



Compendium of Election Laws, Practices and Cases of Selected Commonwealth Countries

Volume 2, Part 2

Prepared and presented by Carl W Dundas

Commonwealth



Secretariat

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COMPENDIUM OF ELECTION LAWS, PRACTICES AND CASES OF SELECTED COMMONWEALTH COUNTRIES

Volume 2 – Part 2

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The views expressed in this compendium do not necessarily reflect the opinion or policy of the Commonwealth Secretariat.

NOTE ABOUT THE AUTHOR

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OTHER WORKS BY THE AUTHOR

Practical Steps in Negotiating Maritime Boundary Agreements: Guide to Small States, Commonwealth Secretariat (1991)

Organising Free and Fair Elections at Cost-Effective Levels, Commonwealth Secretariat (1993)

Dimensions of Free and Fair Elections: Frameworks, Integrity, Transparency, Attributes and Monitoring, Commonwealth Secretariat (1993)

Compendium of Election Laws, Practices and Cases of selected Commonwealth countries, Vol. 1 Part 1, Commonwealth Secretariat (1996) Vol. 1, Part 2

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PREFACE

Volume Two of the Compendium of Election laws, Practices and Case Studies in Selected Commonwealth Countries deals with election cases which are arranged according to themes. This style of presentation is aimed at making election cases user-friendly. Interventions in the electoral process by the judiciary are not expected to be disrupted of that process, but have the potential to contribute significantly to the enhancement of the management of elections.

Nine specific themes, namely, election management bodies, electoral boundaries, registration of voters, nominations, voting – the right to vote, manner of voting and bogus voting, election irregularities, election expenses and the media, and a miscellaneous theme, are covered. It is believed that this modest work will lead to more of this type of exercise being undertaken.

The cases presented in this volume were taken from the certified copies of original judgements. The headnotes of most of them were designed specifically to bring out the essentials of each case. The background facts, the core of the judgement and the case cited, have been highlighted for the purposes of easy reference, while each judgement is presented in its completed form.

An attempt has been made to highlight four specific themes, namely, election management bodies, the right to vote, the role of media and election irregularities. Like volume 1, this volume is presented in two parts. Parts 1 and 2 deal with five themes each.

The judiciary in many jurisdictions has been clothed with a prominent role in the promotion of free and fair election. The fear of a disruptive and intervening court upsetting the electoral process in an untimely manner is gradually giving way to a more positive approach to a constructive role for the court. Election cases do not always attract the attention of law reporters, particularly in small countries. Thus many important contributions by the courts to the development of election law and management are not widely appreciated. In each of the following themes, cases collected from many jurisdictions illustrate significant judicial decisions and utterances on vital issues. The overall strategy employed in this compilation is to demonstrate the contribution of the courts to the proper organisation and conduct of free and fair multi-party elections.

Theme 1 – Election Management Bodies

The cases selected for this theme seek to encompass a range of issues. This theme presents one of the great pillars of free and fair elections. These cases provided the courts with the opportunity to pronounce on some issues central to good practice in election management. These include the appointment, integrity and behaviour of individual members of the election management body; the status, role and standing of the election management body; the impartiality, independence and fairness of the election management body. At this point in time, unfortunately, it cannot be said that the concept of an election body being independent of the ruling party or government of the day has gained widespread acceptance. However, there is a growing trend towards establishing election management bodies that are set up as constitutional entities free of the control of government or any other outside authority. Some of the cases included herein attracted the views of the courts on the question of independence of the election management body in the respective concerned jurisdictions.

In such jurisdictions, where the election management body is charged with the task of the superintendence, organisation and control of election organisation and conduct, the question has always arisen as to the extent and scope of the competence of such a body. This area has proven to be a fertile one for the ruling of the courts. Some of the cases included in this volume illustrate the treatment by the courts of this issue.

Theme 2 – Electoral Boundaries

This theme does not attract a great many cases. One reason for this is due to the fact that in many jurisdictions the question of demarcation of electoral boundaries is a non-justiciable issue. However, it is widely acceptable that the requirement of fair demarcation of electoral boundaries is a basic element in the quest for free and fair elections. The limitation on the competence of the courts to intervene in boundaries in many jurisdictions has created the general impression that this area is more of a political than a legal one but this is clearly not so. There is no inherent or fundamental reason why the demarcation of electoral boundaries or the formula on which the boundaries are constituted, should not be subject to the scrutiny of the courts or to a fair and impartial treatment like all other processes of the electoral system. Good practices should prevail throughout the system.

It is also the case that in many jurisdictions, the issue of electoral boundaries is closely tied up with constitutional law where the court is given competence. This makes boundary issues expensive and dilatory to deal with.

Notwithstanding the foregoing observations, there is a faint trend, discernible in some regions of the Commonwealth, to clothe the ‘general election management body’ with the task of demarcating electoral boundaries. This development is a sound one since it removes or at least has the potential to remove, the political influence from electoral boundary demarcation. Gerrymandering of electoral boundaries should not be encouraged whether by removing the competence of the court to deal with the matter or, by conferring the right to demarcate such boundaries on a body other than the body responsible for election management and conduct.

The issue of whether each electoral district of similar nature and status should contain more or less an equal number of voters has come up from time to time; the lone case included under this theme deals at length with this matter.

Theme 3 – Registration of Voters

The regime for voter registration may be broadly divided into two categories, namely, compulsory and voluntary systems. The courts will take each category as they find it in the legislative scheme. Similarly in a first-past-the-post system of elections, voter registration is usually governed by tight rules of residence which are upheld by the courts. Thus, in order to register, a prospective voter must meet the residential requirements that are in place. One issue which the courts are frequently called upon to decide is the question of whether or not a person is a national of the country concerned. The cases included in this compilation display a rich collection of issues arising in the consideration and decision on this question.

Matters such as the completeness of the voters' register and the level of tolerance of discrepancies are not readily justiciable in a voluntary registration system. Similarly, the use or otherwise of up-to-date technology for the purposes of voter registration will not be enquired into by the courts. However, the use of computerised technology may raise questions as to the consideration of the nature of the evidence that can be adduced in court. In general terms, the role of the courts is somewhat limited in helping to mould the quality and efficacy of voter registration, but the future is likely to see an increased role in preventing arbitrarily actions by election management bodies in this area.

Theme 4 – Nomination of Candidates

The nomination of candidates offers a rich ground for intervention by the courts; and this notwithstanding the fact that in many jurisdictions an aggrieved prospective candidate can only move the courts by way of an election petition after the elections in question are held. Amongst the issues that are frequently brought before the courts are the nationality of a prospective candidate, the status of the individual, that is, whether he/she holds an office of profit of the state or is a public servant, whether he/she was forcibly prevented from handing in the nomination papers within the stipulated time and whether the nomination papers were rejected on grounds of mere technicality. The role of the courts is likely to increase and become more dynamic in many Commonwealth countries.

Theme 5 – Voting

The theme of voting is a multi-dimensional one. It covers fields such as the right to vote, the manner of voting, validity of a voter and bogus voting. All these issues have been treated by the courts, in the case included herein. This is an area which has the potential for a dynamic approach by the courts through bold interpretation. Perhaps, a greater effort should be made to protect the right of an individual in a manner not dissimilar to that of human rights. No vote should be lightly ruled to be invalid when the voter's intention is clear, even though the technical voting rule may not be strictly followed.

Theme 6 – Election Irregularities

The courts are the best placed entity to assist the quest for election purity. Perhaps the greatest threat to a healthy election process is corruption, particularly the incidence of bribery. The cases selected for this theme provide a range of issues in respect of which the courts showed their distaste for corruption in elections, while frowning on those who mischievously falsely raise charges against the innocent.

But election irregularities are not always of the most serious types. For these categories, some argue that conflict resolution means might be more suitable to provide solutions than the courts, particularly where the incidents giving rise to the irregularities are rooted more in politics than individual statutory breaches.

Theme 7 – Political Parties

Political parties often trigger issues which require adjudication by the courts. Such issues include registration, de-registration, recognition and de-recognition as a national party, succession of a party by another, the appointment or election of a new leadership for a party, the allocation of a party symbol to contest an election, as well as party campaign expenses. The selection of cases within is aimed at highlighting the courts' treatment of some of these issues. Many jurisdictions deal inadequately with these issues in their legislative scheme and so the courts' role is vital in the development of the law in this area.

Political parties (though not ruling parties) frequently complain about the lack of fair access to the publicly-owned media and this has led to intervention by the courts. Recent trends suggest that the courts are being called upon to determine the standard of impartiality and fairness that the media should apply to political parties. However, in the absence of specific legislation with sanctions, the court may find it difficult to formulate general standards in this area.

Theme 8 – Election Expenses

The influence of 'money power' on the electoral process has provoked a varied response by election commentators. The limits, if any, to be placed on the expenditure of political parties and candidates have been equally controversial. However, many jurisdictions find it necessary to impose sharp limits on expenditure of parties and candidates. The issues encountered under this term are many – for example, should the state fund the election campaigns of parties and candidates? Should foreign individuals or companies contribute to election campaigns? Should all contributions to an election campaign be recorded and made public? What sanctions should be imposed for a breach of the spending limits laid down? Should the legislative scheme provide for strict accounting procedure? Should the election management body be clothed with the authority to ensure that proper accounting is done by each candidate and/or political party?

Sometimes the amount and the treatment of the deposit paid to contest an election is challenged by unsuccessful candidates. The cases selected for this theme illustrate the treatment of some of these issues by the courts.

Theme 9 – The Media and Elections

As the role of the media in elections generally increases through the growing international trend of political broadcasts and debates by opposing candidates, the impartiality of media houses comes under even closer scrutiny. In some jurisdictions the parties, particularly the smaller parties and independent candidates, look to the courts to uphold the delicate balance between the parties. There is considerable scope here for the courts to enunciate some acceptable norms where the legislature or the parties, or both, have been unable to do so. Good practice should be able to take root at the level of the publicly-owned media, both with respect to free time (if any) that is made available, as well as time available for purchase. Since the media has the potential to impact on or largely influence the quality of the playing field for electioneering, considerable attention has been devoted to this theme.

Theme 10 – Miscellaneous

The miscellaneous theme seeks to deal with issues of a recurring nature which do not readily fall within the other themes. For example, the status of public servants in the political process.

THEME 6

ELECTION IRREGULARITIES

EXTRACT
of
Judgement of Supreme Court
dated 9th August, 1994
In Election Petition No 2 of 1991
Shri C. Narayanswamy

v

Shri C. K. Jaffar Shariff

ELECTION COMMISSION OF INDIA
ASKOKA ROAD
NEW DELHI

Elections – Corrupt practice – Large-scale mass free-feeding for electors – Proof of corrupt practice.

Background facts

The appellants challenged the election of the respondent primarily on the grounds (i) that the respondent arranged large-scale mass free-feedings for electors during the election; (ii) that the said respondent incurred expenditure at the election which amounted to a corrupt practice; and (iii) that the declaration of the result of the respondent was in violation of the provisions of the Act in as much as several thousand votes which should not have been counted in favour of the respondent, which materially affected the result of the election of the respondent and as such his election was liable to be declared void.

Held

That, on the special facts of the case, it was not possible to hold the respondent guilty of the charge of bribery by arranging mass-feeding.

Cases cited in Judgement

Kanwor Lal Gupta v Amar Nath Chawla (1975) 3 SCC 646

P. Nalla Thampy Terah v Union of India (1985) Supp. SCC 189

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 7194 of 1993

C Narayanaswamy Appellant

versus

C. K. Jaffar Shariff & Others Appellant

with

Civil Appeal No 2543 of 1993

Smt. Pramila Nesargi Appellant

versus

C K Jaffer Shariff & Others Respondents

JUDGEMENT**N. P. Singh J:**

These appeals have been filed against the judgement of the High Court dismissing two election petitions filed on behalf of the appellants, questioning the validity of the election of respondent C. K. Jaffar Shariff (hereinafter referred to as "the respondent") to the Lok Sabha from Bangalore North Lok Sabha Constituency.

The appellants challenged the election of the respondent, primarily on the grounds (i) that the respondent arranged large-scale mass free-feedings for the electors during the election which amounted to a corrupt practice within the meaning of Section 123 (1) (A) of the Representation of the People Act 1951 (hereinafter referred to as "the Act"); (ii) that the said respondent incurred expenditure at the said election in contravention of Section 77 of the Act which amounted to a corrupt practice within the meaning of Section 123 (6) of the Act; and (iii) that the declaration of the result of the respondent was in violation of the provisions of the Act in as much as several thousand votes, which should not have been counted in his favour and ought to have been rejected as invalid, were counted in favour of the respondent, which has materially affected the result of the election of the respondent and as such his election is liable to be declared void under Section 100(1) (d) (iii) & (iv) of the Act.

The relevant part of Section 123 (1) is as follows:

"Corrupt practices – The following shall be deemed to be corrupt practices for the purpose of this Act:

- (1) "Bribery", that is to say
- (A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent or any gratification, to any person whomsoever, with the object, directly or indirectly of inducing
- (a)
- (b) an elector to vote or refrain from voting at an election

Explanation – for the purposes of this clause the term "gratification" is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78." (Emphasis supplied.)

In view of Section 123 (1)(A)(b), any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any gratification, with the object of "directly or indirectly" inducing a voter to vote, shall be deemed to be "bribery" and as such shall amount to a corrupt practice. Mass feeding of the electors after the process of election has commenced and before the date of poll may induce directly or indirectly the electors to vote in favour of the candidate who has arranged such a feast for them in course of the election. In the case of *Moham Singh v Bhanwarlal* (A.I.R. 1964 SC 1366), a Constitution Bench of this Court, while commenting on the expression "gratification" in Section 123 (1) (A), held that:

"....."Gratification" in its ordinary connotation means satisfaction. In the context in which the expression is used, and its delimitation by the Explanation, it must mean something valuable which is calculated to satisfy a person's aim, object or desire, whether or not that thing is estimable in terms of money....."

It was further stated that Explanation to sub-section (1) of Section 123 of the Act extends the expression "gratification" to include all forms of entertainment.

In the case of *Rajendra Prasad Jain v Sheel Bhadra Yajee & Others* (A.I.R. 1967 SC 1445), this Court said:

"...In our opinion, when considering the scope of the words "offer of bribery" in the Election Law, we should not place a narrow construction on that expression. In fact, the scope of that expression should be extended in order to ensure that elections are held in an atmosphere of absolute purity, and a wide meaning should be given to the expression "offer of bribery".

The Explanation of sub-section (1) of Section 123 says specifically that the term "gratification" includes all forms of entertainment. Even Explanation to Section 171-E of the Indian Penal Code says that "treating" means that form of bribery where the gratification consists of food, drink, entertainment or provision.

In view of the Explanation of Section 123(1) of the Act, there should be no difficulty in holding that, after the process of election has commenced and before the electors have exercised their right of franchise, mass-feeding of electors arranged by the candidate or his agent or any other person with the consent of the candidate or his election agent or order to induce directly or indirectly the electors to vote shall be a corrupt practice within the meaning of the said Section. Particularly with the existing economic conditions prevailing in the country, feeding of electors may induce them to vote in favour of the candidate arranging it. As such, if the Court is satisfied that mass-feeding had been arranged in order to directly or indirectly induce the electors to vote for the candidate in question, the charge of 'bribery' shall be deemed to have been established.

The next aspect which needs examination is as to whether, before arranging any such mass-feeding, or in course thereof, the factum of any negotiation between the electors on one side, and the candidate or his agent or any person arranging such mass-feeding on behalf and with the consent of the candidate or his election agent on the other side, has to be proved. The framers of the Act while specifying as to what shall be deemed to be "bribery", did not provide that the negotiation between the candidate or his agent or any other person with the consent of such candidate or his election agent on the one hand and the electors on the other should be proved. Section 123(1)(A) says that any gift, offer or promise by a candidate or his agent or any other person with the consent of such candidate or his election agent, of any gratification made to the elector "with the object, directly or indirectly of inducing" such an elector to vote, shall be deemed to be 'bribery'. Section 123(1)(A) does not require the electors to express or convey their acceptance or assurance that they shall vote for such candidate. On the material on record, of course, the court has to be satisfied that such gift, offer or promise of any gratification has been made to the electors with the object, directly or indirectly, to induce the electors to vote in favour of such candidate. A nexus between the gift, offer or promise of gratification and the inducement to vote has to be established. This can be established even by circumstantial evidence. The Election petitioner is not required to prove any direct negotiation between the candidate or his agent on the one hand and the electors on the other.

