituencies created by the Act violated the right to vote guaranteed by s. 3 of the Charter unless saved under s. 1. The Court explained that it is within s. 1 analysis that the exceptions and the balancing of competing interests can take place, "otherwise the core right which is enshrined in s. 3 would not remain intact."90

The first step of s.1 analysis91 requires that the legislation possess an objective of pressing and substantial concern in a free and democratic society. However, the Court found the legislative scheme "constitutionally flawed" because of the compulsory division of the constituencies into 35 rural and 29 urban seats "which was unknown to previous commissions". The Attorney General for Saskatchewan failed to produce evidence proving this overrepresentation of rural interests was necessary especially in light of the previous legislation, which permitted only a 15 percent deviation from the provincial population average.92 Therefore, with the exception of the two northern constituencies93, the electoral redistribution scheme could not be saved by s. 1. Although the Court did not set a de minimus deviation, it could find no evidence to justify a variation of plus or minus 25 percent set forth in the impugned legislation.

89 Ibid. 15. The constituencies ranged in size from 12,567 voters in Saskatoon-Greystone to 6309 in Athabasca. Accordingly it takes 199 voters in Saskatoon-Greystone to equal the electoral weight of 100 in Athabasca. Ibid. 18.
90 Ibid. 18.
91 The criteria that must be satisfied to establish that a limit is reasonable in a free and democratic society was laid out by the Supreme Court of Canada in R. v. Oakes [1986] 1 S.C.R. 103, at 138-139. 1. The law must pursue a sufficiently important objective; 2. The law must be rationally connected to its objective; 3. The means should impair as little as possible the right or freedom in question; 4. There must not be a disproportionately severe effect on the right on the person to whom it applies.
92 Reference Re: Electoral Boundaries Commission Act, supra note 84, 14.
93 The Court found that the extraordinary or special circumstances of the northern region demonstrated a pressing and substantial need for two constituencies. Ibid 22.
What is interesting about this case, however, is how the Court utilized the same purposive method of constitutional interpretation as employed by McLachlin in *Dixon*, yet reached a remarkably different conclusion. By focusing on the intent of the framers' and the traditional meaning of the right to vote in Canada, McLachlin defined s. 3 as requiring only a relative equality of voting power. Alternatively, by viewing the history of voting rights in Canada under a more negative light, the Court of Appeal read s. 3 so as to require a more stringent adherence to voting equality. Only the Supreme Court of Canada would be able to resolve the judicially created confusion surrounding the meaning of the right to vote.

*The Supreme Court of Canada and the Right to Vote: The Last Word?*

As Richards and Irvine point out, “the implication of the Court of Appeal’s decision was that, with the possible exception of Manitoba, every electoral map in the country was invalid.”94 Therefore, the Attorney General for Saskatchewan immediately appealed the decision to the Supreme Court of Canada. The issue of electoral boundary districting would come before Beverly McLachlin, but this time as a Justice of the Supreme Court of Canada. This reference required the Court to reconcile the seemingly incompatible apportionment standards emanating out of the British Columbia and Saskatchewan decisions. The main question put before the Court was: to what extent does s. 3 permit deviation from one person, one vote?95

---

In answering this question, McLachlin J.\textsuperscript{96}, employed the same generous and purposive approach to constitutional interpretation as was utilized in both the \textit{Dixon} and the Court of Appeal cases. Unlike the latter decision, however, McLachlin's reasoning again, revealed interpretivist undertones by focusing largely on the history of the right to vote in Canada. She explained that "there is little history or philosophy of Canadian democracy that suggests that the framers of the Charter in enacting s. 3 had as their ultimate goal the attainment of voter parity."\textsuperscript{97} McLachlin, therefore, concluded that the purpose of the right to vote "is not equality of voting power, per se, but the right to effective representation."\textsuperscript{98} The majority judgment went beyond the \textit{Dixon} decision by providing a list of what may be some acceptable reasons to justify a departure from relative parity. "Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic."\textsuperscript{99}

In applying the notion of effective representation to the Saskatchewan boundary scheme, McLachlin ruled that although the rural areas are "somewhat over-represented", the deviations are relatively small.\textsuperscript{100} Moreover, the majority did not find the imposed division of the constituencies into a set number of rural and urban ridings to be in violation of s. 3. Although there were many accusations that this legislated requirement was an attempted political gerrymander,\textsuperscript{101} McLachlin reaffirmed that the courts must be

\textsuperscript{96} Majority judgment included La Forest, Gonthier, Stevenson and Iacobucci JJ.

\textsuperscript{97} Ibid. at para. 57.

\textsuperscript{98} Ibid. at para. 49.

\textsuperscript{99} Ibid. at para. 54.

\textsuperscript{100} Ibid. at para. 73.

\textsuperscript{101} It was argued by the applicants that the compulsory division into a set number of rural and urban districts and the resultant overrepresentation of rural areas was deliberately crafted to benefit the Conservative government of Grant Devine because the majority of their electoral support came from rural areas.
"cautious in interfering unduly in decisions that involve the balancing of conflicting policy considerations."\(^{102}\)

As a result, the Court deemed the process as a whole to be fair—"the fact that the legislature was involved in the readjustment does not in itself render the process arbitrary or unfair."\(^{103}\)

Therefore, the Saskatchewan electoral boundary scheme as set out by the Electoral Boundaries Commission Act, was found not to be in violation of the right to vote in s. 3.\(^{104}\)

**Conclusion**

The Supreme Court of Canada’s adoption of “effective representation” revealed that the Court was unwilling to accept the activist stance of the American courts in requiring the strict adherence to the principle of one man, one vote. Professor Donald Blake points out that voter equality in all provinces (except Quebec) has, indeed, substantially increased since the Supreme Court’s ruling in the *Saskatchewan Reference*.\(^{105}\)

However, the decision failed to spark a massive “reapportionment revolution” based on the strict equality of voting power for reason that it allows the legislatures, rather than the courts, to balance the factors that may justify deviation from the relative equality of voting power. As Kent Roach points out, the decision...

\(^{102}\) *Ibid.* at para. 64.

\(^{103}\) *Ibid.* at para. 76.

\(^{104}\) The dissent delivered by Justice Cory (joined by Lamer C.J. and L’Heureux Dubé J.) agreed with the majority that the right to vote under s. 3 does not guarantee the absolute equality of voting power. However, the dissent found that the boundary scheme strayed too far from the “relative equality” of voting power because the process itself “shackled” the commission by requiring a mandatory division into rural and urban ridings. *Ibid.* at para. 23. In addition, the dissent found no justification for the resulting inequalities when the previous Saskatchewan map proved that it was possible to achieve equality within 15 percent of the provincial quotient while still addressing other issues. *Ibid.* at para. 22.

\(^{105}\) D. Blake, *Electoral Democracy in the Provinces* (2001) 7:2 Strengthening Canadian Democracy, a research project for the Institute for Research on Public Policy, at p. 10. The conclusion was reached by comparing the gini coefficient of inequality after the most recent redistribution in each province to the situation in the early 1980s. Another measure of equality was determined by comparing the ratio of the largest district to the smallest district in each province. See Table 3: Equality of the Vote, p. 11.
“demonstrates a tendency for the Court...to place definitional limits on some Charter rights and to defer to the legislature’s balancing of competing policy interests.” More specifically, although McLachlin stated in both the B.C. and Saskatchewan decisions that s. 3 should be afforded a “generous” interpretation, her definition failed to be broad enough so as to include a more stringent standard of voting equality. Her more narrow interpretation based on the notion of “effective representation” placed the necessary balancing of interests within s. 3, itself, rather than under s. 1. By doing so, the Court has placed an almost impossible burden on anyone wishing to challenge the constitutionality of an electoral boundary scheme. This has the effect of allowing the enacting legislature to avoid having to vigorously defend its electoral scheme under s. 1 of the Charter. Building on this argument, Robert Charney argues that if the Court was willing to accept the large disparities that existed under the Saskatchewan proposal, “one is left to wonder just how much vote dilution the Court is prepared to tolerate before the onus shifts to the government to justify the scheme.”

Although the Court adopted the purposive method of constitutional interpretation, the decision focused primarily on the history of the right to vote as well the intention of the framers’. This approach prevented the meaning of the right to vote from evolving into anything more than what we already had prior to the Charter. More importantly, it prevented the Court from requiring a stricter adherence to the principle of equality. McLachlin’s interpretivist logic, which led to the creation of the concept of “effective

representation," revealed that the Court would be highly deferential to any electoral apportionment scheme stipulated by a legislative body.\(^{108}\)

Although some may praise the Supreme Court's decision for having respected Canadian practice and tradition\(^{109}\), it is perhaps unfortunate that a more progressive approach was not employed. It is arguable that the method of analysis utilized by the Court undermines the need for a Charter at all if its only function is to affirm the inequalities associated with the status quo.\(^{110}\) The purposive approach was developed to guard against "stunting" the growth of the Charter, however, McLachlin may have frozen the meaning of the right to vote in time. Professor Ronald Fritz explains that unfortunately, Justice McLachlin "viewed Canadian constitutional history through rose-coloured glasses. She failed to see how politicians had manipulated the system...to thwart the principle of representation by population."\(^{111}\) It is thus conceivable that Supreme Court judges do not make very good historians, especially when it is possible that they have read the record selectively to fit their technique of constitutional interpretation.

It is apparent that the Court exercised restraint in upholding the Saskatchewan map, however, it has been argued that this decision may only be the beginning of future judicial activism. More specifically, the reference to minority representation as a justification for deviating from the principle of equality may lead to constitutional challenges based on gender, race and ethnicity. Professors Knopff and Morton argue that

the Supreme Court of Canada "has closed only one door to judicial activism, leaving others open...As in the United States, the one-person-one-vote jurisprudence may only be the first installment in a continuing story."\(^{112}\)

Although these challenges may be possible, the case law reveals that the success of such arguments is highly unpredictable since the notion of effective representation has placed a profound evidentiary burden on potential applicants that may prove to be impossible to meet. Furthermore, the Supreme Court has demonstrated, via its relatively narrow interpretation of s. 3, that it is exceptionally hesitant to interfere with the legislative choices regarding electoral boundary redistribution. What is significant about the jurisprudence regarding apportionment is the inconsistency in the judicial application of the purposive method of interpretation to s. 3. Whereas Justice McLachlin, in both the B.C. and Saskatchewan cases, ruled that the right to vote does not guarantee strict parity of voting power, the Saskatchewan Court of Appeal, using the same purposive method of interpretation decided to the contrary.

This apparent contradiction reveals that although specific courts may apply a uniform method of constitutional interpretation to the same provision of the Charter, this does not guarantee a consistent definition. However, because the Supreme Court of Canada has ruled on this issue, it would be very difficult, if not impossible in the near future, to successfully argue that the right to vote under s. 3 if the Charter warrants anything more equality than is provided for than under the guise of "effective representation." Consequently, the judicial mention of factors other than population equality make the future of any litigation concerning electoral boundary redistribution, as well as other areas of election law, entirely unpredictable.

The previous chapter revealed how the entrenchment of the right to vote in s. 3 of the Charter of Rights and Freedoms has allowed for the judicial review of electoral boundary apportionment in Canada. This chapter focuses on how prison inmates have employed s. 3 in their efforts to attain the right to vote in both federal and provincial elections. Despite the vast expansion of universal adult suffrage prior to the enactment of the Charter, virtually all jurisdictions in Canada denied the franchise to prison inmates.\(^{113}\)

The loss of political rights for prison inmates flowed from the historical belief that the removal of all previously held civil rights should logically accompany imprisonment. This evolved at common law into the concept of “civil death” which meant, that as far as civil rights were concerned, the convict was legally dead.\(^{114}\) Landreville and Lemonde explain that at the time society believed it “was justified in exacting revenge for wrongdoing by barring people who had broken these norms from participating in society.”\(^{115}\) Although the notion of civil death was fortunately removed in Canada with the 1892 codification of the Criminal Code, the disenfranchisement of prisoners remained.\(^{116}\)

In recent times, the philosophy underlying the penal system has shifted from focusing solely on retribution to incorporating principles of rehabilitation into

\(^{113}\) Since 1979, inmates in Quebec have been allowed to vote in provincial general elections.


sentencing.\textsuperscript{117} This leads one to question whether the traditional goals of disqualifying prisoners from voting are, perhaps, inconsistent with the more modern objective of rehabilitation. The entrenchment of the right to vote has allowed these conflicting visions of punishment and incarceration to be brought before the courts. Consequently, soon after the enactment of the Charter, challenges to both federal and provincial prohibitions against the voting rights of prisoners were heard in courtrooms across Canada.