Mr Prashant Bhusan, learned counsel appearing for one of the appellants rightly pointed out that in the case of *Laxmi Narayan Nayak v Ramratan Chaturvedi & Others* (1990 (2) S.C.C. 173), the attention of the two learned Judges of this Court was not drawn to the case referred to above and because of that, an observation was made viz "element of 'bargaining' is completely absent in the present case". If an election petitioner is required to prove that the gift, offer or promise of gratification was accepted by the electors by assuring to vote in favour of such a candidate, the provisions of Section 123(1)(A)(b) shall become redundant and shall have to be read as a pious wish to the framers of the Act to eliminate the role of 'bribery' in the elections. The framers of the Act were quite conscious that in many cases it would be difficult to get direct evidence of inducement to the electors to vote, and because of that they provided that inducement to voter may be indirect as well. This is so even where before poll, cash, clothes, cycles, blankets, etc., are distributed amongst the electors, by the candidate or his agent. Once the Court comes to the conclusion that such gifts were made to induce the electors to vote in favour of the candidate concerned, a corrupt practice within the meaning of Section 123(1)(A) shall be deemed to have been committed.

But before the charge of bribery, as contemplated in Section 123(1)(A) of the Act, is held to have been proved, against the candidate concerned, because of mass-feeding arranged by him or his agent or any other person with his consent or the consent of his election agent, it must be established that the object of such mass-feeding was directly or indirectly to induce the electors to vote in favour of such candidate. In some cases, on material being produced, this charge can be established directly if the candidate or his agent, or any other person with the consent of the candidate or his election agent, as such mass-feeding of the electors, seeks their support and votes

at the election in question. But there may be cases, where the inducement to vote is not a direct one but only an indirect one. The candidate or his agent or any other person who has arranged such mass feedings with the consent of the candidate or his election agent, may not make a direct appeal to the electors either before, during or after the feast.

The High Court has rightly come to the conclusion that in the special facts and circumstances of the present case, it is not possible to hold the respondent guilty of the charge of bribery, by arranging mass-feeding.

Section 123(6) says that the incurring or authorising of expenditure in contravention of Section 77 shall be deemed to be a corrupt practice, for the purpose of the said Act. The relevant part of Section 77 is as follows:

Section 77(1) "Account of election expenses and maximum thereof. – (1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent between the date on which he has been nominated and date of declaration of the result thereof, both dates inclusive.

Explanation, 1. Notwithstanding any judgement, order or decision of any court to the contrary, any expenditure incurred or authorized in connection with the election of candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be, and shall not ever be deemed to have been, expenditure in connection with the election incurred or authorized by the candidate or his election agent for the proposes of this sub-section:

Explanation (1) aforesaid was introduced by Act No 58 of 1974 w.e.f. 19.10.1974. It may be mentioned that this Court on 3.10.1974, in the case of *Kanwar (a) Gupta v. Amar Nath Chawla*, (1975) 3 SCC 646, while examining the scope of section 77(1) had observed:

"When the political party sponsoring a candidate incurs expenditure in connection with his election, as distinguished from expenditure on general party propaganda, and the candidate knowingly takes advantage of it or participates in the programme of activity or fails to disavow the expenditure or consents to it or acquiesces in it, it would be reasonable to infer, save in special circumstances, that he impliedly authorised the political party to incur such expenditure and he cannot escape the rigour of the ceiling by saying that he has not incurred the expenditure, but his political party has done so. A party candidate does not stand apart from his political party and if the political party does not want the candidate to incur

the disqualification, it must exercise control over the expenditure which may be incurred by it directly to promote the poll prospects of the candidate.

The same proposition must also hold good in case of expenditure incurred by friends and supporters directly in connection with the election of the candidate. This is the only reasonable interpretation of the provision which would carry out its object and intendment and suppress the mischief and advance the remedy by purifying our election process and ridding it of the pernicious and baneful influence of big money."

To take away the effect of the judgement of this Court in the case of *Kanwar Lal Gupta (supra)* the explanation aforesaid was introduced saying that notwithstanding any judgement, order or decision of any Court on the contrary, any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to have been, expenditure in connection with the election, incurred or authorised by the candidate or by his election agent for the purposes of the said sub-section.

The validity of the said explanation was questioned before this Court. A Constitution bench of this Court in the case of *P. Nalla Thampy Terah v Union of India* (1985) Supp. SCC 189, observed that petitioner in that case was not unjustified in criticising the provision contained in Explanation 1 as diluting the principle of free and fair elections, which is the cornerstone of any democratic polity, but it was not for the Court to lay down policies in matters pertaining to election. As the said amendment in sub-section 1 of Section 77 of the Act did not violate the constitution, it could not be declared to be invalid although this Court may not approve the policy which underlines it. It was further said:

"While we are on this question, we would like to point out that if any expenditure which purports to have been incurred, for example, by a political party, has in fact been incurred by the candidate or his election agent, Explanation 1 will not be attracted. It is only if the expenditure is in fact incurred or authorised by a political party or any other association or body of persons, or by an individual (other than the candidate or his election agent) that the Explanation will come into play. The candidate cannot place his own funds in the power or possession of a political party, or a trade union or some other person and plead for the protection of Explanation 1. The reason is that, in such a case, the incurring of the expenditure by those others, is a mere façade. In truth and substance, the expenditure is incurred by the candidate himself because the money is his. What matters for the purpose of Explanation 1 is not whose hand it is that spends the money. The essence of the matter is, whose money it is."

It is true that right to elect or to be elected is pure and simple a statutory right and in the absence of the statutory right and in the absence of the statutory provision neither a citizen has a right to elect nor has he a right to be elected, because such right is neither a fundamental right nor a common law right. The same is the position so far as the right to challenge an election is concerned. It flows from the provisions of the Act itself. As such, the right of a person to question the validity of an election is dependent on the conditions prescribed in the different sections of the Act and the rules framed thereunder. It was open to the parliament to say that any expenditure incurred by a political party or by any other association or body of persons or by any individual other than the candidate or his election agent, shall not be deemed to be expenditure in connection with the election, incurred or authorised by the candidate or his election agent for the purpose of sub-section (1) of Section 77 read with rule 90 aforesaid.

At the same time we cannot resist from observing that sub-section (6) of Section 123 which makes incurring or authorising expenditure in contravention of Section 77, a corrupt practice because of the aforesaid Explanation 1 to Section 77(1) has become nugatory and redundant. Sub-section (6) of Section 123 read with Section 77 and rule 90, purports to restrict the unlimited flow of money power, and makes expenditure in excess of the limit fixed, a corrupt practice, but legality and sanctity has been given to such excess expenditure by explanation 1 aforesaid, which fixes no limit on the expenditure in connection with the election of a candidate. Neither the candidate nor the political party nor the persons who incur such huge expenditure for the candidate are required to disclose the same to anyone. It need not be impressed that it is not always possible for the election petitioner to prove or even for the Courts to record a finding that the fantastic expenditure in the election has been incurred or authorised by the candidate concerned or by his election agent, although the court is satisfied on the material on record that the limit fixed by the Act and the rules has been far exceeded in any particular case.

As the law stands in India today anybody, including smuggler, criminal or any other anti-social element may spend any amount over the election at any candidate in whom such person is interested, for which no account is to be maintained or to be furnished and any such expenditure shall not be deemed to have been expenditure in connection with the election, incurred or authorised by the candidate or by his election agent for the purpose of sub-section (1) of Section 77, so as to amount to a corrupt practice within the meaning of sub-section (6) of Section 123. It is true that, with the rise in the costs of the mode of publicity for support of the candidate concerned, the individual candidates cannot fight the election without proper funds. At the same time, it cannot be accepted that such funds should come from hidden sources which are not available for public scrutiny. According to us, sub-section (6) of Section 123 declaring "incurring or authorising of expenditure in contravention of Section 77" a corrupt practice has lost its significance and utility with the introduction of the Explanation 1 aforesaid which encourages corruption by underhand methods. If the call for "purity of elections" is not to be reduced to a lip service or a slogan, then the persons investing funds, in furtherance of the prospect of the election of a candidate must be identified and located. The candidate should not be allowed to

plead ignorance about the persons, who have made contributions and investments for the success of the candidate concerned at the election. But this has to be taken care of by the Parliament.

ELECTION COMMISSION OF INDIA

Nirvachan Sadan, Ashoka Road, New Delhi 110 001,
Dated 6th January, 1994/16 Pausa, 1915 (SAKA)

NOTIFICATION

No. 82/MT-HP/2/91 (Aurangabad). In pursuance of clause (b) of sub-section (2) of section 116C of the Representation of the People Act, 1951 (43 of 1951), the Election Commission of India hereby publishes the Order, dated 19th November 1993 of the Supreme Court of India in Civil Appeals Nos. 2115, 1758, 2116 and 2444 of 1993 filed against the judgement dated 30th March, 1993 of High Court of Judicature at Bombay (Aurangabad Bench) in Election Petition No. 2 of 1991.

IN THE SUPREME COURT OF INDIA, CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No. 2115 OF 1993 – Gadakh Yashwantrao Kankarrao –

Appellant versus E.V. alias Balasaheb Vikhe Patil & Ors – Respondent
(With Civil Appeal Nos. 2116 of 1993, 2444 of 1993 and 1758 of 1993).

Before

J S Verma, J, N.P.Singh, J and N Venkatachala, J. Corrupt practice – False Statements – Attack on personal character.

Background facts

Vikhe Patil filed an election petition at the Bombay High Court praying that the election of Gadakh be declared as void and the election petitioner Vikhe Patil be declared to have been duly elected from that constituency. The challenge to the validity of the election of Gadakh was made on the ground that Gadakh had committed corrupt practice under the law by making false statements. After the evidence was recorded at the trial of Gadakh, the High Court issued a notice under the R.P. Act, Section 99 to Sharad Pawar to show cause why he should not be so named.

At the end of the trial, the High Court allowed the election petition and declared the election of Gadakh to be void and declared that Vikhe Patil was duly elected. The Court also named Sharad Pawar for commission of corrupt practice.

The appellants appealed against the judgment of the High Court.

Held

That the High Court's judgement declaring the election of Gadakh to be void for commission of the corrupt practice under section 123(4) of the R.P. Act was upheld; the further declaration made by the High Court that Vikhe Patil was duly elected was set aside, and the High Court's order naming Sharad Pawar under Section 99 of the R.P. Act for commission of corrupt practice under Section 123(4) was also set aside.

Cases cited in Judgements

Samant N. Balakrishna v George Fernandez & Others (1969) 3 SCR 603
Azhar Hussain v Rajiv Gandhi (1986) (Supp) SCC 315
Lalit Kishore Chatuverdi v Jagdish Prasad Thada & Others (1990) (Supp.) SCC 248
Daulat Ram Chanhani v Anand Sharma (1984) 2 SCC 64
M.J. Zakharia Sait v T.M. Mohammed & Others (1990) 3 SCC 396
Surinder Singh v Hardial Singh & Others (1985) 1 SCC 91
Magraj Patodia v R.K. Birla & Others (1971) 2 CSR 118
Kumara Nand v Brijmohan Lal Sharma (1976) 2 SCR 127
Napal Chandra Roy v Netai Chandra Das & Others (1971)(3) SCC 303

T. K. Gangi Reddy v M. C. Anhaneya Reddy & Others 22 E.L.R. 261
Guruji Shrihari Baliram Jiratode v Vithalrao & Others (1969)(1) SCC 82
Ran Chand Bhatia v Hardy (1986) 1 SCR 177
Inder Lal v Lal Singh (1962) Supp. 3 SCR 114
Sheopat Singh v Ran Pratap (1965) SCR 175
B. R. Rao v N. G. Ranya (1970) (3) SCC 576
Narasimha Charan Monanty v Surendra Monanty (1974) 2 SCR 39
Manohar Joshi v Damodor Tatyaba & Others (1991) 2 SCC 342
Konappa Rudiappa Nadoonda v Vishwariath Reddy & Another (1969) 2 SCR 90

JUDGEMENT

These appeals under Section 116A of the Representation of the People Act, 1951 (hereinafter referred to as "the R. P. Act") are against the judgement dated 30th March, 1993 in Election Petition No. 2 of 1991 (E.V. alias Balasaheb Vikhe Patil, versus Gadakh Yashwantrao Kankarrao & Ors.) passed by A. A. Halbe, J of the Bombay High Court at the Aurangabad Bench. By the impugned judgement, the election of Gadakh Yashwantrao Kankarrao as a member of the Lok Sabha from 39 Ahmednagar Parliamentary Constituency held in June 1991 has been set aside for commission of the corrupt practice under section 123(4) of the R. P. Act; and E.V. alias Balasaheb Vikhe Patil has been declared elected. Civil Appeal No 2115 of 1993 is by Gadakh Yashwantrao Kankarrao (Gadakh) against declaration of his election to be void and the further declaration of E.V. alias Balasaheb Vikhe Patil (Vikhe Patil) to have been duly elected. Civil Appeal No. 2116 of 1993 is by Deshmukh Bhagwan Rangnath (Respondent No. 3 in Election Petition) against, declaration of Vikhe Patil to have been duly elected. Similarly, Civil Appeal No.2444 of 1993 is by Najan Rambhau Maruti (Respondent No. 6 in the Election Petition) against declaration of Vikhe Patil to have been duly elected. Civil Appeal No, 1758 of 1993 is by Sharadchandra Govindrao Pawar (Sharad Pawar) to whom a notice under Section 99 of the R.P. Act was issued, against naming him for commission of the corrupt practice under Section 123 (4) of the R. P. Act along with the returned candidate Gadakh.

The material facts are now stated: Programme of election of a member of the Lok Sabha from 39 – Ahmednagar Parliamentary Constituency known locally as Ahmednagar South Constituency was as under:

1. Issuance of Nomination Papers	From 19th April 1991 to 26th April 1991.
2. Last date of Acceptance of Nomination Papers	26th April 1991.
3. Scrutiny and publication of list of Candidates	7th April 1991.

4. Withdrawal and Publication of final list of candidates	29th April 1991.
5. Allotment of symbols	29th April 1991 after 3.00 p.m.
6. Duration of Propaganda	30th April to 21st May 1991.
7. Date of polling	23rd May 1991.
8. Counting of votes and declaration of results	27th May 1991.

However, due to the assassination of Shri Rajiv Gandhi, former Prime Minister of India on 21st May 1991, the remaining election programme was modified by fixing 12th June 1991 as the date of polling in that constituency and 16th June 1991 for the counting of votes and declaration of result. For the election, from the constituency, the election petitioner Vikhe Patil, the returned candidate Gadakh. Respondent No. 1 and respondents 2 to 10 in the election petition, were candidates. The polling took place on 12th June 1991 and the result was declared on 16th June 1991 wherein Gadakh was declared elected, having secured 279,520 votes against his nearest rival Vikhe Patil who secured 267,883 votes.

Vikhe Patil then filed an election petition (E.P. No. 2 of 1991) at the Aurangabad Bench of the Bombay High Court praying that the election of Gadakh be declared as void and the election petitioner Vikhe Patil be declared to have been duly elected from that constituency. Challenge to the validity of the election of Gadakh was made by Vikhe Patil on the ground that Gadakh had committed the corrupt practice under sub-section (4) of Section 123 of the R. P. Act. This ground was based on the allegation that Gadakh had made certain false statements in his speeches relating to the personal character and conduct of Vikhe Patil attributing the use of corrupt methods by him, with a view to prejudicing the prospects of Vikhe Patil's election, in meetings held by him at Sonar on 30th April 1991, Ahmednagar on 2nd May, 1991, Newase on 3rd May 1991 and in an interview given to a journalist on 10th May 1991 which was published in the daily newspaper "Maharashtra Times" on 13th May 1991. It was also alleged by Vikhe Patil that in the public meetings held at Newase on 3rd May 1991 and at Srigonda on 11th May 1991, Sharad Pawar, the then Chief Minister of Maharashtra had made similar statements relating to the personal character of Vikhe Patil. In the presence of and along with Gadakh, it was alleged by Vikhe Patil that these statements relating to the personal character of Vikhe Patil made by Gadakh and Sharad Pawar amounted to corrupt practice under section 123 (4) of the R. P. Act, on account of which Gadakh's election was void and Sharad Pawar was liable to be named in accordance with Section 99 of the R. P. Act. After the evidence was recorded at the trial and Gadakh had also been examined on commission on account of his illness, the High Court issued a notice under Section 99 of the R. P. Act of Sharad Pawar to show cause why he should not be so named.

Sharad Pawar challenged the issuance of this notice under Section 99 of the R. P. Act to him by a special leave petition filed in this Court, but the same was dismissed requiring Sharad Pawar to raise his objections to the notice in the first instance at the trial of the election petition in the High Court itself. Sharad Pawar then raised his objections before the High Court but chose not to adduce any evidence or to apply for the recall of any witness already examined for further cross-examination. Sharad Pawar denied the commission of any such corrupt practice as did Gadakh at the trial of the election petition.