The purpose of this chapter is to review how the courts have approached the judicial review of prisoner voting rights legislation. My analysis will reveal that the success of the prisoner voting rights movement has not always been consistent. A closer examination of the reasoning behind the decisions will help shed light as to why the courts have failed to develop a coherent set of guidelines for the legislatures to follow when drafting legislation regarding prisoner voting rights. I will also show how the prisoner voting rights jurisprudence highlights the continual conflict between the traditional limitations on the right to vote and the more modern notion of equality advocated by s. 3 of the Charter.

\textit{Provincial Jurisprudence}

The first constitutional challenge to prisoner voting rights legislation was heard in the 1982 case of \textit{Reynolds v. British Columbia (Attorney General)}\textsuperscript{118}. The British Columbia Supreme Court found that, because of the restrictive nature of incarceration, it "requires little imagination to see the practical reasons why a prisoner in custody should not be entitled to vote." However, the Court was not convinced that any public benefit

\textsuperscript{117} \textit{Canada, Royal Commission on Electoral Reform and Party Financing, Final Report} (Minister of Supply and Services Canada, 1991), \textit{Lortie Report}.

\textsuperscript{118} (1982), 143 D.L.R. (3d) 365.
could be gained in prohibiting probationers from voting.\textsuperscript{119} Therefore, the provision was, to the extent that it prohibited persons from serving a term of probation of voting, of no force or effect.\textsuperscript{120}

The next challenge was launched in 1986 against s. 31\textit{(d)} of the \textit{Manitoba Elections Act}, which prohibited any prisoner from voting in a provincial election in \textit{Badger v. Manitoba (Attorney General)}\textsuperscript{121}. Rather than entering into a long discussion as to the meaning of the right to vote, Justice Scollin briefly explained that there are, indeed, limitations which are inherent in s. 3 (citizenship and age requirements), however, a prima facie breach of s. 3 occurs when the law moves from "standard qualification to selective disqualification."\textsuperscript{122}

Unlike \textit{Reynolds}, Justice Scollin now had the \textit{Oakes} test\textsuperscript{123} as a guideline to determine whether the s. 3 breach could be reasonably justified under s. 1 of the Charter. When applying the \textit{Oakes} criteria to the case at hand, Scollin J. found that this limit on the right to vote had several "pressing and substantial" objectives including preserving the currency of the franchise and both symbolically and practically stigmatizing those who breach their duty to society.\textsuperscript{124} However, the overall blanket disqualification failed both the rational connection and the minimal impairment component of \textit{Oakes} because it applied to \textit{all} prisoners regardless of whether they had committed a serious or a minor  

\textsuperscript{119} \textit{Ibid.} 369.  
\textsuperscript{120} The decision was upheld by the British Columbia Court of Appeal in \textit{Reynolds v. British Columbia (Attorney General)} (1984), 11 D.L.R. (4th) 380.  
\textsuperscript{121} (1986), 27 C.C.C. (3d) 158 (Man. Q.B.).  
\textsuperscript{122} \textit{Ibid.} 162.  
\textsuperscript{123} \textit{R. v. Oakes} [1986] 1 S.C.R. 103, at 138-139. For a Charter breach to be justified as a reasonable limit, the impugned provision must contain a pressing and substantial objective in addition to satisfying the proportionality test. The latter includes the fulfillment of three criteria: First, the law must be rationally connected to its objective; two, the means should impair as little as possible the right or freedom in question; and three, the deleterious effects of the legislation must not outweigh its salutary effects.  
\textsuperscript{124} \textit{Badger, supra} note 121, 163.
Therefore, the impugned provision could not be saved under s. 1 as a reasonable limit and was, thus, deemed to be of no force or effect. As a result, prisoners in Manitoba were able to cast their ballots in the 1990 provincial general election.

Another provincial exclusion was successfully challenged in the 1988 Ontario case of Grondin v. Ontario (Attorney-General). The Attorney General for Ontario conceded that s. 16 of the Ontario Election Act, which prohibited every prison inmate from voting, constituted a prima facie breach of s. 3. However, Justice Bowlby rejected the government’s contention that s. 16 constituted a reasonable limit under s. 1. He reasoned that, “if a limitation on such a fundamental aspect of democracy had been contemplated by those who framed our constitution, I am of the view that such a limitation could have been specifically provided for and made infinitely clear.” Bowlby J., additionally, emphasized that the rehabilitative potential in allowing prisoners to vote must not be overlooked. These reasons combined left him unable to find this restriction on the right to vote a constitutionally justifiable limit under s. 1.

Over a decade later, the complete disqualification of all prisoners from the franchise in Alberta was deemed to be an overly broad ban in Byatt v. Alberta (Chief Electoral Officer). However, the Alberta Court of Appeal decided that it would not force the Alberta legislature into a game of “twenty questions” by having to guess whether the constitutional problem is curable. Referring to the Saskatchewan Boundaries

---

125 Scollin J. explained that “a minimal infraction of a regulatory statute which is penalized by a few days imprisonment may result in the effective loss for four years or more of the right to vote.” Ibid. 164.
127 S.O. 1984, c. 54.
128 Grondin, supra note 126, 428-429.
129 Ibid. 430. Bowlby J. made referred to the s. 2 of the 14th Amendment of the United States Constitution which specifically sanctions the exclusion of prisoners from the franchise.
130 Ibid. 431.
Reference\textsuperscript{132} (discussed in previous chapter), the Court recognized that the right to vote under s. 3 is not absolute and is, therefore, subject to historical qualifications and limitations.\textsuperscript{133} In Coté J.'s view, not all bans on inmate voting would be unconstitutional and the over-breadth of the Alberta legislation would be capable of easy amendment.\textsuperscript{134} Coté J. declined to determine the degree to which prisoners should be disenfranchised because he believed this to be a matter best left to the legislatures rather than the courts.\textsuperscript{135}

Over 11 years following the Badger decision, \textit{supra}, the Manitoba legislature amended the provincial \textit{Elections Act} to disqualify only those inmates serving a sentence of five years or more.\textsuperscript{136} Although the amended provision was significantly narrower in scope than its predecessor, the Manitoba Court of Queen’s Bench in \textit{Driskell v. Manitoba}\textsuperscript{137} still did not find the adjustment to be sufficient. Justice Kaufman explained that “the objective…in this case is laudable but broad and vague. It is not sufficiently focused to be assessed as pressing and substantial.”\textsuperscript{138} For the second time in Manitoba, a provincial ban on prisoner voting rights was once again struck down.

\textbf{Federal Jurisprudence}

The first constitutional challenge to federal prisoner voting rights legislation was heard in the 1983 case of \textit{Jolivet v. Canada}.\textsuperscript{139} It was argued that s. 14(4)(e)\textsuperscript{140} of the

\par
\textsuperscript{132} Reference Re Provincial Electoral Boundaries (Sask.) [1991] 2 S.C.R. 158.
\textsuperscript{133} Byatt, \textit{supra} note 131, at para. 60.
\textsuperscript{134} \textit{Ibid}.
\textsuperscript{135} \textit{Ibid.} at para. 35.
\textsuperscript{136} R.S.M. 1987 c. E30, s. 31.
\textsuperscript{138} \textit{Ibid.} at para. 89.
\textsuperscript{139} (1983), 7 C.C.C. (3d) 431.
Canada Elections Act (herein after CEA), which prohibited any prisoner from voting, violated the right to vote under s. 3 of the Charter. In denying the claim, Justice Taylor recognized that s. 3 means more than just the right to cast a ballot. More importantly, it means the right to make an informed choice reached through the "complete freedom of access to the process of discussion and the interplay of ideas by which public opinion is formed."\textsuperscript{141} He reasoned that the conditions in prison prevent inmates from exercising their right to vote to the standard that the Charter requires. Therefore, the denial of the right to vote logically flows from punishment for breach of the criminal law and "is clearly justifiable in a free and democratic society."\textsuperscript{142}

The Manitoba Court of Queen’s Bench reached a different conclusion regarding the constitutionality of s. 14(4)(e) of the CEA in Badger v. Canada.\textsuperscript{143} Justice Hirschfield agreed that the blanket disqualification of all prison inmates was overly broad and, therefore, could not be justified as a reasonable limit under s. 1. However, he clarified that "had the words ‘penal institution’ been defined to mean only a federal penitentiary, and had ‘any offence’ been defined to mean indictable offence, the result...would have been radically different."\textsuperscript{144} Using the remedial authority under s. 24(1) of the Charter,

\textsuperscript{140} S. 14(4)(e) provides that “every person undergoing punishment as an inmate in any penal institution for the commission of any offence” shall be disqualified from voting. Canada Elections Act, R.S.C. 1970, c. 14 (1\textsuperscript{st} Supp.), s. 14(4)(e).
\textsuperscript{141} Jolivet v. Canada, supra note 139, 434.
\textsuperscript{142} Ibid. 436.
\textsuperscript{143} Badger v. Canada (Attorney General) [1988] M.J. No. 501, online: QL (CJ). In addition, the Federal Court Trial Division in Gould v. Canada (Attorney General) [1984] 1 F.C. 1119, online: QL (CJ), agreed that the denial of prisoner voting rights constitutes a prima facie breach of s. 3. However, because the application was for an interlocutory injunction, the case did not proceed to the Oakes test. The Federal Court of Appeal reversed the decision on the grounds that the trial court had misapplied the interlocutory injunction [1984] 1 F.C. 1133, online: QL (CJ). Appeal dismissed by the Supreme Court of Canada [1984] 2 S.C.R. 124.
\textsuperscript{144} Ibid. at 4.
Hirschfield J. ordered the Chief Electoral Officer of Manitoba to enumerate the inmates so as to enable them to vote.\textsuperscript{145}

The Manitoba Court of Appeal, however, disagreed with the decision of the trial court.\textsuperscript{146} In overturning the trial judge’s decision, Justice Monnin reasoned that “the task of franchising or disenfranchising all or certain prisoners should be left to the elected members of Parliament. In ruling the way he did, Hirschfield J. has taken a quantum leap which logic does not permit.”\textsuperscript{147} In a concurring opinion, Justice Lyon agreed with Monnin’s conclusions, however, his reasoning stemmed from his interpretivist approach to the definition of s. 3. More specifically, Lyon believed that the “enactment of s. 3 was intended to entrench and constitutionalize the traditional and fundamental right to vote enjoyed and practiced by Canadian citizens subject to the reasonable statutory conditions and disqualifications then extant which attached to it.”\textsuperscript{148} Therefore, the exercise of judicial restraint in this case can partially be explained by Lyon’s focus on the intent of the framers. To assume that s. 3 was intended to create a new right would be “unreasonable, unrealistic and unjustified” considering the historical practice of excluding inmates from the franchise.\textsuperscript{149} The subsequent appeal to the Supreme Court of Canada was dismissed with costs.\textsuperscript{150}

During that same year, the federal exclusion of prisoners was scrutinized by the Ontario courts. In \textit{Sauvé v. Canada (Attorney General)}\textsuperscript{151}, the Ontario High Court of Justice upheld the constitutionality of s. 14(4)(e) of the \textit{CEA} as a reasonable limit in a

\textsuperscript{145} Ibid. at 5.
\textsuperscript{147} Ibid. 5.
\textsuperscript{148} Ibid. 10.
\textsuperscript{149} Ibid.
free and democratic society. Justice Van Camp explained that "Parliament was justified in limiting the right to vote with the objective that a liberal democratic regime requires a decent and responsible citizenry." Using language similar to Lyon J.'s interpretivist rhetoric, Justice Van Camp reasoned that s. 3 cannot be interpreted so as to create a new right for prisoners when prior to the Charter they did not possess such a right.

However, the Ontario Court of Appeal disagreed holding, instead, that the impugned provision (now s. 51(e)) could not be sustained under s. 1 analysis. Justice Arbour ruled that the objectives of affirming the sanctity of the franchise and preserving the integrity of the electoral process were highly symbolic and, thus, detracted from their importance. More specifically, in light of the slow movement toward universal suffrage and the enactment of s. 3 of the Charter, "I doubt that anyone could now be deprived of the vote on the basis, not merely symbolic, but actually demonstrated, that he or she was not a responsible citizen." Therefore, the decision of Van Camp J. was set aside and s. 51(e) of the CEA was declared to be of no force or effect.

In 1991, a year prior to the release of this decision, the constitutionality of s. 51(e) was challenged before Justice Strayer of the Federal Court Trial Division in Belczowski v. Canada. Strayer J. accepted a recent Supreme Court of Canada ruling, which suggested that courts should be more activist where the state is the "singular antagonist" of the person whose rights have been violated. Although Strayer deemed prisoner voting rights to fall under this more stringent category, the legislative objective of

---

152 Ibid. 5.
154 Ibid. 6.
157 Conversely, the S.C.C. stated that courts should show more deference to legislative assessments involving the reconciliation of claims of competing groups or individuals.
sanctioning offenders was accepted as pressing and substantial. However, in light of the possible rehabilitative effects of allowing prisoners to vote, Strayer J. was unconvinced that the denial of every inmate was proportional to this objective.\textsuperscript{158}

The Federal Court of Appeal upheld the conclusion reached by the trial court that the federal disqualification of all prisoners violated s. 3 and could not be saved under s. 1.\textsuperscript{159} Hugessen J. explained that "the alleged symbolic objective is one whose symbolism is lost on the great majority of citizens, it is impossible to characterize that objective as pressing or substantial."\textsuperscript{160} Although the Court would have found acceptable the denial of the right to vote for those persons convicted of treason or felony, the over-breadth of the impugned provision prevented it from surviving constitutional scrutiny.

Both the \textit{Belczowski} and \textit{Sauv\'e} decisions were appealed to the Supreme Court of Canada in 1993 and heard at the same time.\textsuperscript{161} In a very brief, four paragraph oral judgment, Justice Iacobucci affirmed that s. 51(e) contravened s. 3 of the Charter and could not saved by s. 1. The only explanation was that the impugned provision was "drawn too broadly" and failed to meet the proportionality test, "particularly the minimal impairment component of the test."\textsuperscript{162} Therefore, the complete ban on all prisoners from voting in federal elections was deemed to be of no force or effect by the highest Court in Canada.

In response to this ruling, Parliament amended s. 51(e) of the \textit{CEA} to disqualify only those prisoners who are serving a sentence of two years or more.\textsuperscript{163} Soon after its

\textsuperscript{158} \textit{Ibid.} 16.
\textsuperscript{160} \textit{Ibid.} at para. 36.
\textsuperscript{161} \textit{Sauv\'e v. Canada (Attorney General); Belczowski v. Canada} [1993] S.C.J. No. 59, online: QL.
\textsuperscript{162} \textit{Ibid.} at para. 2.
\textsuperscript{163} R.S.C. 1985, c. E-2, s. 51(e).
enactment, Richard Sauvé along with several other inmates challenged the constitutionality of the revised disqualification before the Federal Court Trial Division. The twin objectives of enhancing both civic responsibility and criminal sanctions were deemed by Justice Wetston to be pressing and substantial. Although the defendant’s arguments lacked empirical evidence, the impugned provision survived the rational connection component because the Court felt that “it is reasonable to suggest that it [the disqualification] sends a message that certain kinds of behavior are not accepted in our society.” However, s. 51(e) failed to pass the minimal impairment component because Wetston J. believed that Parliament could have chosen less intrusive and equally effective means of infringing a prisoner’s right to vote. He specifically referred to the option of dispersing voting disqualifications on a case-by-case basis at the time of sentencing. Consequently, s. 51(e) could not be upheld as a reasonable limit in a free and democratic society and, by virtue of s. 52(1), was declared to be of no force or effect.

The Attorney General for Canada immediately appealed the decision to the Federal Court of Appeal which released its judgment in 1999. Justice Linden agreed with the trial court’s conclusion that the objectives of the impugned provision are pressing and substantial and they are rationally connected to the law. However, the

---

165 Ibid. 157.
166 Ibid. 165.
167 Ibid. 162-163.
168 Even though s. 51(e) of the CEA failed the minimal impairment test, Wetston J. went on to apply the proportionality component anyways. Due to the lack of evidence of the possible salutary effects of the impugned provision, and in consideration of the possible deleterious effects of preventing rehabilitation and successful reintegration into society, Wetston J. concluded that the provision failed this component. Ibid. 167-178.
169 Sauvé v. Canada (Chief Electoral Officer) [1999] F.C.J. No. 1577, online: QL.
170 The Crown submitted that the objectives of s. 51(e) of the CEA are (a) the enhancement of civic responsibility and the respect for the rule of law; and (b) the enhancement of the general purposes of the criminal sanction. Ibid. at para. 93.
171 Ibid. at para. 93-108.
Court approached the minimal impairment component of *Oakes* in a different manner. With reference to the S.C.C.'s decision in *RJR-MacDonald*\(^{172}\), Linden stipulated that in assessing whether an impugned provision impairs the right “as little as possible”, the courts must accord some deference to Parliament. Justice McLachlin (as she then was) explained that “the tailoring process seldom admits of perfection and the courts must afford some leeway to the legislature. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they conceive of an alternative which might better tailor the objective to the infringement.”\(^{173}\) Linden J. emphasized that this particular subject matter concerning penal philosophy is an area where Parliament should be accorded such deference.\(^ {174}\) Since the evidence revealed that the impugned provision was carefully tailored by Parliament to affect Canada's most serious offenders, the minimal impairment element of *Oakes* was satisfied.\(^ {175}\)

The last portion of the *Oakes* test required the Court to assess whether the deleterious effects of the measure are proportional to its beneficial effects. Although the removal of one's right to vote is a serious deprivation, Linden J. reasoned that allowing prisoners to vote would “undermine our democratic values” and, thus, result in a greater deprivation.\(^ {176}\) Therefore, the revised prohibition survived the proportionality test and was deemed to be a reasonable limit in a free and democratic society. Application for leave to appeal was granted by the Supreme Court of Canada on 10 August 2000 and is set to be heard during the late summer 2001. So, although the federal ban on those

---


\(^ {173}\) Ibid. 342.


\(^ {175}\) Ibid. at para. 120.

\(^ {176}\) Ibid. at para. 139.
prisoners serving two years or more is still on the books, it will not be until the Supreme Court speaks that its fate will finally be decided.

Conclusion

It is apparent that the jurisprudence concerning the disqualification of prison inmates from the franchise has been both contradictory and inconsistent. In comparison to the cases at the federal level, the challenges to the provincial disqualifications have been much more successful. This has resulted in disparities both inter-provincially as well as intra-provincially as in some jurisdictions, inmates may be allowed to vote in a federal election, but are barred from casting a ballot provincially.\(^{177}\) These discrepancies may partially be explained via the lack of a determinative ruling by the Supreme Court of Canada. The only judgment given in Sauvé & Belczowski, supra, failed to provide any concrete guidelines for what may constitute a constitutionally acceptable limitation on the rights of prisoners to vote. Moreover, it has still yet to be explained why the Supreme Court dismissed the same action just over a decade prior in Badger, supra.

The approach utilized in applying s. 3 also highlights a fundamental difference between the jurisprudence regarding prisoner voting rights, on the one hand, and electoral boundary apportionment on the other. Whereas the electoral boundary apportionment cases focused heavily on the meaning and purpose of the right to vote in s. 3, the prisoner voting rights judgments were largely absent of any such analysis. Not only was it conceded by the Attorneys General in the majority of cases that any disqualifications on the right to vote constituted a prima facie breach of s. 3, many of the judges believed s. 3

\(^{177}\) For a comparison of inmate voting eligibility within Canada, see D. Blake, Electoral Democracy in the Provinces (2001) 7:1 Strengthening Canadian Democracy, a research project by the Institute for Research on Public Policy, Table 4: Qualifications for Voting, p. 13.
required “no interpretation at all.” Therefore, “[s]ection 1 of the Charter quickly became the focal point of virtually all of the judgments rendered in these voting rights cases.”

The overview of the case law unearthed a few decisions in which the relevant activism or restraint could be explained via the method of constitutional interpretation applied to s. 3. Similar to the theme highlighted in the electoral boundary cases, the constitutionality of prisoner voting restrictions often hinged on whether the court believed that s. 3 was meant to confer new rights. Although the Supreme Court of Canada in the Saskatchewan Reference employed interpretivist logic to uphold the inequalities associated with the status quo, this line of reasoning was definitely in the minority of the cases involving the overall disqualification of inmates from the franchise. Professors Knopff and Morton explained that with regards to prisoner voting rights, justices employing inteptivist reasoning “should have known they were swimming up against the tide.”

It may also be argued that the heightened level of judicial activism in this area as opposed to the electoral boundary jurisprudence may perhaps be attributed to the focus on s. 1 analysis. Peter Hogg explains that the Oakes test “imposes stringent requirements of justification. Those requirements may be more difficult for the government to discharge than the requirements that would have been required in the absence of s. 1.”

As mentioned in the previous chapter, the approach adopted by McLachlin J. in the Saskatchewan Boundaries Reference placed the onus of proving the Charter violation completely on the applicant. This gave the decision an aura of judicial restraint for the reason that it excused the government from having to vigorously defend its policy.

179 Ibid. 299.
However, in the prisoner voting rights cases, a s. 3 breach was conceded causing the analysis to proceed immediately to the *Oakes* test where the burden of justifying the Charter violation shifted solely to the government.

It is also conceivable that the application of the *Oakes* test itself may partially account for the inconsistent treatment of prisoner voting rights restrictions. For example, many courts refused to afford the legislatures any deference in assessing whether the objective is pressing and substantial under the first component of *Oakes*, whereas other decisions permitted the legislatures leeway under the minimal impairment section. Thus, the revisions that have been applied to the *Oakes* test since its inception in 1986 have vastly expanded the discretion available to the judiciary. It is, therefore, arguable that this has allowed the courts to manipulate the *Oakes* test to justify a particular outcome.

Similarly, the direction of the courts appeared to be determined by what particular view of penal philosophy they preferred. For example, the acceptance of the more modern objective of rehabilitation over the more traditional notions of retribution and vengeance served as a warning that the restriction would not survive constitutional scrutiny. In doing so, the courts which have rejected the legislative limits on the rights of prisoners to vote have employed a non-interpretive approach to s. 3. Professor Manfredi explains that “the Canadian decisions, especially those that have rejected the very objectives of criminal disenfranchisement, might represent a moral re-evaluation of conventional ideas of justice and community membership.”[^181]

It is clear that the courts have been significantly more interventionist where prisoner voting rights are concerned as compared with legislation concerning electoral

boundary apportionment. However, they are similar in the fact that all of the decisions recognize that s. 3 is not an absolute right and is subject to limitations. There has been a notable theme throughout the majority of the cases that there are indeed pressing and substantial objectives behind the legislation. However, the courts have been unwilling to concede that, given the guarantee of the right to vote in s. 3, the Charter will tolerate a complete prohibition on all prisoners from voting.