The High Court, at the end of the trial, allowed the election petition and declared the election of Gadakh to be void, making a further declaration that Vikhe Patil was duly elected. The High Court also named Sharad Pawar for the commission of corrupt practice under Section 123(4) of the Act, along with the returned candidate Gadakh. The conclusions of the High Court on the basis of which these reliefs have been granted are summarised in paragraphs 223 of the impugned judgement, which are as under:

"From the discussion in the foregoing paragraphs, it has to be concluded that the respondent No. 1 and Sharad Pawar did make supplementary statements of each other. Those statements can be enumerated as below:

- 1) Petitioner was to spend Rs. 3 crores for his election;
- 2) Petitioner had paid Rs 50 lakhs to Janata Dal;
- 3) Petitioner had paid Rs 20 lakhs to Janata Dal candidate for withdrawing from Nagar constituency and to contest from Beed Constituency.
- 4) Petitioner was to take out rally of 5,000 cycles and distribute the cycles amongst the participants;
- 5) Petitioner was to spend for repairs of Chawadies and had sent Rs. 5,000 for repair of Chawadi at Ganganagar, taluka Newasa;
- 6) Petitioner was to distribute sarees, dhoties and liquor amongst the workers obviously with a view to attract them.
- 7) Voters must accept them and vote for congress.

These are the statements made by the respondent No.1 and Sharad Pawar in various meetings. The foregoing discussion has clearly indicated as to what was spoken by either of them at different meetings. That portion would be again reconsidered at the end but suffice it to say that they would certainly touch upon the personal character and conduct of the petitioner."

It is these conclusions and reliefs granted on this basis which are challenged by the returned candidate Gadakh and the noticed Sharad Pawar, while respondent No. 5, Deshmukh Bhagwan Ranganath and respondent No. 6, Najar Rambhau Maruti have challenged merely the further declaration of Vikhe Patil to have been duly elected, in their appeals.

At this state, a gist of the alleged false statements relating to the personal character of Vikhe Patil attributed to Gadakh and Sharad Pawar may be mentioned while the details thereof would be stated later at the time of considering each of them separately. It has been alleged by Vikhe Patil that Gadakh attributed to him the resort of corrupt methods for winning the election in his statements by stating that Vikhe Patil had a huge election budget of Rs. 3 crores; that Vikhe Patil had paid Rs. 50 lakhs to the election fund of Janata Dal; that Rs. 20 lakhs were paid by him to the Janata Dal candidate E.G. Kolse Patil to shift to another constituency; that he was to distribute 5,000 bicycles to the participants in a bicycle rally to be taken out for him; that he had offered the workers in the election campaign Rs 25,000 at the village level and Rs. 50,000 at the taluka level; that he was to give money for repairs of chawadies and the temple in the constituency and he was to distribute sarees, dhoties, trousers and cash to the voters for purchasing their goods. It was also alleged that Gadakh exhorted the voters in the constituency to accept these things from Vikhe Patil but to vote for Gadakh. Against Sharad Pawar, it was alleged that, in the public meetings he addressed at Newasa and Srigonda, he made similar statements in the presence of Gadakh, except the statement attributed to Gadakh alone of payment by Vikhe Patil to the Janata Dal election fund and the Janata Dal candidate. It may be noticed at this stage that combined findings against Gadakh and Sharad Pawar have been recorded by the High Court in paragraph 223 and 224 of the judgement in respect of all the alleged statements including those relating to payments to the Janata Dal and the Janata Dal candidate, even though there is no pleading or proof of such statements being made by Sharad Pawar. The application made by the returned candidate Gadakh for recrimination alleging that the election of Vikhe Patil would have been void if he had been the returned candidate, was also dismissed by the High Court. Civil Appeal No. 2445 of 1993, as well as Special Leave Petition (Civil) No. 9210 of 1993 filed by Gadakh against dismissal of his application for recrimination, have already been dismissed by us as not pressed.

The operative order made by the High Court is as under:

- "(i) The Election Petition is allowed.
- (ii) The election of the respondent No. 1 Gadakh Yeshwantrao Kankarrao from 39 Ahmednagar Parliamentary constituency is hereby declared as null and void as the respondent Gadakh Yeshwantrao Kankarrao is proved to have committed corrupt practices under section 123(4) of the Representation of People Act.
- (iii) The notice against Sharadchandra Govindrao Pawar is made absolute under Section 99 of the Representation of People Act and Sharadchandra Govindrao Pawar is named as a person who has been proved to be guilty of corrupt practices under Section 123(4) of the Representation of People Act. The respondent No. 1 shall pay the costs of Rs. 30,000 to the petitioner and likewise respondent No. 6 shall pay the costs of Rs. 5,000 to the petitioners.

- (iv) Registrar to take action under section 103 of the Representation of People Act and forward the copy of the notice under section 99 of the Representation of People Act and the judgment and order in this Election Petition of the Election Commissioner and also to the Speaker or the Chairman of the House of Parliament or the State Legislature, as may be found necessary.
- (v) The petitioner E.V. Balasaheb Vikhe Patil is declared as candidate duly elected from the above parliamentary constituency.
- (vi) Petitioner be refunded his security deposit."

In these matters, Shri Ashok Desai appeared for Gadakh; Shri K. Parasaran for Sharad Pawar; V. N. Ghanpule for Deshmukh Bhagwan Rangnath (respondent No.5 in the election petition); and Shri Ram Jethmalani for Najan Rambhau Maruti (respondent No.6 in the election petition). In substance, the contention of Shri Ashok Desai was that Gadakh did not make any of the statements attributed to him and at any rate none of those statements amounts to the corrupt practice under Section 123(4) of the R. P. Act. Shri K. Parasaran contended that the statements attributed to Sharad Pawar, which do not include the statement of payment of Rs.50 lakhs to the election fund of Janata Dal and the payment of Rs.20 lakhs to the Janata Dal candidate B. G. Kolse Patil for shifting to another constituency, do not satisfy the requirements of Section 123(4) and, therefore, do not amount to the corrupt practice thereunder. Shri Desai further contended that, apart from there being no ground to declare the election of Gadakh to be void, no ground had been made out to declare Vikhe Patil to have been duly elected. Shri Ghanpule appearing for Deshmukh Bhagwan Rangnath adopted the arguments of Shri Ashok Desai to contend that Vikhe Patil could not be declared elected. Shri Ram Jethmalani appearing for Najan Rambhau Maruti, apart from challenging the declaration of Vikhe Patil to have been duly elected, supported the submissions of Shri Ashok Desai and Shri Parasaran to contend that no corrupt practice under Section 123(4) was committed either by Gadakh or Sharad Pawar.

The statements attributed to Gadakh and Sharad Pawar as constituting the corrupt practice under Section 22(4) of the R. P. Act are alleged in the election petition to have been made in four meetings and one interview to a journalist given by Gadakh. Before setting out the particulars of these allegations, the particulars of these meetings and the interview may be given. It may be mentioned that Gadakh was the candidate of the Congress (1) Party at the election and Sharad Pawar, belonging to the same Party, was the Chief Minister of Maharashtra at that time. The first meeting was held on 30th April 1991 at Sonai at which Gadakh had addressed the Congress Party workers. The second meeting of the District Congress Committee was addressed by Gadakh at Ahmednagar on 2nd May 1991. The third was public meeting at Newasa on 3rd May 1991 addressed by Gadakh as well as Sharad Pawar. The fourth was also a public meeting at Srigonda on 11th May 1991 which was addressed by Sharad Pawar after he had been introduced and welcomed by Gadakh. The speeches by Gadakh and Sharad Pawar at these meetings were also

published in the newspapers. Apart from these meetings, an interview was given by Gadakh on 10th May 1991 to a journalist Girish Kulkarni and that interview was published in the "Maharashtra Times" of 13th May 1991.

The averments in the election petition relating to the statements attributed to Gadakh and Pawar alleged to constitute the corrupt practice under Section 123(4) are mixed up but the relevant portions in the election petition are as under:

"(On 30th April 1991, the first respondent had addressed a meeting at village..... Further he made a statement that the petitioner had paid 20 lakhs of rupees for the candidate who was selected by Janata Dal Party for the Ahmednagar constituency to contest the election from Beed constituency. Respondent No.1 further alleged that the Petitioner was going to spend Rs. 3 crores for Petitioner's election. Respondent No.1 also alleged that Petitioner has declared rate of Rs. 25,000 for defecting worker of village level and Rs. 50,000 for worker of Tahsil..... The petitioner states that the statements made by the first respondent that petitioner paid Rs. 20 lakhs to the candidate of Janata Dal to withdraw from Ahmednagar Parliamentary constituency is false is known to first respondent as false and such a statement is relating to personal character and conduct of the petitioner the statement is false and also relate to the candidate. This statement was made by the first respondent believing it to be false. The said statement was made to prejudice prospects of the petitioner in the election. The statement of first respondent that the petitioner had paid Rs.50 lakhs to the Janata Dal Party is also false and this statement of the first respondent that petitioner has declared rate of Rs. 25,000 per defection worker of village level and 50,000 per worker of tahsil level is equally false. The first respondent know and believe that it was false statement. The petitioner was indulging into an act of bribery for inducing Janata Dal candidate to withdraw from election. This statement relates to the personal character of petitioner.

(Para.9)

..... The petitioner states that the first respondent made a statement in the meeting dated 2nd May 1991, that in order to take the support of Janata Dal, the petitioner had paid Rs.50 lakhs to the election fund of (Janata Dal).....

(Para.10)

The petitioner states that in the meeting addressed by the first respondent in the office of the District Congress Committee, Ahmednagar, on 2nd May 1991, as stated in Para No. 10, and further the first respondent made a statement that a sum of Rs. 5,000 had been sent on behalf of the Petitioner for constructing Chawdi at Ganganagar area of Newasa Tahsil. The respondent No. 1 further stated that the petitioner was going to have bicycle rally of 5,000 strong and those bicycles

would be given permanently to the participants in the said rally..... The petitioner states that no bicycles rally was held. The petitioner had not purchased any bicycle and had not handed over any bicycle to anybody. The statement made by the first respondent was false. The statement indicates that the petitioner was going to spend a large sum of money to bribe voters and even distribute 5,000 bicycles.....

(Para.11)

The petitioner states that an election meeting was held at Newasa Bajartal of 3rd May 1991, at 10.30 a.m. for the inauguration of propaganda. The said meeting was addressed among others by the first respondent and then Chief Minister of Maharashtra Shri Sharad Pawar. In the said meeting, the first respondent repeated that 5,000 bicycles.....distributed, money is also being sent for repairing of Chawdi, Temples, and cash was being distributed on behalf of the petitioner. Shri Sharad Pawar made a reference to this statement in the presence of the first respondent and Shri Sharad Pawar also made statement that Vikhe is under false impression that the poor men from famine affected area of South Nagar District can be purchased. Poor persons do not go here or there for money. Don't take test of self respect of those (poor men). Institutions have been erected by taking advantage of party. Voter can't be purchased by that money. Shri Pawar advised the voters that if the wealth is being distributed take the wealth but vote for Congress. Statements were repeated to the effect that the petitioner was distributing bicycles and pairs of dhoties and sarees, among voters in the constituency.

The petitioner states that these statements were false. The first respondent, Shri Sharad Pawar knew that these statements were false. Shri Sharad Pawar knew well that these statements reflected on the personal character of the petitioner. The petitioner was being painted by the first respondent and Shri Sharad Pawar, that the petitioner would do anything to get elected by use of his money.

(Para 12)

The petitioner states that the first respondent gave an interview to Shri Girish Kulkarni representative of Maharashtra Times. The said interview has been published in the Maharashtra Times dated 13th May 1991..... In the said interview it was put up to the first respondent that the first respondent had been accusing the petitioner of indulging in corrupt practices, on which basis such accusations were made. The first respondent replied stating that, according to his own information, the petitioner had paid Rs. 50 lakhs to the election fund of Janata Dal for getting its support and Rs. 20 lakhs to Shri B. G. Kolse Patil to make him not to contest the election from 39. Ahmednagar Parliamentary constituency but to contest from Beed constituency. First respondent had further stated that the Petitioner had

collected Rs. 3 crores from various places to fight out this election as it is a fight for political existence of Vikhe Patil. It was further stated that he would be distributing cycles, liquor bottles, dhoties, sarees and cash among the workers then only will he be elected and arrangements made. It was further stated by respondent no. 1 that the petitioner had been trying to win over the political workers by financial inducements.....The petitioner states that the above statement is false. The petitioner had not paid Rs. 50 lakhs nor any amount to Janata Dal Election Fund, nor paid Rs. 20 lakhs to Shri B.G. Kolse Patil. The petitioner had not distributed bicycles, liquor bottles, dhoties, sarees, cash amounts among the voters. The petitioner had not attempted to induce the workers of any other party with financial support. The first respondent knew that the above statement was false. The first respondent believed it to be false.....

(Para.13)

The petitioner states that the first respondent was also present in the election meeting on 11th May 1991, at Shrigonda at 8.30 p.m. in Ahmednagar constituency. The said meeting was addressed by the then Chief Minister Shri Sharad Pawar..... The petitioner states that the then Chief Minister Shri Sharad Pawar, making the reference to above act relating to the petitioner, made the following statements: "Who is contesting this election against us. On one side there is Rajiv Gandhi and this his candidate trying to save the country. On the other side are ranged the people trying to secure votes in the name of religion and some other candidates, and on the third side there is someone who went in adoption somewhere because it was not possible for him to wait when the party told him to wait for some time. And the third candidate who is contesting the election with their support had left his party and came here thinking that this is a soft (electorate). I am not worried about the Bhartiya Janata Party candidate in this constituency because he is going to lose. He too is aware of this. The question is different because he is going to lose. He too is aware of this. The question is different while what to do about this adoptive candidate who was raised by the Congress made a Member of Parliament for five times, and office bearer of the Zilla Parishad. On one occasion when he was asked to wait a little, he grew impatient and began searching. He filled up (nomination) forms in Kibergaon and in Nagar. He adopted a stand of interested parties while to rebel in south constituency (*sic*). But while performing that role he saw that he could not get an opportunity in the north. So the idea entered his mind that this south constituency, being a famine-prone region and the people there being poor, that he could pocket them. So he started activating in this part with a view to take over Maharashtra from here and win the election by efforts of interested parties by playing a game of purchasing your self-respect. We must face it and defeat such activity. That is the task to be done in this election. At some time or other you will have to tell (them) that money alone cannot be an important motivation

in this election. What is needed is ideology, policy, programme and morality. It is wrong to give up morality when one's wish is not fulfilled to leave the party program and colleagues when a favourable decision is not taken and to join hand with other parties once the "koom-koom" (sacred powder indicating matrimony) is applied, its sanctity must be maintained. But we did not know, that the koom koom was being applied in the name of one person and the eyes were looking at somebody else. Then the possibility cannot be ruled that attention will be drawn to such questions as what benefit we will get; which leaders are coming to South (constituency); will the village chawdi be built; will the temple be renovated; will motorbikes be available for riding; will bicycles, at least, be available for riding. It is not in your and my interest to accept the same. It will not behove our self-respect, but it must be accepted. I say that the reason for this (acceptance) is that whatever comes will be from society's resources. If the process of distribution has begun, it is very good in the interest of establishing socialism in this way. Take the same for free and use it against them. If we can do this sincerely, then I am sure that all these people shall realize that the people of South (constituency), are poor but their attitude is different.....

The petitioner states that in the speech, Shri Pawar did not taken the name of petitioner, but made references to the petitioner stating his political career and naming the petitioner as the third candidate going in adoption

The petitioner states that the statements made by Shri Sharad Pawar stated above were innuendos. The petitioner states that the statements above quoted were false. The said statement was made in the presence of first respondent. The first respondent never objected to these statements The petitioner stated the first respondent and Shri Sharad Pawar believed these statements to be false. The petitioner states that the said false statements were made by Shri Sharad Pawar with the calculation of prejudicing the petitioner's prospects of election.....

The Petitioner submits that the statements made by the first respondent himself and statements made by Shri Sharad Pawar in the presence of the first respondent amounts to corrupt practice under section 123(4) of the Representation of People Act 1951. These statements are even published in the widely circulated newspapers which are produced at Exhibit A to K. The statements amounted to an allegation that the petitioner was ready to buy the voters by offering bribes to them. The petitioner states that bribery itself is a corrupt practice and if it is said against a candidate that he practises the corrupt practice of buying votes by means of bribery, it clearly and unequivocally constitutes an attack on the private character. The petitioner states that the statements of the first respondent and Shri Sharad Pawar as reported above were totally false. He believes that the statements

were false and the statements were calculated to prejudice the election prospects of the petitioner.

Recording of the evidence at the trial of the election petition was concluded on 4th September 1992 when the statement of Gadakh was recorded on commission. The High Court made an order on 18th September, 1992 directing issuance of a notice to Sharad Pawar under Section 99 of the R. P. Act pursuant to which the notice was actually issued on 3rd October, 1992 together with the annexure as directed in the order itself. This notice was served on Sharad Pawar on 12th October, 1992. As earlier stated, Sharad Pawar preferred a special leave petitioner in this Court against issuance of the notice and that special leave petition was dismissed remaining Sharad Pawar to raise all his objections to the notice in the first instance before the High Court leaving those questions open for consideration after the final decision of the High Court, if necessary. In view of the High Court's order naming Sharad Pawar under section of the R.P. Act, the question now arises for consideration of his pleas in the notice issued to Sharad Pawar under Section 99. The statements attributed to him in the meeting at Newasa on 3rd May, 1991 and at Srigonda on 22th May, 1991 were quoted. At this stage, it is necessary to quote only those portions from the extracts given in the notice which have been relied on by Shri P.P. Rao on behalf of Vikhe Patil to support the allegation of corrupt practice against Sharad Pawar. The relevant portions are as under:

At Newasa on 3rd May, 1991

"Filed the nomination in South instead of North. These people guessed that it is a poor region. Scarcity area, suffers from water problems. People are engaged on Employment Guarantee Schemes. The people are having problems always. A good circumstance to win over easily. But they do know what is underneath. A black granite of Sahyadri is there. Any hammering would be not without danger. It would hurt the head
that Shri Balasaheb has taken a stand to test the self respect of the common man. He should be warned in clear terms that you have grown big because of Congress. Congress makes you known to everybody. Your institutions have grown because of the support coming from the Congress Governments at the State and the Centre. Today you left Congress. Left your family name. Parental name you have cast off and I warn that, you now will realise your true place and nature. Possessed with the illusion that you will be able to purchase the poor man of the south with the help of the resources at your disposal. You have come here every person of this part is a man possessing self-respect. He would rather remain without food and be in a peril but he would never sell his vote with anybody's money. Balasaheb would come to realise after the election of 23rd at the time of counting of votes schedule on 26th

They will distribute bicycles, distribute dhotis and sarees. He told you to accept them. I do not have any objection.....

Balasaheb has become one of them. And in celebration of that occasion, if the wealth is being distributed into this constituency, there should be no hesitation in (benefiting) getting benefited. Complete the renovations, if a bicycle is coming, let it be accepted. The symbol should be always in our hands. We should not worry ourselves about everything. Maybe there should be generous attitude behind the distribution of wealth in the shape of decentralisation. Let us welcome it. Let them do at the place and so far diverting the votes on the strength of money, let it be clear to whole of Maharashtra that voters cannot be bought.....

Efforts are being made, to corrupt the people, attempts being made to put on the pressure. There will be an attempt to distribution and notwithstanding anything done as above.....

And side by side, in this district, here is a right between morality and honesty from one side and money resources and a tendency guided by ego to the other side. I am sure that in this fight, morality and honesty would triumph. Though to that side, we see a mountain of wealth, but we also see that there is an infinite sea of common poor public. They are backing Yeshwantrao and Shankarrao. With the help of this common man's support, the voters of this constituency of the district have become able to be little and destroy this mountain of wealth."

At Srigonda on 11th May, 1991

"So the idea entered his mind that this South Constituency being a famine-prone region and the people there being poor he could pocket them. So he started activities in these parts with a view to take over Maharashtra from here and win the election by efforts of interested parties by playing their game of purchasing your self-respect.....

At some time or other you will have to tell them that money alone cannot be an important motivation in this election. What is needed is ideology, policy, programme and morality.

It is wrong to give up morality when one's wish is not fulfilled to leave the party, programme and colleagues, when a favourable decision is not taken and to join hands with other parties. Once the 'kumkum'(koom koom?) (sacred red powder) indicating matrimony is applied its sanctity must be maintained. But we did not know that the "kumkum" was being applied in the name of one person and the eyes were looking at somebody else.....

Then the possibility cannot be ruled out that attention will be drawn to all such questions like "what benefit we will get; which leaders are coming to the south (constituency); will the village Chavdi be built; will the temple be renovated; will motorbikes be available for riding; will bicycles at least be available for riding?".

It is not your and my interest to accept the same. It will not have our respect, but it must be accepted. I say that the reason for this (acceptance) is that whatever comes will be coming out of the resources of society. If the process of distribution of social wealth has begun, it is very good in the interest of establishing socialism in this way. Take the same for free and use it against them.....

A decision is to be taken whether one should act on principle or disloyally whether one is to act according to morality or immorality according to humanity or in the arrogance of money and power.”

The submission of Shri Ashok Desai was that the making of these statements, or at least the disparaging part thereof by Gadakh, is not proved by any acceptable evidence and at any rate all the requirements of Section 123(4) are not proved to hold that the corrupt practice was committed by Gadakh. Shri Parasaran contended that the statements attributed to Sharad Pawar have not been duly proved and, therefore, the question of any rebuttal by Sharad Pawar does not arise; and even if the alleged statements are proved to have been made by Sharad Pawar, all the requirements of section 123(4) have not been made out to justify naming him under Section 99 of the Act. Shri Ram Jethmalani supported the submissions of Shri Ashok Desai and Shri Parasaran. It was submitted by this learned counsel that the charge of commission of a corrupt practice being of a quasi-criminal nature, the standard of proof applicable is of a criminal charge and not merely that of preponderance of probabilities of a civil case. It was further submitted that the statements which were made by Gadakh and Sharad Pawar were only to caution the electorate against possible misuse of money power and to exhort them not to succumb to any such pressure or temptation. They submitted that this was done on account of the reasonable apprehension arising from the rumours afloat in the area of the likelihood of such tactics being adopted by Vikhe Patil who was a person of considerable financial means. They submitted that such exhortation with a view to educate the electorate cautioning them against possible misuse of money and adoption of unfair tactics does not amount to the corrupt practice under Section 123(4) of the R.P. Act.

Background of Political Climate

Before advertng to the particular statements alleged to have been made by Gadakh and Sharad Pawar which are alleged to constitute the corrupt practice under Section 123(4), it would be appropriate to deal with one submission made by Shri Ashok Desai and followed up by Shri Ram Jethmalani with greater vigour, relating to the manner of appreciation of evidence in such a case.

Shri Desai submitted that, even though it may not be quite proper to make statements reflecting on the personal character of a candidate, yet every such statements does not amount to a corrupt practice since it does not prejudice the election in the prevailing political climate. Shri Desai submitted that the existing norms do not match the earlier norms and, therefore, every reflection on a candidate's character does not necessarily prejudice his election since the electorate is not influenced by such a statement in the prevailing electoral scene. Shri Ram Jethmalani went further and submitted that political leaders have a duty to educate the electorate against possible malpractice which is now not uncommon during the elections and making of such statements is desirable. Shri Ram Jethmalani also submitted that every allegation against a candidate of his committing a corrupt practice is not moral turpitude adversely affecting the personal character of the candidate to constitute the corrupt practice under Section 123(4) of the R. P. Act.

In the present case, the larger question posed by Shri Ram Jethmalani does not arise for consideration and, therefore, we need not express herein any concluded opinion thereon. We may only observe that the proposition enunciated by Shri Ram Jethmalani is too wide for acceptance even in the existing political climate adverted to by the learned counsel unless the election law leaders to that inevitable conclusion exposing a hiatus in the legislative effort to achieve the avowed object of purity of elections. We would also like to observe that the suggestion of a liberal construction of the election law relating to corrupt practices by appreciation of evidence in the manner suggested in the existing political climate wherein mud-slinging is commonplace, does not commend to us as the proper approach envisaged by the election law. If purity of elections is the essence of democracy and providing for invalidation of an election on the ground of commission of any corrupt practice is the object of enacting these provisions, it cannot be accepted that the election scene has degenerated over the years. Appreciation of evidence for determining the commission of a corrupt practice must be made liberally because of the low value in the arena of elections. If the rule of law has to be preserved as the essence of the democracy of which purity of elections is a necessary concomitant, it is the duty of the courts to appreciate the evidence and to construe the law in a manner which would subserve this higher purpose and not even imperceptibly facilitate acceptance, much less affirmance, of the falling electoral standards. For democracy to survive, rule of law must prevail and it is necessary that the best available men should be chosen as people's representatives for the proper governance of the country. This can best be achieved through men of high moral and ethical values who win the elections on a positive vote obtained on their own merit and not by the negative vote of a process of elimination based on comparative demerits of the candidates. It is also necessary that the impact of money power, which has eliminated many men of undoubted ability and credibility from electoral contest for want of requisite financial support, should be able to re-enter the field to make the people's choice meaningful. This can be achieved only if elections are contested on a positive vote and the comparison is between the merits and abilities of the contestants without the influence of power and self and not between their comparative demerits and the supports of money power. Apart from the other adverse consequence, the growing influence of money power has also the effect of promoting criminalisation of politics.

The increasing electoral malpractices, of which some like booth-capturing have led to amendment of the election law, make availability of evidence difficult and this cannot be ignored while applying the standard of proof of a quasi-criminal charge for the proof of a corrupt practice. The existing laws do not measure up to the existing realities. The ceiling on expenditure is fixed only in respect of the expenditure incurred or authorised by the candidate himself but the expenditure incurred by the party or anyone else in his election campaign is safely outside the net of legal sanction. The spirit of the provision suffers violation through the escape route. The prescription of a ceiling on expenditure by a candidate is mere eye-wash and no practical check on election expenses for which it was enacted to attain a meaningful democracy. This *lacuna* in the law is, however, for the Parliament to fill lest the impression is reinforced that its retention is deliberate for the convenience of everyone. If this is not feasible, it may be advisable to omit the provision to prevent the resort of direct methods for its circumvention and subversion of the law, accepting without any qualm the role of money power in the elections. This provision has ceased to be even a fig leaf to hide the reality.

We are constrained to make these observations on account of the repeated reference made at the hearing to growing malpractice during elections, even though it was made for the purpose of persuading us not to attach any significance to statements relating to the personal character or conduct of a candidate since they are not taken seriously by the voters due to the falling ethical standard.

Real education of the electorate contemplates informing them of the past achievements and future plans of the political party on a positive note and its candidates' qualifications to serve that purpose, compared with those of the other political parties and their candidates and not a projection of the comparative greater demerits of the opponents. This is to emphasise that the functioning of a democracy depends on the quality of the men chosen to govern the country. This is the need which the election campaign is meant to serve in an election based on party lines, the qualifications of the candidates being material for this purpose.

The duty of the top echelons of leadership at state and national levels of all political parties is to set the trend for providing the required information to the electorate by adopting desirable standards so that it percolates to the lower levels and provides a congenial atmosphere for a free and fair poll. A contrary trend of speeches by the top leader tends to degenerate the election campaign as it descends to the lower levels and at times promotes even violence leading to criminalisation of politics. The growth of this unhealthy trend is a cause for serious concern for the proper functioning of democracy and it is the duty of the leaders of all political parties to reverse this trend to enable a functioning democracy to move in the proper directions.

The lament of Gadakh and Sharad Pawar of despair against the financial might of Vikhe Patil was indeed farcical and sounds comical in view of their own considerable resources, including the power of the ruling party and the active support of the Chief Minister of the State. We cannot accept that the alleged offending portions of the speeches of Gadakh and Sharad Pawar were

educative of the electorate even if they do not constitute the corrupt practice under Section 123(4) of the R. P. Act. To suggest that the electorate needs to be warned against the purchase of votes by anyone is to insult their intelligence. Past experience has shown that even the illiterate section of the electorate is educated enough to remain uninfluenced by power and self. This it has been shown more than once by rejecting the high and the mighty in power when it felt that they had failed to discharge their true obligations.

We must also add that, even if we come to the conclusion that these statements or any of them do not constitute the corrupt practice under Section 123(4), it only means that the existing law does not frown upon the same to visit it with any adverse consequence, but that does not mean that it is a desirable practice during an election campaign. It is one thing to say that a statement does not constitute corrupt practice but entirely different to suggest that it is a desirable electoral practice forming a part of the programme for education of the electorate.

We emphasise this fact on account of the vehemence with which Shri Ram Jethmalani canvassed for acceptance the view that all these statements are within the permissible electoral practice, necessary for education of the electorate. We are unable to subscribe to this view, which can only lead to a further degeneration of the waning morality in the electoral scene, when the felt need is for curbing any such tendency to ensure purity of elections.

The question therefore is: Whether in the law as it exists all or any of the statements proved to have been made by Gadakh or Sharad Pawar constitute corrupt practice under Section 123(4) of the R. P. Act?

Corrupt Practice under Section 123(4) of the R. P. ACT

Several authorities were cited to emphasise the strictness of pleadings in election petitions and the pleadings necessary to raise a triable issue of the corrupt practice under Section 123(4). It is not necessary to deal with all the authorities cited since, in the present case, even assuming there is no such defect in the election petition, many statements attributed to Gadakh and all the statements to Sharad Pawar do not constitute corrupt practice under Section 123(4) of the R. P. Act. These cases on which particular emphasis was laid by Shri Ashok Desai on behalf of Gadakh are alone referred briefly. In *Samant N. Balakishna etc. v George Fernandez and Others etc.* (1969) 3 SCR 603, it was held that the facts which constitute corrupt practice must be stated and the facts must be correlated to one of the heads of the corrupt practice and that an election petition without the material facts relating to a corrupt practice is no election petition at all. In *Azhar Hussain v Rajiv Gandhi*, 1986 (Supp.) SCC 315, it was held that a petition is liable to be summarily dismissed in the case of a petitioner's failure to furnish any of the material fact and particulars which are essential for disclosing a cause of action relating to a charge of corrupt practice. In *Lalit Kishore Chaturvedi v Jagdish Prasad Thada and Others*, 1990 (Supp.) SCC 248, the pleading in the election petition was found to be deficient but, even on the facts, the

corrupt practice alleged was found was found to be not proved. Similarly, in *Daulat Ram Chauhan v Anand Sharma*, (1984) 2 SCC 64, the requirement of pleading of a corrupt practice alleged was emphasised.

In *M. J. Zakharia Sait v T.M. Mohammed and Others* (1990) 3 SCC 396, it was held that when the corrupt practice alleged is based on an innuendo in the false statement published, then innuendo meaning must be specifically pleaded and proved. Accordingly, the attempt made by Shri P. P. Rao at the hearing to suggest that the statement made that Vikhe Patil had an election budget of Rs. 3 crores meant that he had that amount of ill-gotten money cannot be taken note of since such an innuendo is neither pleaded nor proved.

The scope of an appeal under Section 116A of the Representation of the People Act is as wide as in a civil appeal. This court has to dispose of the appeal by exercising the same jurisdiction as is exercised in an appeal against the original judgement of the High Court. It is well settled that allegations of corrupt practice are of quasi-criminal nature and the proof that would be required in support of such allegations would be as in a criminal charge and not mere preponderance of probabilities as in a civil matter. (See *Surinder Singh v Hardial Singh and Others*, [1985] 1 SCC 91).

In *Magraj Patodia v R.K Birla and Others* (1971) 2 CSR 118, it was held that many times corrupt practices may not be established by direct evidence and the same may have to be inferred from the proved facts and circumstances but the circumstances proved must reasonably establish that the alleged corrupt practice was committed by the returned candidate. It was also emphasised that a preponderance of probabilities is not sufficient proof in such a matter.

The requirements of Section 123(4) of the R. P. Act may now be considered.

The provision is as under:

"123. Corrupt practices – The following shall be deemed to be corrupt practices for the purposes of this Act:-

(4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election."

It is clear that every statement of fact in relation to the personal character or conduct of any candidate does not amount to a corrupt practice under section 123(4) unless all the requirements of the provision are satisfied, notwithstanding the fact that such a statement may be defamatory

in character. The traditional requirements to constitute a corrupt practice are obviously to maintain the delicate balance between the freedom of speech of an individual and public interest of giving full information to the electorate of the candidates. There is no presumption of falsity of such a statement of fact for the purpose of section 123(4) as it is under the law of defamation; and apart from proving the statement of fact to be false, it must also be shown that the maker of the statement either believed it to be false or did not believe it to be true. Irrespective of the quantum of evidence necessary to discharge the initial onus of leading evidence, the burden of proving these requirements on the evidence adduced remains with the person alleging commission of the corrupt practice. The object of making this provision more stringent is to emphasise the significance of freedom of speech in this sphere while prohibiting the making of such statements of fact relating to the personal character or conduct of any candidate, which are not merely false but which are also believed to be false or not believed to be true by the maker. The greater latitude in election law is meant to serve the public purpose if the statement found to be false is made with the belief in its truth based on reasonable grounds and it is not intended to be a licence for making a scurrilous attack on the opponents recklessly.