The Supreme Court of Canada has accorded the legislatures much leeway when apportioning electoral districts. Although the Court invalidated blanket disqualifications of prisoner voting rights, we can only wait to find out how much deference, if any, will be given to Parliament regarding the revised disqualification. It will be interesting to see how the Supreme Court and especially the now Chief Justice McLachlin will approach s. 3 in the context of prisoner voting rights. Although one may hope that the impending Supreme Court judgment will finally provide a coherent set of guidelines for the legislatures to follow, the Saskatchewan Boundaries Reference and its adoption of “effective representation” proves that there are no guarantees where the application of s. 3 is concerned. If the Court upholds the decision of the Federal Court of Appeal, it will provide a good example of what Peter Hogg calls “Charter dialogue”\(^{182}\) between the courts and the legislatures. However, if the Court invalidates the revised federal disqualification \textit{sans} any explanation as to what may constitute a reasonable limit, then the legislatures will once again be left to play the game of “20 questions” as far as disqualifications of inmates from the franchise is concerned.

Nevertheless, although the constitutional challenges have not always been successful, it is indisputable that the judiciary has had a profound effect on the voting

rights of prisoners in Canada. Unlike the Supreme Court of Canada’s decision in the *Saskatchewan Boundaries Reference*, which reasoned that the Charter was not meant to confer new rights, by striking down the prisoner disqualifications, the relevant courts were granting prisoners rights that they did not possess prior to the Charter. Thus, instead of freezing the constitution in time, the Courts have been more willing to give s. 3 a more expansive reading where prisoner voting rights are concerned.
CHAPTER 4: OPINION POLL RESTRICTIONS DURING CAMPAIGNS

The previous two chapters addressed how the right to vote under s. 3 of the Charter has impacted the areas of election law concerning electoral boundary redistribution and prisoner voting rights. The following two chapters will shift the focus from s. 3 to the freedom of expression guaranteed under s. 2(b) of the Charter. The present chapter will assess how this provision has affected the specific area of election law pertaining to opinion poll publication restrictions during campaigns while the subsequent chapter will discuss what effect the Charter has had on the legislated limitations on third-party spending limits.

The vast expansion of the usage of opinion polls within the political process was largely the result of the rapid growth of media involvement in election campaigns. As Colin Feasby points out, public opinion polls have become “ubiquitous in Canadian politics” for not only do polls inform party policy, “they set the tenor of media coverage and affect voters’ preferences.”183 Despite their widespread popularity, however, there has been a growing concern about the possible negative effects of public opinion polls on the electoral process. Previous studies have found that opinion polls are susceptible to many forms of error and misrepresentation and, therefore, may potentially exert an undue influence over both governments and voters.184 This, consequently, led to numerous,

---

albeit unsuccessful, attempts by both the federal and provincial governments to regulate public opinion polls during campaigns.\textsuperscript{185}

However, the federal government finally succeeded in passing legislation restricting public opinion poll publications following the release of the Royal Commission on Electoral Reform and Party Financing (Lortie Commission).\textsuperscript{186} The newly enacted s. 322.1\textsuperscript{187} of the \textit{Canada Election Act} (hereinafter \textit{CEA}) prohibited the broadcasting, publication and dissemination of public opinion polls during the final 72 hours of an election campaign. The restrictions embodied in s. 322.1 undoubtedly cast limits on the freedom of expression, especially in light of the extremely broad definition afforded to this guarantee by the Supreme Court of Canada. In \textit{Irwin Toy v. Quebec}\textsuperscript{188} the Court afforded constitutional protection to any activity “if it attempts to convey meaning.”\textsuperscript{189} Therefore, regardless of the possible negative effects that opinion polls may have on the electoral process, any legislated restrictions placed on this form of expression would have to be justified before the courts.

The jurisprudence discussed throughout the previous two chapters has highlighted how the courts have constitutionally assessed legislative limits on the right to vote in order to promote a fair and effective electoral system. The purpose of this chapter is to evaluate how far the courts are willing to limit the freedom of expression under s. 2(b) in

\textsuperscript{185} British Columbia was the only province to legislate prohibitions against public opinion polls during campaigns in 1939. The B.C. \textit{Election Act} provided for a complete ban on all public opinion polls relating to the campaign throughout the entire election. R.S.B.C. 1979, c. 103, s. 166. However it was repealed in 1982. \textit{Election Amendment Act}, S.B.C. 1982, c. 48, s. 29.

\textsuperscript{186} \textit{Supra} note 184. The \textit{Lortie Report} recommended a 48 hour blackout period prior to an election, the mandatory disclosure of methodological information, and the creation of a professional code of conduct supervised by a professional association.

\textsuperscript{187} Section 322.1 provides that “no person shall broadcast, publish or disseminate the results of an opinion survey respecting how electors will vote at an election or respecting an election issue that would permit the identification of a political party or candidate from midnight the Friday before polling day until the close of all polling stations.” S.C. 1993, c. 19.

\textsuperscript{188} [1989] 1 S.C.R. 927.

\textsuperscript{189} \textit{Ibid.} 968.
the pursuit of electoral fairness within the context of opinion poll publication restrictions during campaigns. The chapter will begin with a review of the relevant case law followed by a discussion focusing primarily on how the judicial treatment of this area of election law compares with the approaches adopted in the previous two chapters.

**The Ontario Courts and s. 322.1 of the CEA**

Two years following the enactment of the federal opinion poll restrictions, an application seeking to have the provision declared unconstitutional was brought before the General Division of the Ontario Court by Thomson Newspapers Ltd.\(^{190}\) The applicants argued that the prohibitions violated the freedom of expression of those wishing to disseminate information as well as the voters who have the corresponding right to know. It was also submitted that the blackout infringed s. 3 of the Charter that must be read to include the right to vote in an informed manner.\(^{191}\) It was conceded that s. 322.1 constituted a prima facie breach of s. 2(b), however, the Attorney General for Canada rejected the claim that s. 3 had been violated.

The evidence presented to the Court, which consisted of various commission reports, social science studies and excerpts from Hansard, all pointed to a “general worry” about the undue influence that opinion polls may have on the election process. Justice Somers recognized that whether opinion polls comprised a real danger was a matter of some debate, however, he concluded that “taken as a whole, such evidence serves to buttress the respondent’s contention that the unregulated distribution of poll


results is not without its potential problems." In addition, Somers J. made reference to the numerous government initiatives aimed at dealing with the prospective negative effects of opinion polls ranging from Royal Commissions to bills introduced in the House of Commons. Moreover, "such restrictions would not be exceptional in the context of electoral legislation in Canada"..."elections in Canada are not periods of unfettered free debate."  

Before moving on to the constitutional analysis, it was necessary to first determine the scope of s. 322.1 of the CEA. Using the contextual approach, Somers J. reasoned that the opinion poll blackout should be viewed in consideration of the general purpose of the CEA, which is to ensure that elections are free and fair. From this, he concluded that the blackout provision was meant to apply to scientific polls using a representative sample that are not already in the public domain at the time of the blackout. To include previously published results within the ambit of the restriction would be "absurd" because it would seriously weaken the right of full response contemplated by Parliament.

As previously mentioned, the Attorney General for Canada immediately conceded a prima facie breach of s. 2(b) in light of the broad definition given to freedom of expression by the Supreme Court of Canada in Irwin Toy, supra. With regards to s. 3, however, the Court was not willing to expand the scope of the right to vote to in order to grant a prima facie breach. Justice Somers explained that although it is persuasive that a

---

192 Ibid. 10.
193 Ibid. 11.
194 This approach of determining the meaning of the provision involves looking that the broader context of the section including other provisions of the statute as well as parliamentary intent.
195 Ibid. 15.
196 Ibid. 17.
197 Ibid. 18.
right to information exists under s. 3, “it would be a mistake, even under a broad and
purposive approach, to grant this implied ‘right to information’ the same scope and
standing as the right to vote in democratic elections that is at the core of s. 3’s
purpose...while the right to information gives substance to the right to vote, it remains
ancillary to it.”

Since it was determined that the polling blackout constituted an infringement of s.
2(b), it was then necessary to examine whether the violation could be justified as a
reasonable limit in a free and democratic society under s. 1. Justice Somers recognized
that the Supreme Court of Canada had relaxed the pressing and substantial objective
requirement under the Oakes test in recent years. However, the Court followed the
prisoner voting rights decision given by the Federal Court of Appeal which stated that
where a violation of electoral rights is at issue, the more stringent “pressing and
substantial” test of Oakes should be applied. Despite the adoption of the stricter
version of this component of Oakes, Somers J. concluded that, given the concern that has
been displayed by the public and reports from public consultation, the polling blackouts
contained an objective which was “pressing and substantial.”

Under the rational link requirement of the Oakes test, the applicants submitted
that the government must demonstrate a “causal link” between the publication of opinion

---

198 Ibid. 21.
199 The s. 1 Oakes test is outlined in note 91 of Chapter 1 – Electoral Boundary Redistribution.
200 Thomson Newspapers, supra note 190, 22-23. Justice McIntyre explained in Andrews v. Law Society of
British Columbia, [1989] 1 S.C.R. 143, at 184, that “given the broad ambit of legislation which must be
enacted to cover various aspects of the civil law”...“and the necessity for the Legislature to make many
distinctions between individuals and groups for such purposes, the standard of ‘pressing and substantial’
may be too stringent for application in all cases.” In such contexts, the threshold question should be
“whether the limitation represents a legitimate exercise of the legislative power for the attainment of a
desirable social objective.”
202 Ibid. 24.
surveys and the harm to the electoral process. In rejecting this argument, Somers J. explained that only a "reasonable fear of harm" is necessary and that "actual harm need not be proved."203 Taken together, the sheer prevalence of polling results, the awareness of these polling results among the majority of the public, the lack of methodological information as well as the lack of corrective response time all make it reasonable "to presume that polls can harm the electoral process."204 Therefore, it was concluded that there was a rational connection between the objectives and s. 322.1 of the CEA.

When moving on to the minimal impairment component of Oakes, Justice Somers emphasized that this section does not force the government to rely upon "only the mode of intervention least intrusive of a Charter right or freedom."205 The Court found that although the ban on the publication of opinion polls during the final three days of an election campaign was quite strict, it would be short-lived. To cut the restriction time down from its current three days would prevent adequate response time and could result in irreparable harm. In addition, considering the blackout in the context of Canadian electoral law reveals that s. 322.1 is neither unusual nor anomalous. Justice Somers explained that "the blackout is part of a highly structured scheme found in the CEA" under which the electoral process in Canada "is not a free-for-all but a finely tuned operation aimed at producing an election that is both free and fair."206 Furthermore, the Court must be sensitive in cases where the legislature had the difficult task of balancing the different interests of several groups. It is in these circumstances, it is not for the courts to "second guess" the results of the legislature’s deliberations as to where the line

203 Ibid. 24-25.
204 Ibid. 25.
206 Ibid. 27.
should be drawn.\textsuperscript{207} Without discussing the proportionality between the effects and the objectives of the impugned legislation (being the final component of \textit{Oakes}), Somers J. concluded that s. 322.1 is a demonstrably justifiable limitation on the freedom of expression found in s. 2(b) of the Charter.

Following the release of the judgment in favour of the federal government, Thomson Newspapers Ltd. brought an appeal before the Ontario Court of Appeal.\textsuperscript{208} Although there existed no empirical evidence as to the extent of the effect of opinion polls on the electoral process, the Court agreed with Somers J. that the potential for opinion polls to be deceiving satisfies the requirement that the impugned provision contain an objective that is pressing and substantial.\textsuperscript{209} Moreover, the provision "is part of a wider legislative scheme whose purpose...was to ensure fairness in elections and to safeguard the integrity of the electoral process."\textsuperscript{210} The Court also affirmed that the government may fulfill the rational connection component of \textit{Oakes} based on a "reasonable apprehension of harm." Therefore, the objectives of preventing the distorting effects of opinion polls was deemed to be rationally connected to the blackout during the last three days of an election campaign.\textsuperscript{211}

The minimal impairment analysis was found to be "critical" in this constitutional challenge because Parliament did have alternatives to the restrictions actually adopted in s. 332.1 of the \textit{CEA}. Despite the broader interpretation of the impugned provision adopted by this Court, however, it was still found to serve its intended purpose with

\textsuperscript{207} \textit{Ibid.} 28. Reasoning taken from \textit{Irwin Toy}, \textit{supra} note 188, 990-994.
\textsuperscript{209} \textit{Ibid.} 3. The views of the Appeals Court differed from the trial court in that the latter found the provision to apply only to scientific polls not yet released at the time of the blackout, the former deemed the blackout to apply to the less formal "hamburger polls." In addition, the prohibition would extend to all opinion surveys whether or not they were in the public domain or not.
\textsuperscript{210} \textit{Ibid.}
\textsuperscript{211} \textit{Ibid.} 7-8.
minimum impairment upon the freedom of expression. Similar to the judgment of Somers J., the Court dismissed the appeal without any discussion of the last component of the proportionality test as required by *Oakes*.