The primary requirements of section 123(4) are that the statement should be statement of fact which is false, and which the maker either believes to be false or does not believe to be true. If these requirements are not satisfied, the further inquiry to ascertain the satisfaction of the remaining requirements of section 123(4) serves no useful purpose. No doubt, the burden of proving the satisfaction of all these requirements is on him who alleges commission of the corrupt practice. The onus of leader evidence relating to some requirement is however light in view of their nature. Once the initial onus is uncharged, the onus shifts to the other side. For proving the statement of fact to be false, the initial onus is discharged and the burden shift to the other side by assertion of its falsity on oath whereafter it is for the other side to rebut the same. Similarly, the nature of belief of the maker being primarily related to the state of mind of the maker, the initial burden is discharged by an assertion on oath to that effect. If there be any circumstances relevant for proving and justifying the relief of the maker, that also would be a matter of evidence. The maker of the statement knows best the material on which his belief was formed and, therefore, it is for him to prove the same. Whether the maker of the statement believed it to be false or did not believe it to be true, is then ordinarily a matter of inference from the facts so proved.

The meaning of the expression "statement of fact" was a point of considerable debate at the Bar. The true meaning of this expression is of significance because several statements attributed to Gadakh and Sharad Pawar relate to apprehensions about Vikhe Patil's likely future conduct and not to his acts done in the past or at the time of making the statement. It was contended by Shri Ashok Desai for Gadakh and Shri K. Parasaran for Sharad Pawar that every statement is not a statement of fact and, therefore, as statement made about future apprehension or opinion of the maker, does not fall within the ambit of this expression. It was urged by them that most of the statement attributed to Gadakh and all the statements attributed to Sharad Pawar do not constitute a statement of fact within the meaning of this expression in section 123(4). Shri P. P. Rao, on

the other hand, contended that the expression "statement of fact" has to be given a wider meaning to include even a statement relating to the state of mind of the other person about his future conduct and, therefore, all the statements attributed to Gadakh and Sharad Pawar fall within the meaning of this expression.

There can be no dispute that the meaning of the expression "statement of fact" used in section 123(4), must be such which is opposite in the context and even if the meaning of the word "fact" be wider to include opinion about another person and apprehension about his future conduct, that is not sufficient to so construe the expression "statement of fact" in this provision unless fits in the context. A pragmatic test is to examine whether the meaning given to the expression "statement of fact" is capable of satisfying the other requirements of the provision. It is only that meaning of his expression which is capable of satisfying the other requirements of the provision which can be its true meaning in the context.

For constituting the corrupt practice in section 123(4), all the requirements thereof must be satisfactorily proved. A "statement of fact" for the purpose of section 123(4) can be one which is capable of proof as "false" and which the maker either "believe to be false" or "did not believe to be true" at the time of making it. These further requirements of its falsity and nature of belief of the maker at the time of making the statement of fact are essential requirements without which the "statement of fact" is not the one contemplated by section 123(4). It needs no elaboration to say that a "statement of fact" can be proved to be "false" only if it relates to an event which has happened and not to a hypothetical future possibility. Similarly, the belief of the maker about its falsity or the lack of belief in its truth relates to an existing fact and not to a hypothetical future apprehension howsoever honestly one may believe in its likelihood. It is clear that any statement made which is a conjecture of a likelihood in future, would not come within the ambit of the expression "statement of fact" used in section 123(4). This is also supported by the fact that another requirement of section 123(4) is that the statement of fact made should be reasonably calculated to prejudice the prospects of that candidate's election. This further requirement cannot be satisfied by merely stating a likely apprehension for the future and if the event does not happen, this requirement cannot be tested. It is a different matter if the statement amounts to an opinion relating to the personal character or conduct of any candidate which is based on existing or past acts of the candidate. In other words, if the statement made is that a candidate is a "murderer", that would imply that he had committed a murder and that amounts to a "statement of fact" for the purpose of section 123(4).

The view we have taken finds support from the meaning of 'fact' in the realm of jurisprudence. Relevant extracts from textbooks are as under:

"There is yet a third meaning of the expression "question or matter of fact" in which it is contrasted with a question or matter of opinion. *A question of fact is one capable of being answered by way of demonstration, a question of opinion is one that cannot be so answered. The answer to it is a matter of speculation which*

cannot be proved by any available evidence to be right or wrong. The past history of a company's business is a matter of fact; but its prospects of successful business in the future is a matter of opinion....."

(Salmon on Jurisprudence 12th Edition at Page 69)

"Secondly fact and opinion are frequently contrasted. Whether a company has been prosperous in the past is a matter of fact, whether it will fulfill the expectations aroused by its prospectus a matter of opinion....."

(A Textbook of Jurisprudence by George Whitecross Paton, 4th Edition, at page 207.)

In Stroud's Judicial Dictionary, 4th Edition, the meaning of the expression "false statement of fact in relation to the personal character or conduct" of a candidate at a parliamentary election is given as "of fact, as distinguished from a false statement of opinion."

The meaning of the expression "statement of fact" in section 123(4) of the R. P. Act has to be understood in this manner.

In *Kumara Nand v Brijmohan Lal Sharma*, (1976) 2 SCR 127, it was reiterated that the onus is on the election petitioner to prove commission of the corrupt practice under section 123(4), but the onus on him to prove that the statement is false is very light and can be discharged by the complaining candidate swearing to that effect; and once that is done the burden shifts to the candidate making the false statement of fact to show what his belief was. Wanchoo J then was speaking for the Court stated thus:

".....But though the onus is on the election petitioner to show all these things, the main things that the election petitioner has to prove are that such a publication was made of a statement of fact and that statement is false and is with respect to the personal character or conduct of the election petitioner. The burden of proving that the candidate publishing the statement believed it to be false or did not believe it to be true though on the complaining candidate is very light and would be discharged by the complaining candidate swearing to that effect. Thereafter it would be for the candidate publishing the statement to prove otherwise. The question whether the statement was reasonably calculated to prejudice the prospects of the election of the candidate against whom it was made would generally be a matter of inference. So the main onus on an election petitioner under s. 123(4) is to show that a statement of fact was published by a candidate or his agent or by any other person with the consent of the candidate or his election agent and also to show that statement was false and related to his personal character or conduct. Once that is proved and the complaining candidate has sworn as above indicated, the burden shifts to the candidate making the false

statement of fact to show what his belief was. The further question as to prejudice to the prospects of election is generally a matter of inference to be arrived at by the tribunal on the facts and circumstances of each case." (at page 136)
(Emphasis supplied.)

This decision summarises the extent of onus on the election petitioner and the manner in which it is discharged indicating that some of the requirements of section 123(4) are matters of inference. This is the gist of the law on the point and is reiterated in the subsequent decisions of this Court: *Nepal Chandra Roy v Netai Chandra Das and Others*, 1971(3) SCC 303.

In *T.K. Gangi Reddy v Vithalrao and Others*, 22 E.L.R. 261, the same position with regard to the manner in which the burden can be discharged by the election petitioner was stated and it was indicated that if, on shifting the burden to the respondent, he fails to establish either that the petitioner did in fact commit the alleged act or to give any other circumstances which made him *bona fide* believe that he was so guilty, the court is entitled to say that the burden of proving the necessary facts has been discharged by the petitioner.

In *Guruji Shrihari Baliram Jivatode v Vithalrao and Others*, 1969(1) SCC 82, while considering the meaning of the expression "personal character or conduct", it was indicated that the allegations must reflect on the moral or mental qualities of the candidate relating to his personal character or conduct and not merely to his political personality. In *Ram Chand Bhatia v Hardyal*, (1986) 1 SCR 177, the distinction between the personal character or conduct of the candidate and his public or political character and conduct was explained and it was indicated that a statement relating to public or political character and conduct of the candidate is not a corrupt practice under section 123(4).

Both sides referred to *Inder Lal v Lal Singh*, (1962) Supp. 3 SCR 114. In that case, the allegation made against the candidate was that he was purchaser of the opponents of the Congress by means of money. This was held to constitute the corrupt practice under section 123(4) since the statement was construed to mean that the candidate buys, by his offering of bribes, the votes of the opponents of the Congress. It was held that bribery is itself a corrupt practice and if it is said against a candidate that he practises the corrupt practice of buying the votes of the opponents of the Congress by means of bribery, that clearly and unequivocally affects his private character. Shri P. P. Rao strenuously urged that this allegation was construed as a 'statement of fact' for the purposes of section 123(4) in *Inder Lal*, even though of a general nature. It is clear that the allegation related to the personal character of the candidate based on the fact, not more speculation about the future, of purchasing votes by bribery and it was not simply a statement of the maker's opinion of the candidate. It was also made clear that having regard to the moral turpitude involved in the offering of the bribe, the statement in question affected his private character as well and not merely the political character of the candidate. Thus, the emphasis was on the allegation relating to the personal character of bribing the voters which cannot form part of the political character since the act of bribery has a personal element.

In *Sheopat Singh v Ram Pratap* (1965) SCR 175, it was held that any criticism of a person's political or public activities is outside Section 123(4). It was further held that the word "calculated" means designed: it denotes more than mere likelihood and imports a design to affect voters.

The consent of the candidate for the purposes of Section 123(4) when the offending statement of fact which is false is published by any other person may be proved by inference from the circumstances and not necessarily by positive evidence to that effect since positive evidence of consent may not be available. (See *B.R. Rao v N.G. Runga*, 1970 (3) SCC 576; *Narasingh Charan Monanty v Surendra Monanty*, (1974) 2 SCR 39; and *Samant N. Balakrishna etc. v George Fernandez and Others etc.* (1969) 3 SCR 603).

The question, therefore, is: whether the declaration of Gadakh's election to be void is sustainable and so also the naming of Sharad Pawar under Section 99 of the R. P. Act.

Allegations of corrupt practice under Section 123(4) of the R.P. Act.

The gist of the several statements attributed to Gadakh and Sharad Paward which are alleged to constitute the corrupt practice under Section 123(4) of the R.P. Act are now enumerated for the sake of convenience before each of them is taken up for consideration. The requirements of Section 123(4) have been already indicated.

Re. Gadakh Yashwantrao Kankarrao

- (1) He stated that Vikhe Patil has an election budget of Rs. 3 crores.

This was stated by Gadakh in the meeting at Sonai on 30th April 1991 and in the interview given to Girish Kulkarni on 10th May 1991 which was published in the Maharashtra Times of 13th May 1991.

- (2) A sum of Rs.50 lakhs was paid by Vikhe Patil to the Janata Dal election fund for the support of that party.

This was stated by Gadakh in the meetings at Sonai on 30th April 1991 and Ahmednagar on 2nd May 1991 and in the interview given to Girish Kulkarni on 10th May 1991 which was published in the Maharashtra Times of 13th May 1991.

- (3) A sum of Rs.20 lakhs was paid by Vikhe Patil to the Janata Dal candidate B. G. Kolse Patil for shifting to another constituency.

This was said by Gadakh in the meeting at Sonai on 30th April 1991 and the interview given to Girish Kulkarni on 10th May 1991 which was published in the Maharashtra Times of 13th May 1991.

- (4) A rally of 5,000 bicycles was to be taken out by Vikhe Patil and the participants were to be given those bicycles.

This was stated by Gadakh in the meetings at Ahmednagar on 2nd May 1991 and Newasa on 3rd May 1991 and in the interview given to Girish Kulkarni on 10th May 1991 published in the Maharashtra Times of 13th May 1991.

- (5) Vikhe Patil had offered payment of Rs. 25,000 to each worker at the village level and Rs. 50,000 at the Taluka level.

This was said by Gadakh in the meeting at Sonai on 30th April 1991.

- (6) Money was being given by Vikhe Patil for repair of chawdies and temples in the constituency.

This was said by Gadakh in the meetings at Ahmednagar on 2nd May 1991 and Newasa on 3rd May 1991.

- (7) Vikhe Patil was going to distribute sarees, dhoties, liquor and cash in the constituency.

This was said in the meeting at Newasa on 3rd May 1991 and in the interview given to Girish Kulkarni on 10th May 1991 which was published in the Maharashtra Times of 13th May 1991.

- (8) In his speech, Gadakh had advised the voters to accept these articles from Vikhe Patil but to vote for Gadakh only.

Re: Sharad Pawar

The gist of the statements attributed to Sharad Pawar according to the notice given to him under section 99 of the R. P. Act, is as follows:

- (A) *At Newasa on 3rd May 1991*

- (1) Vikhe Patil had filed the nomination from the South instead of the North constituency because the people of this constituency are poor having problems due to which Vikhe Patil thinks to win over easily, but he does not know the inner strength of the poor people.
- (2) Possessed with the illusion that Vikhe Patil will be able to purchase the poor people of the South with the help of the resources at his disposal, but every person of this part is a man possessing self-respect who will remain without food and be in peril, but he would never sell his vote.
- (3) They will distribute bicycles, distribute dhoties and sarees. He (Gadakh) told you to accept them. I do not have any objection.
- (4) If the wealth is being distributed in the constituency, there should be no hesitation in getting a benefit and the things given should be accepted, but let it be clear to whole of Maharashtra that voters cannot be bought.
- (5) Efforts are being made to corrupt the people and put pressure on them and there will be an attempt to distribute.
- (6) There is a fight between morality and honesty on one side and money resources and the tendency guided by ego on the other side but I am sure that in this fight the morality and honesty would triumph. With the help of common man's support, the voters of the constituency have become able to belittle and destroy the mountain of wealth.

(B) *At Srigonda on 11th May 1991*

- (1) The idea entered his (Vikhe Patil) mind that the South constituency being a famine-prone region and the people there being poor he could pocket them.
- (2) We will have to tell them that money alone cannot be important motivation in this election. It is wrong to give up morality when one's wish is not fulfilled, to leave the party, programme and colleagues, when favourable decision is not taken and to join hands with the other parties. Once the 'kumkum' is applied, its sanctity must be maintained. But we did not know that the 'kumkum' was being applied in the name of one person and the eyes were looking at somebody else.
- (3) The possibility cannot be ruled out that questions may arise whether chawdies will be built, temples renovated and motorbikes or bicycles at least be

made available for riding. It will not behove our respect to accept the same but if the process of distribution has begun it is good for established socialism in this way and to take the same and use it against them.

(4) A decision must be taken to choose between principle or disloyalty, morality or immorality, humanity or arrogance of money and power.

It may be noted that in respect of the statements attributed to Gadakh, the alleged offending portions being denied by him, it is also to be considered whether the making of those statements has been proved. On the other hand, Sharad Pawar has chosen not to adduce any evidence, or pray for recall of any witness for cross-examination and, therefore, the statements attributed to him being pleaded and proved by the election petitioner, the only question is whether they constitute the corrupt practice under Section 123(4) of the R. P. Act. It is also significant that all the statements alleged to have been made by Gadakh as enumerated earlier are not attributed to Sharad Pawar, particularly those relating to Vikhe Patil's election budget of three crore rupees payment by him of Rs. 50 lakhs to the Janata Dal election fund and Rs. 20 lakhs to the Janata Dal candidates B. G. Kolse Patil. On behalf of Sharad Pawar, it was also contended by Shri Parasaran that to constitute the corrupt practice under section 123(4), the consent of the returned candidate Gadakh to the making of these statements by Sharad Pawar was also essential which had neither been pleaded nor proved. It was submitted that the fact of Gadakh's presence at the time when these statements are alleged to have been made by Sharad Pawar in the public meetings is not sufficient to prove the consent of the returned candidate requisite for constituting the corrupt practice under section 123(4).

To enable proper appreciation of the question whether all or any of the aforesaid statements attributed to Gadakh and Sharad Pawar constitute the corrupt practice under section 123(4), it is necessary at at this stage to briefly restate the requirements of this section.

The essential requirements of the corrupt practice under section 123(4) are: (1) publication by the candidate or his election agent or any other person with the consent of the candidate or his election agent; (2) of any statement of fact which is false; (3) which he either 'believes to be false' or 'does not believe to be true'; (4) in relation to the personal character or conduct or any candidate or in relation to the candidature or withdrawal of the candidate; and (5) being a statement reasonably calculated to prejudice the prospects of that candidate's election. The plain meaning of the section indicates that not every statement of fact should be false; that such a statement should be made believing it to be false or at least not true; that it should relate to the personal character or conduct etc. of any candidate; and it should be reasonably calculated to prejudice the prospects of that candidate's election. Unless all these requirements are satisfied, the statement does not constitute corrupt practice under section 123(4) of the R. P. Act howsoever undesirable morally or ethically, the making of that statement may be otherwise. This is too well deserved by a catena of decision of this Court, some of which have been referred. Accordingly,

it is this test which must be satisfied to hold that the statements attributed to Gadakh or Sharad Pawar constitute corrupt practice.