Nonetheless, the decision of the trial court was affirmed and s. 322.1 of the *CEA* was deemed to be a reasonable limit in a free and democratic society. Subsequent to the release of this judgment, Nicholas Devlin commented that, given the widespread concern and distrust over the increasing role opinion polls are playing in electoral campaigns, “the Court’s approval of this limitation seems hardly surprising and appears to be in accordance with the letter and spirit of the Charter.”

Although this may have been accepted as a logical conclusion at that time, the appeal to the Supreme Court of Canada soon turned the apparent common sense of this statement on its head.

**The Supreme Court of Canada**

In affirmation of the approach adopted by the two lower courts, the Supreme Court of Canada concluded that the issue of public opinion poll restrictions was best dealt with under the s. 2(b) freedom of expression rather than the right to vote under s. 3. Therefore, the onus was placed on the Attorney General for Canada to justify the opinion poll blackout in s. 322.1 of the *CEA* as a reasonable limit on the freedom of expression in a free and democratic society under s. 1 of the Charter. In addition to utilizing the contextual approach when evaluating the impugned provision, the Court agreed that the more stringent version of *Oakes* must be applied. They explained that “the possibility of

---

harm arising from the unfortuitous publication of an inaccurate poll does not displace the general nature of this expression as political expression at the core of s. 2(b).  

Therefore, the nature of expression did not advocate the usage of a deferential approach in this case.

Despite the adoption of the more stringent Oakes standard, the majority concluded that the purpose of guarding against the possible manipulation of inaccurate polls constituted a pressing and substantial objective. In addition, the Court hesitantly found the objective of the legislation to be rationally connected to the three-day blackout period under the second component of Oakes. However, the majority took a different path when confronted with the minimal impairment test. Unlike the judgments of the two lower court decisions, the Supreme Court was unable to accept, without more specific and conclusive evidence, that the potential harm caused by opinion polls affected a significant number of voters. Moreover, the majority reasoned that to accept the restrictions as they stand is to assume that the Canadian voter is a naïve and irrational actor, unable to make independent judgments about the value of particular sources of electoral information.

Therefore, it was concluded that the legislation was both overbroad and underbroad in that the three-day blackout was too much and the failure to require the disclosure of methodological information was too little. Consequently, the Court suggested that a mandatory disclosure of methodological information accompanied by a narrower

\footnotesize

\begin{itemize}
  \item \textit{Ibid.} at para. 94.
  \item \textit{Ibid.} at para. 117.
  \item \textit{Ibid.} at para. 112.
  \item \textit{Ibid.} at para. 119.
\end{itemize}
blackout period may “fulfill the government’s purpose more effectively.”\(^{218}\) The aforementioned deficiencies made the majority feel it impossible to permit the impugned provision to pass the minimal impairment test and, therefore, could not be justified under s. 1.\(^{219}\) However, the majority reassured Parliament that this ruling does not prevent the enactment of legislation redressing the dangers associated with inaccurate public opinion polls. The Court explained that “the present legislation was found to be defective not with regard to its purpose, but with regard to the fact that the means chosen to carry out that purpose did not satisfy the minimal impairment and the proportionality tests.”\(^{220}\)

**Opinion Polls in British Columbia**

In 1995, British Columbia amended its *Election Act* to include provisions that made it mandatory for those publishing opinion polls relating to an election campaign to publish the name of the sponsor, specific detailed information about the survey and contact information so that the sponsor can be contacted. Although the Supreme Court of Canada in *Thomson*, implicitly accepted in *obiter* that these requirements would be constitutionally acceptable, the British Columbia Supreme Court judgment in *Pacific Press*\(^{221}\) decided to the contrary. With reference to American jurisprudence, Justice Brenner stressed the importance of the people of B.C. to be informed by a free press

\(^{218}\) *Ibid.*

\(^{219}\) Although the blackout failed the minimal impairment test, the Court applied the fourth and final stage of *Oakes* that requires a proportionality between the deleterious and salutary effects of the measures. However, the impugned provision failed this component as well because “the very serious invasion of the freedom of expression of all Canadians is not outweighed by the speculative and marginal benefits postulated by the government.” *Ibid.* at para. 130.

\(^{220}\) *Ibid.*

"exercising its independent judgment as to what is newsworthy." The Court reasoned that even if one accepts that the information would be of benefit to the public, there was no evidence that the media has ever refused a request by the public for the information. More importantly, there was no history of false or misleading election opinion surveys ever being published in British Columbia. As a result, the Brenner J. was not convinced that the restrictions pursued an objective which was sufficiently pressing and substantial to satisfy the first requirement of *Oakes* and were, therefore, declared to be of no force or effect.

**Conclusions**

Following the enactment of the Charter, Professor Howard Kushner warned that "any legislation prohibiting poll taking or publication runs counter to the unrestricted access to ideas," therefore, any restrictions must be "narrowly construed" in order to withstand Charter scrutiny. The Supreme Court of Canada decision in *Thomson* confirmed this prediction that the legislatures would be afforded very little deference when the freedom of political expression is at stake. Although the requirements of the *Oakes* test have been relaxed in certain circumstances, *Thomson* makes it clear that where the electoral process is at issue, the more rigorous version of *Oakes* must be applied.

However, this fails to explain why the Supreme Court reached a different conclusion than the two lower courts for the reason that the same contextual approach had been employed. Perhaps the discrepancy is reflective of two competing visions of

---

just what constitutes a fair electoral process. In upholding the opinion poll blackout, the two Ontario Courts placed great emphasis on how a fair and effective electoral system requires some legislative involvement in order to prevent the undue manipulation of the electorate in the final three days of a federal campaign. Colin Feasby explains that under this position “voters may only be free if the state regulates the electoral process to further their interests.”

Although the Courts were applying s. 2(b) rather than s. 3 of the Charter, it is arguable that these two decisions echo the Supreme Court jurisprudence where the legislatures were afforded some leeway when the integrity of the electoral process was at stake. This was done primarily by accepting that the evidence constituted a “reasonable apprehension of harm” rather than requiring the Government to provide proof of actual harm. The contextual approach led the Ontario courts to view the blackout against the overall purpose of the CEA, which is to ensure that elections are free and fair. Therefore, the polling blackouts were seen as a logical extension of the other regulations embodied in the Act.

Conversely, the Supreme Court’s reasoning in Thomson focused heavily on the importance of free political speech to the proper functioning of the electoral process. Therefore, the Court viewed the blackout as an impediment to electoral fairness by denying voters a source of political information in the critical days before an election. Without more concrete evidence as to the actual harm caused by the dissemination of

225 Feasby, supra note 183, at 267.
226 See Reference Re Provincial Electoral Boundaries (Sask.) [1991] 2 S.C.R. 158, discussed in Chapter 1 – Electoral Boundary Redistributions; Harvey v. New Brunswick (Attorney General) [1996] 2 S.C.R. 876, upheld s. 119(c) of the New Brunswick Election Act which requires a sitting member of the legislature to vacate his or her seat upon conviction of a corrupt or illegal practice.
opinion polls, the Court was unwilling to uphold such a “crude instrument” which seeks to suppress political expression during campaigns.227

While the Supreme Court reassured the Parliament that s. 2(b) did not preclude the enactment of any restrictions on opinion polls during campaigns, it did rule that the particular limit enshrined in s. 332.1 of the CEA could not be accepted. The majority explained that the three-day limit was too much given the availability of less intrusive means.228 However, this explanation appears to run contrary to recent Supreme Court decisions which maintain that the courts will not require of the legislatures that they adopt the absolute “least” intrusive means in order to meet their legislative objective.229 Given that the only two alternatives consisted of a two or a one day blackout, the Court appears to have impliedly required of Parliament that they adopt the most “least intrusive means” available.

It is arguable that this decision parallels the route that the Supreme Court took with regards to prisoner voting rights. Similar to the polling blackout, the federal ban on inmate voting was found to be an overbroad limitation when scrutinized under the minimal impairment test. However, with regards to the complete ban on inmate voting, Parliament could not refer to any concrete deliberations that took place which led to the adoption of the particular prohibition. Therefore, the exclusion of all prisoners from the franchise displayed an aura of arbitrariness that could not be condoned under s. 1 analysis. With regards to the blackout, however, the three-day restriction was not something picked out of thin air. On the contrary, the opinion poll blackout enacted by

227 Thomson, supra note 213, at para. 111.
228 See recommendations of the Lortie Report, supra note 184.
Parliament was the result of years of careful consideration and debate. This serves as possible evidence of an activist Court overstepping its authority by indirectly rewriting legislation as they see fit. As Professor Manfredi argues, “the Court seems to have adopted the view that there is no real principled justification for limiting freedom of expression, which leads it into the dense thicket of policy analysis.” Or, perhaps, the decision reflects an emerging tendency of the Court to afford the freedom of expression “a place a privileged protection for political speech in Canadian rights jurisprudence.”

By denying the impugned mandatory disclosure requirements, the British Columbia Supreme Court’s decision in Pacific Press endorsed this vision of electoral “fairness” which stresses the importance of free political speech. Similar to the reasoning of the S.C.C. in Thomson, the B.C. Court was unable to accept the limits on the freedom of expression without more concrete evidence of potential harm caused by the release of opinion polls not accompanied by methodological information. However, the judgment runs contrary to the obiter suggestions made by the Supreme Court of Canada that the mandatory disclosure requirements of opinion poll information during campaigns may pass constitutional scrutiny. Therefore, it will not be until this issue comes directly before the Supreme Court that it will be definitively decided.

It is indisputable that the Charter has significantly affected this area of election law. The Supreme Court of Canada has made it clear that any attempts by Parliament or the provincial legislatures to promote the integrity of the electoral process via public opinion poll restrictions must be construed very narrowly. The judgment reveals that the

---

231 Devlin, Opinion Polls and the Protection of Political Speech, supra note 212, at para. 15.
232 Sections 327 & 328 of the CEA currently prevent the dissemination of new opinion polls only on polling day.
Court is not as willing to uphold legislation whose goal is to advance the fairness of the political process under freedom of expression as they were under the right to vote. The two Ontario court decisions appeared to have followed the path instigated by the notion of effective representation enunciated in the *Saskatchewan Boundaries Reference* by permitting the violation of Charter rights in the name of electoral fairness. However, the Supreme Court has adopted the view that the version of electoral fairness guaranteed under s. 2(b) will afford the legislatures very little leeway when the protection of political speech is at stake.
CHAPTER 5: THIRD PARTY SPENDING LIMITS DURING CAMPAIGNS

The previous chapter reviewed how the federal government attempted, albeit unsuccessfully, to prevent the potential "undue influence" of the electorate via restrictions on the publication of opinion polls during campaigns. The present discussion will shift our focus to the issue of third-party spending limits during elections. As mentioned in the preceding chapter, the growth of the media as the dominant mode of communication for election issues was accompanied by the increased usage and publication of opinion polls in the political process. However, a more pressing concern surrounding the increased media presence was the inevitable rise in costs of running an effective election campaign. The Watergate scandal involving President Nixon and the Republican Party in the United States served as an example of how the skyrocketing costs of campaigning could lead to the corruption and manipulation of the electoral process.

These concerns prompted the federal government to enact a legislative regime of campaign expenditure limits within the Canada Elections Act (hereinafter CEA) in 1974.233 Contained in this package of election expenses reform was a prohibition against anyone other than registered candidates or parties from incurring election expenses in addition to a ban on the publication of advertisements which directly promoted or opposed a party or a candidate.234 Parliament believed these restrictions to be necessary to ensure the viability of the limits imposed on parties and candidates and to prevent those with significant financial resources from distorting the election process by

233 Canada Elections Act, R.S.C. 1970, c. 14. These were enacted based on the recommendations of both the Report of the Committee on Election Expenses (Ottawa: Queen's Printer, 1966) and the Chappell Committee (Canada: House of Commons, 1971).
234 Ibid. ss. 70(1) and 72 of the CEA.
disadvantaging others.\textsuperscript{235} Although these restrictions appeared to be an essential component in the CEA’s regulatory regime, they were, and still are, the subject of much controversy within Canadian election law. As Professor Janet Hiebert explains, the restrictions placed on third-party spending during campaigns revolves around one of democracy’s most “thorny issues: how to facilitate robust and competitive elections while guarding against the use of money in ways that undermine the democratic ideal of citizens’ participation on fair terms in the act of self-governance.”\textsuperscript{236} Therefore, constitutionally speaking, the expenditure limits placed on third parties violates the core of freedom of expression under s. 2(b) of the Charter: political expression.

The inherent conflict surrounding restrictions on third party spending is illustrated by the fact that the federal government has enacted three successive, yet differing, legislative limits and all three have been struck down by the courts as unconstitutional. The purpose of this chapter is to assess how the judiciary has approached the legislated limits on third party spending in relation to freedom of expression as guaranteed by the Charter. I will begin with a brief review of the relevant case law stemming from both federally and provincially enacted restrictions on third party spending. This will be concluded with a discussion of the main highlights of the jurisprudence and whether the reasoning and outcomes of the cases fits in with approaches adopted in the preceding chapters.


The Alberta Courts and the Restrictions on Third Party Spending in the CEA

The first challenge to the federal restrictions on third party spending was launched by the National Citizens' Coalition in 1984 before the Alberta Court of Queen's Bench. The plaintiff argued that the impugned provisions violated both his freedom of expression and his right to vote under ss. 2(b) and 3 of the Charter. While the Attorney General of Canada conceded that the restrictions constituted a prima facie breach of the Charter provisions, he argued that they were justifiable limits under s. 1. The government reasoned that since parties and candidates are subject to spending limits, "the absence of spending limits on the part of third parties gives an unfair advantage to those who have access to large campaign funds." Thus, the overall purpose of the restrictions was to ensure a level of equality amongst all participants in federal elections.

In the Court's "pre-Oakes" assessment as to whether these restrictions were constitutionally justifiable under s. 1, Justice Medhurst reasoned that the "test must be applied on the basis of the likelihood that the mischief or the harm perceived would occur" and that "there should be an actual demonstration of harm...to a society value before a limit can said to be justified." Therefore, the government's "fear" that harm may occur could not constitute sufficient justification for overriding the Charter rights of those individuals and groups affected. The impugned provisions were, thus, declared to be of no force or effect.

237 National Citizens' Coalition Inc. v. Canada (Attorney General) 11 D.L.R. (4th) 481. The aforementioned 1974 restrictions in the CEA included a "good faith" clause. However, this provision was removed via amendments to the CEA in October of 1983 (An Act to Amend the Canada Elections Act (No. 3)) Canada Elections Act 1980-81-82-93, c. 164, s. 15.
238 Ibid. 494.
239 Ibid. 495.
240 Ibid. 496.
241 Ibid.
Although this decision was only legally enforceable in Alberta, the Chief Electoral Officer of Canada refused to enforce the third party spending limits across Canada in both the 1984 and 1988 elections. Contrary to fears that third party spending would skyrocket following this ruling, the 1984 federal election showed insignificant levels of independent expenditures. Conversely, the 1988 federal election witnessed a rise in third party spending to almost $4.7 million, most of which was spent by businesses promoting free trade. The Lortie Commission commented that this election demonstrated how "independent election spending can influence the outcomes of elections by subjecting voters to advertising skewed to one point of view."\(^{242}\) The subsequent recommendations of the Lortie Report\(^{243}\) encouraged the federal government to enact a new, yet different, set of restrictions on third party spending in 1993. Amendments to the CEA included s. 213 which prohibited everyone from advertising in relation to an election during a specified blackout period. Sections 259.1(1) and 259.2(2) limited third party spending to $1000 to promote or oppose a specific candidate or party and also prevented the pooling of their resources.\(^{244}\)

Soon after their enactment, a challenge was launched against the constitutionality of these provisions in 1993 before the Alberta Court of Queen’s Bench in Somerville v. Canada.\(^{245}\) In considering the evidence before him, Justice McLeod found that the limitations constituted a prima facie breach of freedom of expression under s. 2(b) of the Charter. The prohibition on the pooling of funds was found to be in violation of the

\(^{242}\) Lortie Commission, supra note 235, 340.

\(^{243}\) The Lortie Commission recommended that there should be a $1000 limit on third party advertising during election campaigns, that the sponsor be identified in the ad and that the third parties should neither be permitted to pool nor split their funds.

\(^{244}\) Canada Elections Act, S.C. 1993, c. 19.

freedom of association under s. 2(d). The restrictions were also found to be in violation of the right to vote under s. 3 for the reason that it precluded voters from “receiving third party views from other parts of the country.” Unlike in National Citizens’ Coalition, the Court now had the Oakes test to follow when assessing whether a limit can be reasonably justified in a free and democratic society under s. 1. The Attorney General of Canada argued that the spending limits were an essential part of the federal electoral financing regime “which seeks to promote fairness in the electoral process by equalizing the opportunity of all to participate in the democratic debate in a meaningful way regardless of financial resources.”

However, Justice McLeod found these reasons insufficient to constitute a pressing and substantial objective under the first component of Oakes. Justice McLeod explained that even if a valid objective had been found, the impugned provisions would have failed the rational connection requirement of Oakes because there was not enough evidence to sustain a reasoned apprehension of harm which would justify the limits. As a result, none of the impugned provisions were found to be reasonable limits under s. 1 and were, therefore, deemed to be of no force or effect.

In defence of the newly enacted restrictions, the federal government appealed the decision to the Alberta Court of Appeal. However, the Court refused to accept the goal of promoting electoral fairness to be sufficiently pressing and substantial so as to justify the infringement of Charter rights. Justice Conrad explained that this is not a case where the objective of the legislation is trying to balance the expenditures of outside groups. To

---

246 Ibid. at para. 19.
247 Ibid. at para. 23.
248 Ibid. at para. 35.
the contrary the purpose of this legislation "is to ensure that third parties cannot be heard
in any effective way and that parties are entitled to preferential protection...which can
never be justified." The Court reasoned that even if a pressing and substantial objective
had been found, the restrictions would, nonetheless, fail the proportionality component of
Oakes. There could be no rational connection between legislation that limited third party
spending to $1000 when candidates can spend up to $55,000 and parties could spend
millions. The impugned provisions would also fail the minimal impairment test
because the Court found that "without a doubt" less intrusive means of fulfilling the
purported objectives were available to the government. Therefore, the federal
government's second attempt in enacting legislated limits on third party spending during
campaigns had been judicially rejected as a unreasonable limit on Charter rights. As
Colin Feasby pointed out, the decisions of the Alberta Courts in both National Citizens'
Coalition and Somerville left the federal government unsure as to whether their
egalitarian vision of election regulation was compatible with the Charter. However, a
decision of the Supreme Court of Canada soon provided the government with the
encouragement it needed to launch a third attempt at enacting a regime of third party
spending limits which could survive Charter scrutiny.

253 In this case the Court also deemed s. 213 of the *CEA* to be unconstitutional. This prohibited any election
advertising in roughly the first 18 days of an election as well as the final 48 hours before the election day.
Again the Court refused to accept that these provisions contained a pressing and substantial objective which
254 C. Feasby, *Libman v. Quebec (Attorney General) and the Administration of the Process of Democracy
The Supreme Court of Canada and Third Party Spending Limits

The Supreme Court of Canada was finally given the chance to speak to the issue of third party spending limits, albeit indirectly, in *Libman v. Quebec*. The case involved a Charter challenge to specific provisions of the Quebec *Referendum Act*, which severely limited the amount an individual or a group could spend on a referendum campaign if they did not wish to join or affiliate with one of the two National Committees. Similar to the arguments made in *National Citizens’ Coalition* and *Somerville*, the Attorney General of Quebec claimed that the purposes of these restrictions was to prevent the most affluent members of society from exerting a disproportionate influence during the campaign process as well as ensuring that some positions are not buried by others. Unlike the findings of the Alberta Courts, however, the S.C.C. ruled that “the pursuit of an objective intended to ensure the fairness of an eminently democratic process”...“is a highly laudable one.” The unanimous decision of the Court openly disagreed with the Alberta Court of Appeal’s conclusions in *Somerville* regarding the legitimacy of the objective of promoting fairness within the electoral system. Of particular importance were suggestions made in *obiter* that, based on the recommendations of the Lortie Commission, a ceiling of $1000 may serve as a constitutionally acceptable limit on third party expenditures during election campaigns.

---

259 *Ibid.* at para. 81. Even though *Libman* was dealing with provincial referendum law, the Court ruled that the same principles apply to election law.
Professors Jennifer Smith and Herman Bakvis point out, Libman won his case by implication,\textsuperscript{260} however, the federal government "won the real victory" because the Court upheld the validity of such restrictions "as part of an overall regime of spending restrictions designed to promote fairness in the electoral contests."\textsuperscript{261} This statement proved correct as the Libman decision encouraged the federal government to enact a new set of restrictions on third party spending in the year 2000. However, before the final amendments were made to the CEA, similar restrictions enacted by the British Columbia government were coming under Charter attack. Although the limits were far more liberal than the $1000 cap suggested by the Supreme Court in Libman, the decision reached in the British Columbia Supreme Court served as a warning to the federal government that it may not be guaranteed a get out of jail free card where any third party restrictions were concerned – even in light of Libman.

\textit{Third Party Spending Limits in British Columbia}

In 1995 the province of British Columbia amended their Election Act to include provisions which, together, made it illegal for an individual or a group to spend more than $5000 on advertising during an election campaign.\textsuperscript{262} Subsequent to the 1996 election, a Charter challenge was launched against these provisions before the British

\textsuperscript{260} Although the Court found the objective to be pressing and substantial, the impugned provisions failed the minimal impairment component of \textit{Oakes} because the forms of expression that those not wishing to join/affiliate with a National Committee were permitted to exercise were "so restricted that they come close to being a total ban." \textit{Ibid.} at para. 75. Therefore the impugned provisions were severed from the Quebec Referendum Act.


\textsuperscript{262} Amendments also included the mandatory disclosure requirements associated with the publication of opinion polls during election campaigns which is discussed in the previous chapter.
Columbia Supreme Court. The plaintiffs argued that the restrictions on third party spending and the mandatory disclosure requirements violated their freedom of expression under s. 2(b), the freedom of association under s. 2(d) and the right to vote under s. 3.

The Attorney General argued that the Supreme Court of Canada’s decision in Libman was determinative of the issue with regards to the spending limits especially considering the British Columbia restrictions were far more generous in their scope. Although the suggestion of a $1000 limit in Libman was merely obiter, the B.C. Supreme Court rejected its application on different grounds. More specifically, the Supreme Court had relied on the recommendations of the Lortie Commission which had, indirectly, relied on a study conducted by Professor Richard Johnston. From his research, Professor Johnston concluded that third party advertising may have had an impact on voters intentions in the 1988 federal election. However, a more recent study led Johnston to conclude that third party advertising had no net effect on voter intention over the course of the 1988 election. Therefore, although Justice Brenner was satisfied from the evidence that party and candidate advertising does have an impact on voter intentions, there was no evidence for him to conclude that third party advertising or spending has such an impact.

---

With only evidence to the contrary that third party advertising has an effect on voter intention, the Attorney General of B.C. was unable to convince the Court of “any unfair dominance of the electoral process that requires legislative action.”\(^{268}\) In denying that the legislation contained a pressing and substantial objective, Justice Brenner explained that “the government has responded to theoretical abstractions and to unproved hypotheses about what might occur if third party spending is unregulated”\(^{269}\) and because the only empirical evidence is to the contrary, this is not a case where the government can rely on common sense justification or a reasonable apprehension of harm.\(^{270}\) Based on this the Court concluded that the government had failed to satisfy the first part of \textit{Oakes} with regards to the third party spending limits and they were, therefore, deemed to be of no force or effect.