*Re: Gadakh
Vikhe Patil's Election Budget of Rs. 3 Crores*

One of the allegations made against Gadakh is that he stated that Vikhe Patil had an election budget of Rs. 3 crores. The question in the present case relates only to the corrupt practice specified in sub-section (4) of section 123 and not to the corrupt practice under sub-section (6) thereof relating to the incurring or authorising of expenditure in contravention of section 77 of the R. P. Act. This being so, the only question is whether the statement that Vikhe Patil had an election budget of Rs. 3 crores was a false statement of fact or the kind envisaged by sub-section (4) of section 1. Since the allegation is not of incurring or authorising that expenditure but only of the availability of the amount. An attempt was made by Shri P. P. Rao to argue that the innuendo in that statement was that Vikhe Patil had Rs. three crores of ill-gotten money which he could utilise for purchasing the voters and other electoral malpractice. In the first place, there was not even a hint of such an innuendo on the election petition or the evidence adduced in support. This further suggestion has therefore to be ignored as indicated earlier. Faced thereof with this difficulty, Shri Rao modified his argument to contend that, even if this statement by itself did not constitute corrupt practice under section 123(4), it was a relevant fact to indicate the means or capacity of Vikhe Patil to probablise (*sic*) the other statements alleging the possibility of adopting malpractice to win the election. So far as the means of the candidates is concerned, it is sufficient to say that both Vikhe Patil and Gadakh appear to be considerably affluent, being sugar barons of that area. The electorate must have been well aware of their means and, therefore, this is a neutral circumstance which by itself has no significant bearing on the other statements attributed to Gadakh. No further consideration of this statement attributed to Gadakh is necessary, even assuming he had said so.

Payment by Vikhe Patil of Rs. 50 Lakhs to Janata Dal and Rs. 20 Lakhs to B.G.Kilse Patil

Two statements attributed to Gadakh relate to the payment by Vikhe Patil of Rs. 50 lakhs to the Janata Del election fund and Rs. 20 lakhs to the Janata Dal candidate, B. G. Kolse Patil. Gadakh is alleged to have said that Vikhe Patil had paid Rs. 50 lakhs to the Janata Dal election fund for getting the support of that party and Rs. 20 lakhs to the Janata Dal candidate for withdrawing his nomination from his constituency and shifting to another constituency. These statements are alleged to have been made by Gadakh more than once. However, it is sufficient, if such a statement is proved to have been made even once and it satisfies all the requirements of section 123(4). The particulars of these statements have been given earlier.

The statement alleging payment of Rs. 50 lakhs to the Janata Dal election fund is alleged to have been made in the meetings at Sonai on 30th April 1991 and Ahmednagar on 2nd May 1991 as well as in the interview given by Gadakh on 10th May 1991 to Girish Kulkarni (P.W. 11) which was published in the Maharashtra Times of 13th May 1991. The statement by Gadakh of payment of Rs.20 lakhs to the Janata Dal candidate, B.G.Kolse Patil for withdrawing from this constituency and shifting to another constituency, is alleged to have been made in the meeting at Sonai on 30th April 1991 and in the interview given by him to Girish Kulkarni on 10th May 1991 which was published in the Maharashtra Times of 13th May, 1991. From the evidence adduced, the making of both these statements is amply proved and we agree with the finding of the High Court to this effect on this point. Shri Ashok Desai took us through the entire evidence on the point and strenuously urged that these statements are not duly proved but we are unable to accept this contention. From the evidence adduced we have no doubt that these statements were made by Gadakh as alleged by Vikhe Patil. Admitted contemporaneous news reports and the conduct of Gadakh after knowing their contents further reassures that these statements were made by Gadakh. Accordingly, we are referring only to some significant evidence on the point.

The statement of Gadakh alleging payment of Rs. 50 lakhs by Vikhe Patil to Janata Dal election fund does not necessarily imply that this payment to Janata Dal was for shifting its candidate to another constituency, particularly when no other details were given. There is no such clear pleading in the election petition to that effect. This statement has, therefore, to be examined as the allegation of contribution to the election fund of a political party. There is no allegation that this payment was alleged to have been made at any time after Vikhe Patil had become a candidate at the election. In these circumstances, it is doubtful if the mere allegation of contribution to political party's election fund prior to becoming a candidate can amount to corrupt practice under Section 123(4) of the R. P. Act.

The position, however, is different with regard to the allegation of payment of Rs. 20 lakhs to the Janata Dal candidate B. G. Kolse Patil for withdrawing from this constituency and shifting to another constituency. Vikhe Patil has denied on oath making any of these payments. Each of these statements is undoubtedly a statement of fact which is also proved to be false since there is no attempt made by Gadakh to prove it to be true by rebuttal of the testimony of Vikhe Patil on this point. Obviously, Vikhe Patil was not required to examine B. G. Kolse Patil after his own denial on oath. No attempt has been made by Gadakh to even suggest that the allegation is true.

The question, therefore, is whether the statement of Gadakh alleging payment of Rs. 20 lakhs by Vikhe Patil to the Janata Dal candidate, B.G. Kolse Patil, for this purpose proved to be false, amounts to the corrupt practice under section 123(4) of the R. P. Act.

As already held, the requirement of section 123(4) that this statement of Gadakh about payment of Rs. 20 lakhs by Vikhe Patil to the Janata Dal candidate, B.G.Kolse Patil, for this purpose was a statement of fact which was 'false' is duly proved. The publication of these statements was by Gadakh himself in a public meeting and in the interview given to Girish Kulkarni for being

published in the Maharashtra Times and therefore, the further requirement of publication as required by section 123(4) is also proved. It cannot be doubted that this false statement of fact was in relation to the personal character or conduct of Vikhe Patil and it did not relate merely to his political character or conduct so that this requirement of section 123(4) is also satisfied. It must also be held that the statement was reasonably calculated to prejudice the prospects of Vikhe Patil's elections in as much as it conveyed that Vikhe Patil had bribed B.G. Kolse Patil, the Janata Dal candidate, by payment of Rs. 20 lakhs to withdraw his candidature from this constituency for his benefit. In fact, the fulfilment of none of these requirements of section 123(4) was seriously disputed by Shri Ashok Desai if the making of such a statement by Gadakh is found proved, as we have already held. The serious dispute by Shri Ashok Desai in this respect was only to the fulfilment of the remaining requirement of Section 123(4) that Gadakh had made this false statement of fact believing it to be false or not believing it to be true. Shri Ashok Desai very strenuously and ably, even though unsuccessfully, argued that a strong rumour to this effect was then afloat which, together with the circumstances in which B.G. Kolse Patil, the Janata Dal candidate, withdrew from that constituency, lent credence to the rumour creating a reasonable belief in the mind of Gadakh that the same was true. Shri Ashok Desai submitted that in these circumstances, Gadakh had reasonable belief in the truth of the statement attributed to him and, therefore, this requirement of section 123(4) was not satisfied on account of which the corrupt practice under section 123(4) is not proved. We are unable to accept this contention.

Vikhe Patil had denied the payment of Rs. 20 lakhs to B.G. Kolse Patil and also asserted that Gadakh while making the statement did not believe it to be true. This is all that could be done by Vikhe Patil to prove the belief of Gadakh at the time of making the statement since that related to the state of mind of Gadakh which he knew best. Even though the burden on the pleadings to prove the satisfaction of this requirement was throughout on Vikhe Patil, the election petitioner, yet the initial burden of leading evidence of that fact on Vikhe Patil was clearly discharged in this manner, shifting the burden of rebutting the same to Gadakh. The evidence of Gadakh has, therefore, now to be examined to see if the burden so shifted to Gadakh had been discharged by his evidence. It is significant that in the deposition of Gadakh, there are statements on this point which provide the best indication of his belief about the truth or falsity of the allegation made. In our opinion, the admission made by Gadakh in his deposition is decisive on the point.

In his deposition, Gadakh has spoken about his belief in the examination-in-chief, cross-examination and re-examination and the relevant extracts of his deposition, as given in Volume V of the paperbooks, are as under:

Examination-in-Chief

"..... On hearing the information, I was satisfied and got sure that the information given to me by the workers must be correct otherwise the Janata Dal candidate would not have withdrawn and gone to other constituency for election.....". (para 31)

Cross Examination

Q. When information was given to you by Congress workers which they had got from the workers of the petitioner that Rs. 20 lakhs were paid to Shri B. G. Kolshe Patil by the petitioner for withdrawing from South Ahmednagar constituency and contesting election from Beed constituency, did you think that this information was grave matter?

(This question was explained by Commissioner to the witness and he was required to restrict his reply to the extent of what was being asked).

Ans. Since Janata Dal had asked Shri B. G. Kolshe Patil to contest election from Beed constituency, the information conveyed to me was not a grave matter.

I did not believe the information given to me by the workers that Shri B.B. Kolshe Patil was going to withdraw from South Ahmednagar constituency having accepted Rs.20 lakhs from the petitioner....." (para 222) (Emphasis supplied.)

Re-examination

"Q. In paras 21 and 31 of your chief-exam. you have stated that information given by congress workers before the meeting at Sonai on 30th April 1991 that petitioner Balasaheb Vikhe Patil paid Rs. 20 lakhs to Shri B. G. Kolshe Patil to withdraw from South Ahmednagar constituency and that statement was believed by you, whereas in para 222 of your cross-exam. at Page No 215 you have stated that you did not believe the information given to you that Shri B. G. Kolshe Patil (was) going to withdraw from South constituency Ahmednagar having accepted Rs.20 lakhs from the petitioner. What exactly did you want to say in this regard?

(Shri S. B. Mhase, advocate for the petitioner objected asking this question on the ground that there is no ambiguity in both these questions in the chief as well as cross-examination and the purpose for asking this question is to wipe out the admission given by the witness under stress of cross-exam and therefore, it should not be allowed. Moreover, this question is not permissible in re-examination. This objection shall be decided by the High Court).

Ans. It is true that I believed the say of the congress workers before starting of the Sonai meeting that petitioner paid Rs. 20 lakhs to Shri B. G. Kolshe Patil for withdrawing from South Ahmednagar constituency but then when I gave admission in cross-examination as stated above in the question I believed it more, and it was to the effect that Janata Dal asked Shri B. G. Kolshe Patil to withdraw

from South Ahmednagar constituency and to contest election from Beed constituency." (Para 258)

It is clear from the above extracts that Gadakh admitted unequivocally in his cross-examination in para 222 of his deposition that he did not believe the information given to him by the workers that B. G. Kolshe Patil was going to withdraw from South Ahmednagar constituency having accepted Rs. 20 lakhs from the petitioner. In other words, he did not believe in the truth of the information given to him about the payment of Rs. 20 lakhs by Vikhe Patil to B. G. Kolshe Patil and the latter withdrawing from his constituency for a reason. This admission about the kind of belief he had about the truth of this allegation made by Gadakh in his cross-examination is withstanding a different statement in the examination-in-chief and an attempt to resile from that admission in the re-examination. His statement in re-examination, after being pointed out clearly the admission made in the cross-examination that he did not believe the allegation of payment of Rs. 20 lakhs by Vikhe Patil to B.G. Kolshe Patil to be true, does not have the effect of either withdrawing that admission or showing it to be made erroneously. In such a situation, Gadakh's admission in his cross-examination that he did not believe the allegation to be true has the effect of reinforcing Vikhe Patil's assertion to this effect instead of negating it.

Shri Ashok Desai advanced an ingenious argument to avoid the logical adverse effect of this admission made by Gadakh in his cross-examination. We have no doubt that nothing better could have been done in this situation. Shri Desai submitted that the belief about the allegation not being true statement by Gadakh in his cross-examination related to his belief prior to 29th April 1991, when B.G. Kolshe Patil actually withdrew his candidature from the South Ahmednagar constituency and not the belief which he entertained later when he made the statement at Sonai on 30th April, 1991 and also subsequently. Shri Desai submitted that the admission merely means that when he was given such information by his workers, he did not believe in the likelihood of B. G. Kolshe Patil withdrawing from the South Ahmednagar constituency which could be only prior to his actual withdrawal on 29th April 1991. The obvious fallacy in the argument is that the admission has to be read in the context of the earlier question and the speeches made by him to this effect which were all subsequent to the withdrawal of B. G. Kolshe Patil from South Ahmednagar constituency on 29th April, 1991. He was never questioned about his belief on this aspect prior to the making of these statements or prior to the actual withdrawal by B.G. Kolshe Patil. It is also significant that the explanation offered by Shri Desai in his arguments is not the explanation given by Gadakh, even though he was re-examined pointedly with reference to this admission. It is sufficient to say that the explanation offered by Shri Desai cannot be accepted when even Gadakh does not say so and Gadakh's belief at the time of making the statements subsequent to withdrawal of B. G. Kolshe Patil was the only fact in issue.

The dispute relating to the statement attributed to Gadakh alleging payment of Rs. 20 lakhs by Vikhe Patil to B. G. Kolshe Patil for withdrawing from the South Ahmednagar constituency and shifting to another constituency is in a limited area. Gadakh says that this was the rumour afloat and his own workers had been telling him, so pointing out the workers of Vikhe Patil as the

source of their information. It is significant that Gadakh has not examined any of his workers who, according to him, gave this information nor has he named any worker of Vikhe Patil's as the source of this information. No circumstance justifying belief in the truth of the allegation has been relied on by Gadakh. There is also no dispute that in the interview which he gave to Girish Kulkarni (P.W.11), a specific question to this effect was put to him. The news item appeared in the Maharashtra Times of 13th May, 1991 wherein Gadakh was reported to have said as under:

"..... According to my reliable information Shri Vikhe Patil had paid Rs. 50 lakhs to the election fund of the party and Rs. 20 lakhs in order that Shri B. G. Kolse Patil should contest the election from Beed instead of Nagar."

The so-called "reliable information" mentioned by Gadakh has not been disclosed by specifying the name of anyone supposed to have given the information or by examining him. It is also of significance that Gadakh alleges having sent a letter dated 16th May, 1991 under certificate of posting to the Maharashtra Times Office disputing correctness of the news item (Exh. 90). The receipt of that letter by the addressee is denied and the likelihood of its despatch by Gadakh is extremely doubtful since it was not sent by registered post and a certificate of posting, being easy to obtain, is not reliable. Expense being immaterial in that election for both sides, it is extremely unlikely that Gadakh would send such a letter under certificate of posting and not by registered post. In view of the narrow controversy on this point, the criticism levelled against the testimony of Girish Kulkarni is of no practical significance and his version about the interview to the extent it was reported in the news item (Exh. 90) must be accepted as duly proved. The only significant question on this point is whether Gadakh did not believe this allegation to be true when he made it, so that this further requirement to constitute the corrupt practice under Section 123(4) is made out.

Gadakh's version that he sent the letter dated 16th May, 1991 (Exh.Q) under certificate of posting is unbelievable. A certificate of posting is easy to procure and does not inspire confidence. Moreover, the circumstances belie his version. With his considerable means and past experience of elections, he would have sent such a letter by registered post to insure its delivery and create cogent evidence of its despatch. Moreover, he would not merely send such a letter but have his denial published in newspapers because of its significance during elections. We have no doubt that Gadakh's conduct belies his belated denial at the trial.

There is, however, another aspect of such a stand taken by Gadakh. Some features are rendered beyond doubt on this point. Gadakh must take the consequence of the contents of the letter which he claims to have sent on 16th May, 1991, even though we have rejected his claim of sending such a letter. This letter appears to have been brought into existence later when Gadakh was faced with the consequence of his interview. Admittedly, Gadakh had known prior to 16th May, 1991 the contents of the news item (Exh 90) published in the Maharashtra Times attributing to him the statement alleging payment of Rs. 20 lakhs by Vikhe Patil to B. G. Kolse Patial, but he did not choose to contradict the same by a denial through the press or in any other authentic

manner. Gadakh's silence at that time reinforces authenticity and the correctness of the news items (Exh 90). Another significant feature is that the contents of the letter dated 16th May, 1991 indicate at least his doubt in the correctness of the allegation against Vikhe Patil when he said "It would not be proper on my part to subscribe to those unless I had evidence to that effect." This supports the conclusion that Gadakh did not believe in the truth of that allegation. Absence of a clear denial by Gadakh even therein, much less though the press at that time, in these circumstances, reassures us about the correct reporting of the interview published in the news item (Exh 90) in Maharashtra Times of 13th May, 1991, in addition to its proof by other evidence supported by conduct of Gadakh himself. The making of the statement of fact alleging payment of Rs. 20 lakhs to B. G. Kolse Patil, its falsity and the want in its truth by Gadakh are proved beyond any doubt.

Shri Desai also submitted that there were strong reasons for Gadakh to believe in the truth of this allegation. These factors according to Shri Desai are:

1. Vikhe Patil was an important Congressman who was the likely party candidate earlier having won on the Congress (1) Party ticket five times since 1991 from the adjacent Kopergaon (North Ahmednagar constituency);
2. Vikhe Patil was an extremely influential and affluent person;
3. Vikhe Patil had filed his nominations from both, that is, North and South Ahmednagar constituencies;
4. Smt. Mrinal Gore, President of the State Janata Dal, had said on 28th April, 1991 that their party would not support Vikhe Patil and B. G. Kolse Patil had already filed his nominations from both, that is, South Ahmednagar and Beed constituencies; and
5. On 29th April, 1991 B. G. Kolse Patil withdrew his candidature from South Ahmednagar constituency while Vikhe Patil withdrew from Kopergaon (North Ahmednagar constituency) and Janata Dal declared its support for Vikhe Patil. Shri Desai submitted that these were strong circumstances for Gadakh to reasonably believe in the truth of the rumour that B.G. Kolse Patil had withdrawn from this constituency (South Ahmednagar) on payment of Rs. 20 lakhs by Vikhe Patil to B. G. Kolse Patil in as much as they are equally consistent, with B. G. Kolse Patil preferring to contest from the other constituency on a full assessment of his prospects in the election from the South Ahmednagar constituency against Vikhe Patil who even, according to Gadakh, was a very strong and influential candidate. The mere fact that Smt. Mrinal Gore had spoken against the likelihood of withdrawal of B. G. Kolse Patil from South Ahmednagar is not by itself significant since the actions of politicians contrary to their earlier declarations in such matters are not uncommon. Moreover, in view of the direct evidence in the form of admission by Gadakh of the kind of belief he entertained at the time of making the

statement, these circumstances are inconsequential when Gadakh himself does not say so. The direct evidence of Gadakh himself about the kind of belief he entertained at that time is decisive of the matter and conclusive against him on this point.

It cannot, therefore, be doubted that Gadakh did not believe in the truth of his allegation made against Vikhe Patil when he said in his speech and interview that Rs. 20 lakhs had been paid by Vikhe Patil to the Janata Dal candidate B. G. Kolse Patil for withdrawing from this constituency and shifting to another constituency. It follows that all the requirements of section 123(4) are satisfied and the false statement of fact made to this effect by Gadakh in respect of the personal character and conduct of Vikhe Patil amounts to the corrupt practice under section 123(4) of the R. P. Act. This alone is sufficient for declaring the election of Gadakh to be void. The High Court's conclusion to this effect is, therefore, sustainable only for this reason alone.

Remaining Allegations

We shall now take up for consideration the remaining statements which do not require any elaborate discussion since the very first close look at them reveals that they cannot constitute the corrupt practice under section 123(4). In respect of the statements of this category, we also do not consider it necessary to examine the remaining arguments advanced from both sides since no further consideration of the same appears necessary.

The statement of a proposal to take out a rally of 5,000 bicycles and then distribute the bicycles to the participants obviously related to the future and was at best merely the expression of an apprehension. No one has even suggested that such a rally was taken out at any time during the election campaign by Vikhe Patil. That means that it was at best an apprehension which did not materialise and, therefore, there was no reasonable likelihood of any impact thereof on the minds of the voters. Similar is the statement alleged to have been made of the likelihood of the distribution of sarees, dhoties, liquor and cash in the constituency. No one has said that such a distribution of any of these articles was made by Vikhe Patil during the election campaign. Such a statement, if made, was therefore another apprehension which did not come true and, therefore, could not affect the minds of the voters. This being so, the expression of a mere apprehension which did not come true, apart from not being a statement of fact, does not satisfy the other requirements of section 123(4).

The vague statement of offer by Vikhe Patil of payment to the workers at the rate of Rs. 25,000 at village level and Rs. 50,000 at talika level being unrelated to the maximum permissible limit of election expense is not material for the purposes of section 123(4) of the R. P. Act. The only allegation in the statement is of hiring the workers to work for Vikhe Patil in the election campaign by payment of money, and the mere hiring of workers for the election campaign is not an offending statement of fact under section 123(4). Any further consideration of this aspect may have been necessary only if the corrupt practice alleged was that under sub-section (6) and not

merely under sub-section (4) of section 123 of the R. P. Act. Unless the hiring of workers by payment of money resulted in exceeding the permissible maximum limit of election expenditure to constitute the corrupt practice under section 123(6), this fact alone would not constitute the corrupt practice under section 123(4) since the mere hiring of workers during election campaign is not a corrupt practice.

Another statement attributed to Gadakh is that Vikhe Patil was likely to give money for the repair of chawdies and the renovation of temples. This too is a vague general statement without details and could not be taken seriously by anyone. No attempt has been made in the evidence by either side to prove the truth or falsity of this statement. Assuming such a statement was made which was also false, there is no evidence to prove the impact of such a vague statement. Mere repair of chawdies or the renovation temples is not a disparaging act relating to the personal character or conduct of anyone unless the further requirements of section 123(4) are proved, including the requirement of its impact on the mind of the electorate that it was reasonably calculated to prejudice the prospects of that candidate. We do not find any satisfactory evidence for this purpose and therefore no serious notice needs to be taken of such a statement, even if it were made by Gadakh.

Another statement attributed to Gadakh is that he advised the voters to accept whatever was offered by Vikhe Patil but to vote for Gadakh. Merely saying that if some benefit were offered by a candidate, it should be accepted by the voters without being influenced thereby in the choice of the candidate cannot be a statement reasonably calculated to prejudice the prospects of that candidate since the suggestions in the statements is to cast the vote uninfluenced by any extraneous consideration. This statement also, even if made by Gadakh, does not constitute the corrupt practice under section 123(4) of the R. P. Act. It is difficult to appreciate how the High Court overlooked this clear position in law and reached the conclusion that each of these statements constitutes the corrupt practice under section 123(4).

Re: Sharad Pawar

In respect of the statements attributed to Sharad Pawar which have led to naming him under section 99 of the R. P. Act by the High Court, the submission of Shri K. Parasaran, learned counsel for Sharad Pawar, is two-fold. He contended that the notice under section 99 is invalid as there was no occasion for issuance of that notice on the material present. His other submission was that assuming the alleged statements to have been made by Sharad Pawar, none of them constitutes the corrupt practice under section 123(4) of the R. P. Act as the requirements of that provision are not satisfied. Shri Parasaran contended that none of those statements is a statement of fact as required by section 123(4), being merely the expression of certain apprehensions amounting at best to opinion and exhorting the electorate to beware of such attempts, if any, by Vikhe Patil to win over the electorate. According to Shri Parasaran, the thrust of the speeches of Sharad Pawar at Newasa and Srighonda was that the electorate should uphold the cause of

morality instead of voting for Vikhe Patil who had exhibited a lack of political morality by abandoning the Congress (1) Party when the party ticket was not given to him after he had the benefit of representing the party in the Lok Sabha for five terms. Shri Parasaran contended that the rumours being afloat of the likelihood of such tactics to be adopted by Vikhe Patil to win the election. Sharad Pawar merely warned the electorate not to be misled by the same. It was also contended by Shri Parasaran that Sharad Pawar did not even mention the payment of any money by Vikhe Patil to the Janata Dal election fund or to the Janata Dal candidate, B. G. Kolse Patil, which are the allegations made against Gadakh, in spite of the shifting of the Janata Dal candidate, B. G. Kolse Patil, to another constituency after a categorical statement to the contrary was made at the last minute by the Janata Dal Leader, Smt. Mrinal Gore, and rumours being afloat to that effect. Shri Parasaran, in all fairness, did not dispute that Sharad Pawar was given the requisite opportunity to lead evidence and to cross examine the witnesses examined in support of the election petition, but added that this was unnecessary since the statements made by Sharad Pawar *ex facie* do not constitute the corrupt practice under section 123(4). Shri Parasaran also contended that the requisite consent of the returned candidate, Gadakh, was not pleaded regarding Sharad Pawar's statements made at both Newasa and Srigonda. This is an additional submission to contend that the requirements of section 123(4) are not satisfied.

In our opinion, the statements attributed to Sharad Pawar in the meetings held at Newasa and Srigonda *ex facie* do not amount to 'statements of fact' relating to the personal character or conduct of Vikhe Patil, being only the expression of his opinion based on apprehensions about the likely future conduct of Vikhe Patil or relating only to Vikhe Patil's political character, which do not fall within the ambit of section 123(4) of the R. P. Act. For this reason, the remaining submissions of Shri Parasaran do not require consideration. We shall now deal with the statements attributed to Sharad Pawar specified in the notice under Section 99, which alone require consideration. These have been extracted and enumerated earlier.

The statements made in the meeting at Newasa were these. In the first statement made by Sharad Pawar, he said that Vikhe Patil had filed his nomination from the South constituency instead of the North because it was a poor region and a scarcity area, thinking that it was a good circumstance to win easily. It is difficult to appreciate how this statement can relate to the personal character or conduct of Vikhe Patil envisaged by section 123(4). The second statement was that Vikhe Patil suffered from the illusion that the poor people of South could be purchased with his resources, but these people were men possessed of self-respect who could not be purchased with anybody's money. The indication was that any such illusion or impression of Vikhe Patil was incorrect and was meant for Vikhe Patil and not the voters. This statement also is not of the kind envisaged by section 123(4). This statement also is, therefore, of no significance in the present context. The third statement refers to the speech of Gadakh wherein he said: "They will distribute bicycles, distribute dhoties and sarees"; and then adds: "I do not have any objection". The statement of Sharad Pawar therein was that he had no objection to acceptance of the articles if they were distributed. For the reason given, while dealing with Gadakh's statement to this effect, Sharad Pawar's statement that he had no objection to acceptance

of the same, does not fall within the net of section 123(4). The fourth statement again refers to the likelihood in future of the distribution of articles and wealth and proceeds, to add: "Let them do it at the place and so far diverting the votes on the strength of money, let it be clear to whole of Maharashtra that voters cannot be bought." The emphasis in this statement is on the fact that voters cannot be bought even if such a distribution was made by any candidate and not that any such distribution was being made by the candidate Vikhe Patil. This too does not fall within section 123(4). The fifth statement also is a general statement to the same effect of the likelihood of corrupting the people and putting pressure on them with the further caution of guard against any such attempt. The sixth and the last statement made at Newasa is an exhortation to the electorate to support morality and honesty to belittle and destroy the force of wealth and ego opposed to it. This was merely an exhortation of the speaker to support morality and honesty against money power and ego. These general statements made by Sharad Pawar at Newasa, projecting his party's candidate as the upholder of morality and honesty against the forces guided by money power and ego, amounted to his opinion of the kind of presentation made by the two candidates, irrespective of the correctness or otherwise of that opinion. The exhortation made to the people to vote for his party's candidate as the upholder of morality and honesty cannot be treated as statements of fact relating to the character and conduct of Vikhe Patil amounting to vilification of his character or conduct. Thus, none of the statements of Sharad Pawar at Newasa constitutes the corrupt practice under section 123(4) of the R. P. Act.

At the meeting at Srigonda, Sharad Pawar is alleged to have made four statements to which objection is taken by Vikhe Patil. The first statement is similar to the first and second statements made at Newasa wherein he said that Vikhe Patil chose to contest from the South constituency, being a famine-prone region wherein the people were poor, for the purpose of purchasing their self-respect. He then added that Vikhe Patil had started activities to win the election by efforts of interested parties by playing their game of purchasing the self-respect of the poor people. For the reasons already given, this statement does not come within section 123(4). In the second statement, Sharad Pawar said that money alone could not be an important motivation in the election and there was a need for ideology, policy, programme and morality. He then added that it was wrong to give up morality and leave the party when one's wish is not fulfilled and to join hands with other parties. He added that once the "kumkum" is applied its sanctity must be maintained and there should not be any flirting with a person other than he to whom the "kumkum," is applied. This was part of the background of Vikhe Patil leaving the Congress (1) Party when the party ticket was not given to him and the contesting of the election with the help of other parties. The suggestion was that abandoning the party and switching loyalty was not morally and ideologically correct. In the admitted background of Vikhe Patil, this comment was on his political morality and character because of his leaving the Congress (1) Party on denial of ticket to him and contesting against the Congress (1) Party's candidate. This statement did not relate to the personal character or conduct of Vikhe Patil but merely to his political character and morality. This does not fall within section 123(4). The third statement is a repetition of the apprehensions of the likelihood of future distribution of benefits in the constituency coupled with the exhortation that if such a thing has begun or is to happen in future, the same may be accepted

with him being influenced thereby in the choice of the candidate. For the reasons already given, this too does not come within section 123(4). The fourth and the last statement at Srigonda made by Sharad Pawar was again an exhortation to act on principle, morality and humanity shunning disloyalty and arrogance of money and power. This is indeed high idealism better practised than preached. This cannot obviously come within section 123(4).

These being the only statements attributed to Sharad Pawar, we have no doubt that none of them constitutes the corrupt practice under section 123(4) of the R. P. Act and, therefore, accepting that these statements were made by Sharad Pawar, since there is no attempt by Sharad Pawar to dispute any of them, it must be held that none of them is a statement of fact relating to the personal character and conduct of Vikhe Patil of the kind envisaged by section 123(4). The question of examining whether the remaining requirements of section 123(4), including the consent of Gadakh and the reasonable likelihood of its impact on the mind of the electorate are satisfied does not arise for consideration to enable the electorate to cast its positive vote instead of negative vote by rejecting those with greater demerits. This duty is cast more heavily on the senior leaders of all the political parties to ensure that the election campaign does not degenerate into a campaign of vilification, which may tend to promote violence during elections and lead to criminalisation of politics. These are the hard realities of the present trend of election campaigns and this trend must be reversed to make democracy more meaningful by ensuring purity of elections, which can be achieved only by a shift in the trend towards the right direction.

Judging by these standards, we are constrained to observe that some of the statements made by Sharad Pawar, the Chief Minister of Maharashtra, even though not amounting to corrupt practice under the enacted law, do not measure up to the desired level of electioneering at the top echelon of political leadership to set the trend for a healthy election campaign. His suggestion influenced thereby as a means of propagating socialism exhibits a bizarre perception of socialism. It is shocking enough that Gadakh said so but far worse to find the Chief Minister endorsing that view. Intended as sarcasm it depicts poor taste. If this be the level of election campaigning at the top, it is bound to degenerate.

In the present case, it is unnecessary to deal with the arguments from both sides pertaining to the decision in *Manohar Joshi v Damodar Tatyaba and Others* (1991) 2 SCC 342, since without going into the arguments relating to the defects in the notice under section 99 of the R. P. Act issued to Sharad Pawar, we have reached the conclusion that the statements attributed to him of which he was given the notice, do not constitute the corrupt practice under section 123(4).

We may, however, observe that the conclusion that these statements do not constitute the corrupt practice under section 123(4) should not be construed as our opinion that they are necessary for the education of the electorate. This caution is necessary in view of the attempt made by Shri Ram Jethmalani to widen the scope by contending that the same is a justified electoral practice for the education of the electorate. In our view, the electorate is now well-educated about the justified means desirable during an election campaign and it looks forward to knowing the positive

programmes of the candidate, together with their comparative merits, instead of being left to compare their demerits and choose from amongst them the one with the fewest. The shift in the election campaign has, therefore, to be in a positive direction descends to the lower levels (*sic*). Some portions of the speeches of Sharad Pawar were indeed high precept but the electorate would have benefited more by knowledge of the track record of the preacher practising the same. There was no such attempt. The degree of responsibility and the level of electioneering expected of the top leadership was wanting in these speeches. If probity in public life is to be maintained and purity of elections is not a myth or mere catch-phrase, a higher level of electioneering is expected at least at the highest level of political leadership.

It is with this vote of caution we say that all the statements attributed to Sharad Pawar and many attributed to Gadakh do not constitute the alleged corrupt practice under section 123(4) of the R. P. Act. Accordingly, the notice issued under Section 99 of Sharad Pawar should have been discharged by the High Court instead of Sharad Pawar being named for commission of any such corrupt practice.

Further relief under section 101(b) of the R. P. Act

The further relief granted by the High Court of declaring Vikhe Patil to have been duly elected after declaring the election of Gadakh to be void is clearly unsustainable. This further relief declaring Vikhe Patil to have been duly elected has been granted under section 101 of the R. P. Act which reads as under:

"101. Grounds for which a candidate other than the returned candidate may be declared to have been elected. – If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claiming declaration that he himself or any other candidate has been duly elected and the High Court is of opinion

- (a) that in fact the petitioner or such other candidate received a majority of the valid votes; or
- (b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes, the High Court shall after declaring the election of the returned candidate to be void declare the petitioner of such other candidate, as the case may be, to have been duly elected."