\textbf{Return to Alberta: Strike Three?}

In May of 2000, the federal government enacted a new scheme of third party spending limits to be applied during election campaigns. Section 350 of the \textit{CEA} expanded the $1000 limit, which existed prior to \textit{Somerville}, to $150,000 per general election and $3000 in a particular district. Also similar to the prior restrictions was a prohibition against third parties from splitting or combining their resources in order to circumvent the limits set out in s. 350. Soon after the amendments came into effect, an action was brought against several of the new restrictions before the Alberta Court of Queen’s Bench.\(^{271}\) The plaintiff, Stephen Harper, argued that the third party spending

\(^{268}\) \textit{Ibid.} at para. 76.
\(^{269}\) \textit{Ibid.} at para. 77.
\(^{270}\) \textit{Ibid.} at para. 88.
limits violated both freedom of expression under s. 2(b) and the right to vote under s. 3. In addition, he claimed that the prohibition against the pooling of resources violated the freedom of association under s. 2(d).\footnote{Many other sections of the CEA were challenged in this action but for the purposes of this chapter, I will focus just in those relating to third party spending. The other sections were in relation to the attribution, registration and disclosure requirements (ss. 352-362) of third parties, the prohibition against off-shore contributions and the prohibition against parties (s. 358), candidates and third parties from advertising on polling day (s. 323). All were held to be constitutionally justifiable.}

The Attorney General of Canada conceded a prima facie breach of ss. 2(b) and 2(d) for the respected provisions, however, it was not accepted that the restrictions violated the right to vote under s. 3. With reference to the Supreme Court’s judgment in \textit{Thomson Newspapers}, Justice Cairns agreed that the right to vote contains an ancillary informational component. He explained, however, that the heart of s. 3 is the right to “effective representation” (discussed in chapter 2), which permits some restrictions on information “without running afoul of s. 3.”\footnote{\textit{Harper}, supra note 271, at para. 133.} Although s. 3 protects the right to sufficient information, it does not confer a right on third parties to mount a major persuasive advertising campaign. Therefore, the third party spending limits did not violate the right to vote under s. 3 of the Charter.

The next step for the Court was to determine whether the prima facie breaches of ss. 2(b) and 2(d) of the Charter could be justified as reasonable limits under s. 1. However, before Justice Cairns could conduct an analysis under the \textit{Oakes} test, he had to first consider the plaintiff’s submission that the law in question is vague and is, therefore, not prescribed by law.\footnote{It is a principle of fundamental justice in Canada that a statute is void for vagueness if its prohibitions are not clearly defined. It does not provide “sufficiently clear standards to avoid arbitrary and discriminatory applications by those charged with its enforcement”... “In Canada, the idea that the law may be void for vagueness is also implicit in the requirement that a limit on a Charter right be prescribed by law. That follows from the rule that precision is one of the ingredients of the prescribed by law requirements.”} Of particular concern were the limits on third party advertising...
which takes a position on an issue "particularly associated" with a candidate or a party in s. 350(2)(d). The distinction between the general limit of $150,000 and the constituency limit of $3000 was also accused of vagueness because it is impossible to know how it will be enforced.

Justice Cairns agreed that both of the provisions were unconstitutionally vague in their application. The Court reasoned that the scope of s. 350(2)(d) encompasses potentially any topic and any issue due to the expression "particularly associated." The spending limits were also found to be vague because, given that usual media of communication in an election consists of radio, television and newspapers, it is impossible to determine which expenditures are confined to a particular district. Therefore, Justice Cairns ruled s. 350, in its entirety, to be unconstitutionally vague in its application.

Although this finding of vagueness ended the inquiry, the Court proceeded to consider whether the third party spending limits under s. 350 satisfies the s. 1 Oakes analysis. Similar to the reasoning of the B.C. Supreme Court in Pacific Press, supra, Justice Cairns refused to accept the recommendations of Lortie and Libman as reliable evidence because the information relied on by both sources has since been recanted. The most recent evidence confirms that third party spending actually has no net effect on voters’ intentions. Cairns J. recognized that "scientific proof is not necessary to establish a pressing and substantial concern. Parliament is entitled to a reasonable apprehension of harm." However, he was not satisfied that "it is proper to call an apprehension of harm."
reasonable, if there is no evidence to support that apprehension."²⁷⁷ Because the evidence actually pointed to the contrary, the Court was unable to conclude that the restrictions contained a pressing objective necessary to satisfy the first component of the Oakes test.²⁷⁸

Once again, the Alberta Courts stifled another attempt by the federal government to restrict the spending of third parties during campaigns. Although the most recent restrictions have suffered the same fate as its ancestors, it is questionable whether the federal government will permit the Alberta Courts to dictate federal policy regarding third party limits for a third time.²⁷⁹

Conclusions

The Lortie Commission commented that the electoral law in Canada must "first and foremost reflect and promote fairness."²⁸⁰ According to this view, the purpose of legislating limits on third party spending during campaigns supports the objective of fairness by preventing those with financial resources from distorting the election process by disadvantaging others. However, the jurisprudence reveals that this principle of fairness may not provide an acceptable justification for the government restriction of voices other than parties and candidates. Similar to the issue of opinion poll restrictions

²⁷⁸ Justice Cairns went on to consider the proportionality portion of Oakes and ruled that the third party spending restrictions failed each part because of the lack of evidence that third party spending actually has an effect on voters' intentions.
²⁷⁹ Prior to the release of Cairns J.'s judgment, Harper applied for an interlocutory injunction restraining the enforcement of the third party spending limits due to an impending federal election. The injunction was granted by the Alberta Court of Queen's Bench (Cairns J.) Harper v. Canada (Attorney General) [2000] A.J. No. 1226, online: QL (AJ), and affirmed by the Alberta Court of Appeal [2000] A.J. No. 1240, online: QL (AJ). However, the S.C.C. stayed the injunction [2000] 2 S.C.R. 764. The Court explained that "courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter." At para. 9.
²⁸⁰ Lortie Report, supra note 235, 322.
during campaigns, the judicial decisions concerning third party spending limits highlight a tension that exists in Canada between two competing visions of what constitutes a “fair” electoral system. As Professor Hiebert points out, decisions such as *National Citizens Coalition* and *Somerville* treat freedom of expression as a “negative value which requires only the absence of restraints on individuals or organizations to exercise free speech.”\(^{281}\) This belief regards fairness from the point of view of citizens who wish to express their opinions in the same manner as candidates and parties are able to. Thus, to limit third party spending is to give preferential treatment to parties and candidates while unfairly restricting the expression of others.

Conversely, the Supreme Court of Canada in *Libman* reflects a vision that “democracy and unrestrained political liberty are not necessarily synonymous.”\(^{282}\) Based on this reasoning, limits on third party spending, similar to those on opinion poll surveys, seek to “level the playing field” of participants in elections by prohibiting those with substantial financial resources from exerting undue influence over the electoral process. Professor Hiebert explains that “money rather than the power of ideas is a determining factor in deciding which issues are debated and, through the volume of advertising purchased, what priority is attached to them.”\(^{283}\) Therefore, government intervention is necessary to prevent the political parties, candidates and the electorate from being overwhelmed by the power of third party interests.

The egalitarian – libertarian dichotomy displayed in both the opinion poll restriction jurisprudence as well as the decisions concerning third party spending

---


\(^{283}\) Heibert, *Money and Elections*, supra note 236, 103.
restrictions may also be explained by how the particular court viewed the electorate. In *Thomson Newspapers*, for example, the Supreme Court struck down the opinion poll limitations because their existence assumed that the Canadian voter is a "naïve and irrational actor" incapable of making independent judgments.\(^{284}\) The same can be said of the decisions reached by the Alberta and British Columbia courts regarding third party spending limits. In *Pacific Press*, supra, Justice Brenner explained that to accept the spending limits would be to assume that "the people of British Columbia are unable to qualitatively assess third party communications in election campaigns and to decide, what weight, if any to attach to them."\(^{285}\) However, the Supreme Court of Canada refused to accept this approach when confronted with third party limits in *Libman*. Instead, the Court viewed the electorate as a vulnerable group that can potentially be easily swayed by the uncontrolled advertising of independent spending during campaigns. Thus, identifying how the particular court conceived the intelligence of the electorate can partially explain why a particular restriction was either upheld or struck down. This also reveals that the judiciary has failed to apply a consistent opinion of the Canadian voting public. As Professor Richard Moon points out, this inconsistency makes it "impossible to predict when the court will defer to the legislature’s judgment that the expression causes harm and should be restricted and when it will strike down the law because the causal link has not been clearly established."\(^{286}\)

Also similar to the jurisprudence concerning opinion poll restrictions, the decisions regarding third party spending limits hinged on whether the enacting

---


government could provide proof of actual harm. Professors Smith and Bakvis point out
that “ever since National Citizens’ Coalition, the ‘harm’ question has dogged
governments that attempt to defend third party restrictions in the court.”287 Prior to the
Lortie Commission, there was no evidence except the fear that the rising political
corruption in the United States prompted by unlimited spending would spill across the
border.288 However, the Courts reasoned that it was insufficient for the government to
rely on solely on a hunch that what happened in the United States would be replicated in
Canada.

The requirement that the enacting government provide sufficient proof of harm
parallels the reasoning adopted by the S.C.C. in Thomson (concerning opinion polls).
This more stringent version of the Oakes test stands in contrast to the jurisprudence
concerning s. 3, whereby the courts were more inclined to allow governments to rely on a
“reasonable apprehension of harm” to justify a Charter breach. This may help explain
that, unlike the jurisprudence concerning the right to vote under s. 3, the courts have been
less likely to defer to legislative choice where third party limits are concerned. Although
the overall purpose of such restrictions fits within the ideal of electoral “fairness” that has
been echoed throughout all of the chapters, the courts were not convinced that this
requires the extension of spending limits to include independent parties during
campaigns.

287 J. Smith & H. Bakvis, Changing Dynamics in Election Campaign Finance: Critical Issues in Canada
288 The skyrocketing costs of elections in the United States has been blamed largely on the U.S. Supreme
Court decision of Buckley v. Valeo (1976) 424 U.S. 1 where Congressional attempts at legislation limits on
campaign spending were struck down. However, the limits on political contributions were upheld as a
reasonable limit in the First Amendment.
Similar to the jurisprudence concerning opinion poll restrictions, third party spending judgments have embraced an interpretation of freedom of expression that affords political expression the highest level of judicial protection. From the past two chapters, it is apparent that any legislated restrictions on political expression will be subject to the most stringent standard of constitutional scrutiny. The extremely broad definition given to the freedom of expression makes a prima facie breach easy to establish. The burden is then immediately shifted to the government to rigorously justify its policy under the *Oakes* test. However, the relatively narrow interpretation given to the right to vote has made the task of establishing a prima facie breach of s. 3 much more difficult for a potential appellant, especially where electoral boundaries are concerned. Therefore, any deference revealed within the s. 3 jurisprudence may partially be explained by the absence of any structured constitutional justification required under s. 1 analysis.

Although the Lortie Commission recommended the enactment of third party spending limits based on a study which concluded that third party advertising may have had an effect on voters intentions during the 1988 federal election, that finding has since been reversed. The question now remains as to whether the Supreme Court will stand by its obiter suggestions made in *Libman* in light of these findings. For the Court to uphold the federal restrictions *sans* sufficient evidence would stand in direct contradiction to the strict, non-deferential approach it had employed in *Thomson Newspapers*. Either way, the Supreme Court will be required to exercise a large amount of verbal gymnastics in order to explain its position.
The Court will also have to take into consideration the effects that their decision may have on the remaining spending restrictions contained in the CEA. Professor Hiebert explains that if candidates or political parties were to challenge their own spending limits "the Court may be understandably troubled about the lack of coherency of a regulatory regime which seeks to limit spending of the principle election participants yet subverts that intent by not addressing the spending of others." Thus, any decision reached by the Supreme Court on this issue will most likely involve the indirect "micro-management of public policy."

Without a doubt, the Canadian Charter of Rights and Freedoms has had a major impact on this area of election law. Every attempt by the federal government, and one provincial attempt, to legislate restrictions on third party spending limits during campaigns have been struck down. Although Peter Hogg may characterize this ongoing constitutional battle as an example of "Charter dialogue" between the Courts and the legislatures, it perhaps can be better characterized as a never-ending conversation. It is not until the Supreme Court clarifies its stance on the issue that the dialogue will finally come to an end. Until then there can be "no doubt that the legal chapter on third party advertising restrictions is far from closed."

---

CONCLUSION

The addition of the Charter of Rights and Freedoms to the Canadian Constitution in 1982 has undeniably changed the legal and political landscape in Canada. The Charter has shifted the ultimate responsibility of protecting our civil liberties from the legislatures to the courts. There exists no area of law that can escape the recently expanded scope of judicial review. The four case studies discussed in this thesis reveal that, despite its inherent political disposition, election law in Canada has been no exception. In fact, the Charter has fundamentally altered many pieces of legislation in relation to the electoral process that were enacted both prior to and after its entrenchment in 1982. The purpose of case studies was to assess how the Canadian courts have approached the judicial review of the four specific areas of election law. My conclusion will attempt to address the question I posed in the introduction as to whether the judiciary has managed to develop a coherent and uniform theory of Charter review where election law is concerned.

There has been a notable theme throughout the entire thesis regarding a fair electoral system and what role legislatures may play in its regulation in light of the Charter. The Royal Commission on Electoral Reform and Party Financing stated that “the federal electoral process must first and foremost reflect and promote fairness.” However, the jurisprudence discussed in all four case studies revealed that the notion of political “fairness” is not amenable to one particular definition. As Professors Smith and

---

Bakvis explain, “[i]n Canada, the concept of fairness is the leitmotif of the ongoing debate about the electoral law regime.”

The case study on electoral boundary redistribution highlighted a vision of electoral fairness that permits a significant deviation from electoral equality under s. 3 of the Charter. In the Saskatchewan Boundaries Reference, the Supreme Court of Canada embraced a model of elections whereby the legislatures will be afforded a substantial amount of deference in the electoral boundary reapportionment process. The particular notion of fairness permits the legislatures to stray from the strict equality of voting power so that certain regions may receive “effective representation.” Therefore, it is very likely that “the courts will be very deferential to legislative choice when considering the constitutionality of reapportionment schemes.”

The jurisprudence regarding the rights of prisoners to vote, however, revealed a checkerboard of decisions reflecting two visions of fairness within a democracy. On the one hand there were the courts that were hesitant to provide the legislatures any deference because they embraced rehabilitation as one of the main goals of incarceration. Based on this belief, it would be democratically unfair for the state to deny prisoners the franchise if the purpose of jail to make them better citizens. On the other hand, legislative limits on the rights of prisoners to vote were more likely to be upheld if the particular court accepted retribution as the main goal of imprisonment. According to this reasoning, allowing prisoners to vote would taint the electoral process and thoroughly diminish the value of democracy in Canada. Although the Supreme Court of Canada struck down the


complete federal ban on all prisoners from voting, it is still unclear whether its notion of fairness will permit any legislative limits on prisoner voting rights under s. 3. We can only wait until the Sauvé judgment is released to find out whether the Court will follow the deferential approach to s. 3 that it adopted in the Saskatchewan Boundaries Reference.

With regards to restrictions on opinion polls during campaigns, however, the Supreme Court has made it very clear that the legislatures will be afforded very little judicial deference under s. 2(b) of the Charter. In Thomson Newspapers, the Court embraced the libertarian vision of democracy that privileges the freedom of political expression over government attempts to curb the potential undue influence of opinion polls via legislated restrictions. According to this view, electoral fairness can only exist when political expression is allowed to flow freely in the absence of government restraints. The Supreme Court concluded that restrictions on opinion polls will only be justified if the enacting government can provide some sort of concrete proof that their publication will have an undue influence on the electoral process.

The fourth case study dealing with limits on third party spending has only been addressed by the Supreme Court indirectly via obiter comments given in the Libman case. Professor Colin Feasby commented that "Libman was a watershed decision because it emphatically demonstrated that the Charter guarantee of freedom of expression and the Canadian tradition of regulating democracy can live together." Subsequent cases, however, have rejected the acceptance of the egalitarian model because the evidence upon which the Supreme Court based their reasoning has since been disproved.

---

Following the strict protection afforded to political expression in *Thomson Newspapers*, the courts have been unwilling to accept government attempts to regulate the spending of third parties during campaigns in the absence of proof that the lack of regulations will cause harm to the electoral process. Similar to the approach adopted in *Thomson*, electoral fairness under s. 2(b) can only exist in the absence of government restrictions on the free flow of ideas. Therefore, any attempts to legislate restrictions in this area will be subject to the most strict judicial scrutiny.

It is highly questionable whether the Supreme Court will stand by its reasoning in *Libman* in light of the new evidence which has surfaced since the decision. To affirm the suggestions made in obiter would definitively contradict the approach that it adopted toward political expression in *Thomson Newspapers*. Accepting any new limits on third party spending as constitutional, however, would fit nicely with the approach adopted in the *Saskatchewan Boundaries Reference* that “voters can only be free if the state regulates the electoral process to further their interests.”

Either way, the Supreme Court will have a lot of explaining to do in order to justify its position.

It is apparent from the four case studies that the courts have failed to develop a consistent theory of what constitutes a fair electoral system. In particular, the jurisprudence suggests that the courts are more willing to afford the legislatures constitutional leeway under the right to vote under s. 3 in comparison to freedom of expression under s. 2(b) of the Charter. This is in large part due to the definition and scope the Supreme Court accorded to each of the Charter provisions. More specifically, the relatively narrow interpretation of s. 3 given in the *Saskatchewan Boundary*

---

Reference, to guarantee only “effective representation” rather than a more strict notion of equality, has made it very difficult to prove a prima facie breach for a potential applicant. Justice McLachlin (as she then was) explained that when electoral boundary reapportionment legislation comes under judicial review, “the courts must be very cautious” in interfering unduly in these decisions for reason that they “involve the balancing of conflicting policy considerations.” Therefore, anyone wishing to challenge a reapportionment scheme will bear the onerous evidentiary burden of proving that the boundaries as they stand are in violation of their right to “effective representation.”

Conversely, the generally lower level of judicial deference offered in the s. 2(b) jurisprudence is partially the result of the comparatively broad scope afforded to the freedom of expression. By protecting any expression that “attempts to convey meaning”, the Supreme Court has made the undertaking of establishing a prima facie breach of s. 2(b) relatively effortless. Therefore, the onus is automatically shifted to the enacting government to justify its policy as a “reasonable limit in a free and democratic society” under s. 1 of the Charter. As Peter Hogg explains, “the Supreme Court of Canada decided to prescribe a single standard of justification for all rights” under the Oakes test “and to make that standard a high one, and to cast the burden of satisfying it on the government.” However, because the Supreme Court made the right to vote a

---

“qualified right” where voting parity is concerned, the possibility of the enacting government having to defend its policy remains remote.\textsuperscript{301}

The dissimilar treatment of the right to vote and freedom of expression has resulted in inconsistency and unpredictability where election law is concerned. Although it is possible to generalize about the differing judicial treatments of sections 3 and 2(b), the diversity that exists within each section must not be ignored. The case studies revealed that each topic has produced a multiplicity of outcomes within the realm of each Charter section. My thesis has shown that these discrepancies have stemmed largely from the judicial interpretation of s. 1 of the Charter. More specifically, although the Supreme Court developed a standardized set of criteria under the \textit{Oakes} test, this has not guaranteed uniformity in its application. The jurisprudence highlights the reality that the \textit{Oakes} test itself is subject to many forms of interpretation and application. For example, the Supreme Court has consistently made it clear that that legislated limits on political expression under s. 2(b) will be subjected to the most stringent standard of \textit{Oakes}. Under this variation of \textit{Oakes}, the enacting government must provide evidence of an identifiable harm in order for the Charter breach to be “demonstrably justified.” Jamie Cameron points out that under this version, “harm is key to s. 2(7j’s principle of freedom as well as to s. 1’s concept of justifiable limits: where harm is present, limits are justifiable and where it is absent, the principle of freedom will prevail.”\textsuperscript{302}

The harm question, required by the more stringent version of \textit{Oakes}, has surfaced as a major theme throughout the jurisprudence regarding all of the topics except electoral boundary redistribution. Although the Supreme Court has been quite clear that there


must be some evidence of harm to justify restrictions on the freedom of political expression, it is not certain what approach the Court will adopt toward prisoner voting rights under s. 3. We can only wait until the Sauvé judgment is released to find out whether the Supreme Court will apply the strict version of Oakes accompanied by the requirement of demonstrated harm, or whether it will take the deferential route taken towards s. 3 in the Saskatchewan Boundaries Reference.

Regardless of which direction the Court takes, the jurisprudence across all the of the case studies reveals how the Oakes test has vastly expanded the amount of decision making discretion available to the judiciary. Although the courts have attempted to develop uniformity of the test through mechanisms such as the requirement of harm, this has not guaranteed the consistency or the predictability of judicial outcomes. Because of this, it is difficult to deny the argument that the decisions “may simply reflect judicial preference for one set of principles over another.” As Patrick Monahan argues, “rather than offer any meaningful weights and measures for use in the balancing process,” s. 1 “merely invites the Court to devise its own theory of freedom and democracy.” The constant debate over what constitutes fairness in the electoral system is largely supportive of this argument. The case study on prisoner voting rights is reflective of how judicial outcomes can be attributed to what particular vision of penal philosophy the deciding court preferred. Although it is inevitable that “judges are influenced by their own social, economic and political values.” greater efforts need to be made to establish grounded

principles and philosophies to ensure the consistency of Charter application to election law.

The analysis of electoral boundary redistributions by the Supreme Court of Canada never reached s. 1 analysis due to the narrow definition given to the right to vote. However, this decision highlights how the process of constitutional interpretation itself carries with it incredible amounts of judicial discretion. Through the employment of the purposive method of interpretation, the Court was able to choose from a variety of sources in order to give meaning to the right to vote. As Peter Hogg explains, "judges have a great deal of discretion in interpreting the law of the Constitution and the process of interpretation inevitably remakes the Constitution into the likeness favoured by the judges."306 In this particular case, the Court focused on tradition and history to uphold an interpretation of s. 3 that permits a significant deviation from voter equality in the name of electoral fairness, and did so without any evidence of harm. By qualifying the right to vote and deferring to legislative choice, the Court made an important policy decision by yielding to legislative choice.

Despite the unavoidable overlap between law and politics where election law is concerned, it is without a doubt that the Charter has significantly affected the functioning of elections in Canada. However, the judiciary has failed to establish a consistent theory of Charter review in relation to legislated limits on electoral activities. Although it can be said that more regularity was demonstrated within each of ss. 2(b) and 3, the lack of Supreme Court decisions regarding both prisoner voting and third party spending limits leaves the ability to make any concrete predictions difficult. If consistency is ever going

to be achieved, the courts and, especially, the Supreme Court, needs to adopt a single vision of democracy in Canada. In particular, consensus must be achieved with regards to what extent the legislatures may restrict political freedoms in the name of electoral fairness. Until then, we are left to guess when and where our political rights may be justifiably restricted under the right to vote and the freedom of expression under the Charter.
THESIS BIBLIOGRAPHY


Canada, Report of the Committee on Election Expenses (Ottawa: Queen's Printer, 1966)


The Canadian Bill of Rights, S.C. 1960, c. 44.


Case List


Marbury v. Madison (1803) 5 U.S. (1 Cranch) 137.


Reference re Motor Vehicle Act (British Columbia) s. 94(2) [1985] S.C.J. No. 73.