Obviously, it is clause (b) of Section 101 under which the further relief in the present case can be justified. To justify this further relief, it must be held that, but for the votes obtained by Gadakh by the corrupt practice committee under Section 123(4) of the R.P. Act, Vikhe Patil would have obtained a majority of the valid votes. The High Court has taken the view that the

election of Gadakh being void Vikhe Patil, who polled the next highest number of votes, must be declared to have been duly elected. There is no *discernible cogent reason in the High Court's* judgement to support this conclusion.

In *Konappa Rudrappa Nadoouda v Vishwanath Reddy and Another* (1969) 2 SCR 90, the Constitution Bench pointed out the cases falling under section 101(b) in which this further declaration can be made. It was held therein as under:

".....We are again unable to see any logic in the assumption that votes cast in favour of a person who is regarded by the Returning Officer as validly nominated, but who is in truth disqualified, could still be treated as valid votes, for the purpose of determining whether a fresh election should be held. When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidates may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification. *This is not to say that there are more than two candidates in the field for a single seat and one alone is disqualified. On proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance. For the voters may not, if aware of the disqualification, have voted for the disqualified candidate.*" (pp 95–96) (Emphasis supplied.)

The law applicable being as above, the mere fact that Vikhe Patil secured the next highest number of votes after Gadakh is not sufficient to declare him elected on the conclusion that Gadakh's election is void for commission of a corrupt practice. The High Court proceeded on an erroneous assumption to grant this further relief under section 101(b) of the R. P. Act declaring Vikhe Patil to have been duly elected. Shri P.P. Rao, with his usual fairness, in our view rightly did not seriously support the grant of this further relief, declaring Vikhe Patil to have been duly elected, on account of the absence of the requisite evidence to support the grant of this further declaration in the present case. No further consideration of this point is, therefore, necessary.

Conclusion

The result is that the High Court's judgement declaring the election of Gadakh to be void for the commission of the corrupt practice under section 123(4) of the R. P. Act is upheld on the ground indicated by us: the further declaration made by the High Court that Vikhe Patil is duly elected is set aside, and *the High Court's order naming Sharad Pawar under Section 99 of the R. P. Act for the commission of the corrupt practice under section 123(4) is also set aside.*

Consequently, we direct as under:

- (1) Civil Appeal No. 2115 of 1993 filed by Gadakh Yashwantro Kankarrao is allowed only in part. The appeal relating to declaration of election of Gadakh to be void is dismissed for the reason given by us. However, the remaining part against grant of the further relief declaring Vikhe Patil to have been duly elected is allowed. This appeal partly succeeds to this extent only. Vikhe Patil would get Rs. 20,000 as costs from Gadakh. Other parties to bear their own costs.
- (2) Civil Appeal No. 1758 of 1993 filed by Sharadchandra Govindrao Pawar is allowed and the order naming him for commission of the corrupt practice under section 123(4) of the R. P. Act made by the High Court is set aside. No costs.
- (3) Civil Appeal No 2116 of 1993 by Deshmukh Bhagwan Rangnath only against declaration of Vikhe Patil to have been duly elected is allowed and that further declaration is set aside. No costs.
- (4) Civil Appeal No. 2444 of 1993 by Najan Rambahu Maruthi similarly against declaration of Vikhe Patil to have been duly elected is allowed and that further declaration is set aside. No costs.

J. S. VERMA
(N.P. SINGH)
(N. VENKATACHALA)

By Order,
RAM KISHAN,
Secretary to the Election Commission of India

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4973 OF 1993

Manohar Joshi

.....Appellant

v

Nitin Bhaurao Patil & Another

.....Respondents

Before

J. S. Verma, J, N. P. Singh, J and K. Venkataswami, J.

Elections – corrupt practice emanating from election campaign speeches – Petition filed out of time – whether petition invalid.

Background facts

This was an appeal against a judgement dated 26.4.1983 by S.N. Variava, J of the Bombay High Court in Election Petition No. 24 of 1990 whereby the election of the appellant, Manohar Joshi to the Maharashtra Legislative Assembly from 32, Dadar constituency of Greater Bombay, held on 27 2 1990 had been declared to be void. Mr Manohar Joshi of the BJP – Shiv Sena alliance was declared duly elected on 1 3 1990.

The election petition was filed late, on 16 4 1990, when the last date for filing was 14 4 1990. The petition alleged the commission of corrupt practices under the election law and sought a declaration of the election of Manohar Joshi to be void.

The High Court rejected the contention that the election petition was time-barred, but held that the corrupt practices alleged had been proved.

Held

That the charge of corrupt practices had not been proved and the High Court's declaration that the election was void was contrary to law and was therefore set aside. There was no ground made out for declaring the appellant's election to be void.

Cases cited in the Judgement

H. Raji Harinder Singh v Karnail Singh (1957) SCR 208
Hukumdev Narain Yadav v Lalit Narain Mishra (1974) (3) SCR 31
Hari Shankar Tripathi v Shiv Harsh & Others (1976)(3) SCR 308
Smitadri Satga Narayana Rao v M. Budda Prasad & Others (1994) Supp.(1)
SCC 449 = 1991(1) 5 SCJ 281
Ranlal, Motilal and Chhotelal v Rewa Coalfields Ltd. (1962) SCR 762
Sahodrabai Rai v Ram Sin Aharwar (1968)(3) SCR 13
A. Madan Mohan v Kalarakunta Chandrasekhara (1984) (2) SCC 288
US Sasidharan v K Karunakaran & Another (1989) (4) SCC 482
Bal Thackeray v Prabhakar K. Kunte & Others (Civil Appeals Nos 2835/2836 of 1989)
Jamaat-e-Islami Hind etc. v Union of India (1995) 1 SCC 428

JUDGEMENT**J. S. VERMA, J**

This is an appeal under section 116A of the Representation of the People Act, 1951 (for short "the R. P. Act") against the judgement dated 26.4.1993 by S.N. Variava, J of the Bombay High Court in Election Petition No.24 of 1990 whereby the election of the appellant Manohar Joshi to the Maharashtra Legislative Assembly from 32, Dadar Constituency of Greater Bombay, held on 27.2.1990 has been declared to be void on the ground under Section 100(1)(b) of the R. P. Act.

Manohar Joshi was the candidate of the BJP-Shiv Sena alliance at that election while the original election petitioner Bhaurao Patil (now dead), was the candidate of the Congress (1) Party. Manohar Joshi secured the highest number of votes, i.e. 47,737, while Bhaurao Patil secured 24,354 votes. Accordingly, Manohar Joshi was declared duly elected on 1.3.1990.

Admittedly, the last date for filing the election petition according to the limitation prescribed in sub-section (1) of Section 81 of the R. P. Act was 14.4.1990 but the election petition was actually presented in the Bombay High Court on 16.4.1990. It is also admitted that 14.4.1990 was a Saturday on which date the High Court as well as its office was closed on account of a public holiday and 15.4.1990 was a Sunday on which date also the High Court as well as its office was closed and therefore, the election petition could not have been presented on either of these two dates. The first question which arises relates to compliance of section 81 of the R. P. Act, the non-compliance of which renders the election petition liable for dismissal under section 86 of the R. P. Act.

The election petition alleged the commission of corrupt practices under sub-sections (3) and (3A) of Section 123 of the R. P. Act and sought declaration of the election of Manohar Joshi to be void on the ground under section 100(1)(b) of the R. P. Act. The corrupt practices alleged were, in substance, speeches on 24.2.1990 at Shivaji Park by the returned candidate Manohar Joshi and leaders of the BJP-Shiv Sena alliance, namely, Bal Thackeray, Chhagan Bhujbal and Pramod Nawalkar; and some audio- and video-cassettes played during the election campaign alleged to contain material constituting these corrupt practices. Any further reference to the audio-cassettes is unnecessary since none was either produced or relied on at the trial. The petition was supported only on the ground of the said speeches and video-cassettes. Further details of the same would be given later at the appropriate stage.

The High Court rejected the contention that the election petition was time-barred and, therefore, liable to be dismissed under Section 86 of the R. P. Act. The High Court was held that the corrupt practices alleged have been proved. Consequently, the election petition has been allowed and the election of the returned candidate, Manohar Joshi, has been declared to be void on the ground under section 100(1)(b) of the R. P. Act. Hence, this appeal.

" 81. Presentation of petitions – (1) An election petition calling in question any election may be presented on one or more of the grounds specified in *[sub-section (1)] of section 100 and section 101 to the **[High Court] by any candidate at such election or any elector ***[within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates.]

Explanation – In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

$$\#[\mathbf{xx} \quad \mathbf{xx} \quad \mathbf{xx}]$$

##[(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition ### and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.]

*Subs. by Act 27 of 1956, s. 44, for "sub-sections (1) and (2)".

**Subs. by Act 47 of 1966, s. 39, for "Election commission" (w.e.f. 14.12.1966).

*** Subs. by Act 27 of 1956, for certain words, i.e. "in such form and within such time but not earlier than the date of publication of the name or names of the returned candidate or candidates at such election under Section 67, as may be prescribed."

#Sub-section (2) omitted by Act 47 of 1966, s. 39 (w.e.f. 14.12.1966).

Ins. by Act 40 of 1961, s. 17 (w.e.f. 20.9.1961).

###Certain words omitted by Act 47 of 1966, s. 39 (w.e.f. 14.12.1966).''

"83. Contents of petition – (1) An election petition –

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.”

"86. Trial of election petitions – (1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 of section 82 or section 117.

Explanation – An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98.

xxx

xxx

xxx"

Shri Jethmalani contended that the election petition should have been dismissed by the High Court in accordance with section 86(1) of the R. P. Act for non-compliance of sub-section (1) of section 81 because it was not presented within the prescribed limitation; and it ought to have been dismissed thereunder, also for non-compliance of sub-section (3) of section 81. For the second part of the submission, Shri Jethmalani contended that sub-section (3) of Section 81 must be read along with section 83 and, therefore, the copy of the election petition must be the copy of a petition satisfying the requirement of section 83 (1) of the R. P. Act. These are the two parts of the argument for invoking section 86 for dismissal of the election petition at the threshold. The question, therefore, is whether there has been non-compliance of any part of section 81 to attract section 86 of the R. P. Act. We will consider this argument at the outset.

NON-COMPLIANCE OF SUB-SECTION (1) AND/OR SUB-SECTION (3) OF SECTION 81 OF THE R.P. ACT

Re: Sub-section (1) of Section 81

In substance, the point for decision is whether the election petition filed on 16.4.1990 was presented within 45 days from the date of election of the returned candidates as required by sub-section (1) of section 81, since the last day of limitation, so reckoned, fell on 14.4.1990. Admittedly, the High Court and its office was closed on 14.4.1990 as well as 15.4.1990 on account of which the election petition could not have been presented in the High Court on any of these two days. Incidentally, even 13.4.1990 was a holiday when the High Court and its office was closed, but that is not of any significance since the last day of limitation was 14.4.1990. There is no controversy that the provisions of the Limitation Act, 1963 are not applicable to the election petitions required to be presented under the R. P. Act and, therefore, section 4 of the Limitation Act is of no avail. The only question is whether Section 10 of the General Clauses Act, 1897 applies to an election petition to permit filing of the election petition on the date when the High Court opened after the holidays. If Section 10 of the General Clauses Act is applicable then the election petition presented on 16.4.1990 was within the time prescribed by sub-section (1) of Section 81 and there would be no non-compliance of that provision to attract section 86(1) of the R. P. Act requiring dismissal of the election petition as time-barred.

The submission of Shri Jethmalani is that the R. P. Act is a self-contained Code and, therefore, no provision outside the Act can be imported for the purpose of computing the limitation for presentation of an election petition. On this basis, he submitted that Section 10 of the General Clauses Act has no application. In reply, Shri Ashok Desai, learned counsel for the respondents submitted that the scheme of the R. P. Act and the legislative history of the limitation prescribed by the Act for presentation of an election petition clearly show that Section 10 of the General Clauses Act applies for computing limitation for presentation of an election petition. Shri Desai also relied on the legal maxim – '*lex non kojit ad impossibillia*' – which means 'the law does not compel a man to do that which he cannot possibly perform.'" Shri Desai submitted that the election petitioner was entitled as of right to present the election petition on the last day of limitation which fell on 14.4.1990, but that day and the next day being holidays when the High Court and its office was closed, the election petition presented on 16.4.1990, the first day on which the Court and its office opened after the holidays, was presented within the prescribed period of limitation. On this basis, Shri Desai submitted, there was non-compliance of sub-section (1) of Section 81 of the R. P. Act.

Section 10 of the General Clauses Act, 1897 is as under:

"10. Computation of time – (1) where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed

period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.

(2) this section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1987."

A brief reference to the legislative history of the limitation prescribed by sub-section (1) of Section 81 is relevant. The limitation on 45 days from the date of election of the returned candidate for the presentation of an election petition, has been prescribed in sub-section (1) of section 81 itself by an amendment by substitution of certain words by Act 27 of 1956. Prior to it, the period of limitation was required to be prescribed by the Rules framed under the R. P. Act according to the words then used in sub-section (1) of section 81. Rule 119 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951 (for short "1951 Rules"), prescribed that period. The 1951 Rules also contained Rule 2(6) which expressly provided for the application of the General Clauses Act to the provisions in the Rules.

A similar question relating to applicability of Section 10 of the General Clauses Act arose when the limitation was prescribed by the Rules as required by the then existing sub-section (1) of section 81 in, *H.H. Raja Harinder Singh v S. Karnail Singh*, 1957 SCR 208. It was held by this Court that Section 10 of the General Clauses Act is applicable to the presentation of election petitions. Thereafter, the same view has been taken in *Hukumdev Narain Yadav v Lalit Narain Mishra* 1974 (3) SCR 31; *Hari Shankar Tripathi v Shiv Harsh & Others*, 1976 (3) SCR 308; and *Simhadri Satya Narayana Rao v Budda Prasad and Others*, 1994 Suppl.(1) SCC 449 = 1991(1) SCJ 281. The later decisions were in relation to election petitions filed after amendment of Section 81(1) by Act 27 of 1956 prescribing the limitation in this Section itself. Shri Jethmalani tried to distinguish those decisions in *H.H. Raja Harinder Singh v S Karnail Singh*, 1957 SCR 208 was followed without noticing the legislative change by amendment of sub-section (1) of section 81. In view of the fact that this point was not raised in the manner it has been done by Shri Jethmalani before us, it is appropriate that we consider the merit of this submission.

It is settled by the decision of this Court in *Ramlal, Motilal and Chhotelal v Rewa Coalfields Ltd.*, 1962 (2) SCR 762 at page 767 that the litigant has a right to avail limitation up to the last day and his only obligation is to explain his inability to present the suit/petition on the last day of limitation and each day thereafter till it is actually presented. This being the basic premise, it cannot be doubted that the election petitioner in the present case was entitled to avail the entire limitation of 45 days up to the last day, i.e. 14.4.1990 and he was required to explain the inability of not filing it only on 14.4.1990 and 15.4.1990 since the petition was actually presented in the

High Court on 16.4.1990. If Section 10 of the General Clauses Act applies, the explanation is obvious and the election petition must be treated to have been presented within time.

The question now is: Whether the applicability of Section 10 of the General Clauses Act to the presentation of election petitions under the R. P. Act is excluded? No doubt the R. P. Act is a self-contained code even for the purpose of the limitation prescribed therein. This, however, does not answer the question. It has to be seen whether the context excludes the applicability of section 10 of the General Clauses Act which is in the part therein relating to the General Rules of Construction of all Central Acts. The legislative history of prescribing limitation for presentation of election petitions in accordance with sub-section (1) of section 81 is also significant for a proper appreciation of the context. Admittedly, section 10 of the General Clauses Act applied when by virtue of the requirement in the then existing sub-section (1) of section 81 the period of limitation was prescribed by rules framed under the R.P. Act, in rule 119 of the 1951 Rules. This was expressly provided by rule 2(6) of the 1951 Rules. There is nothing to indicate that providing the period of limitation in sub-section (1) of section 81 itself by substitution of certain words by Act 27 of 1956 instead of prescribing the limitation by Rules, was with a view to exclude the applicability of section 10 of the General Clauses Act. The change appears to have been made to provide for a fixed period in the Act itself instead of leaving that exercise to be performed by the rule-making authority. An express provision in rule 2(6) of the 1951 Rules was required since the General Clauses Act *ipso facto* would not apply to Rules framed under the Central Act, even though it would to the Act itself. The context supports the applicability of section 10 of the General Clauses Act instead of indicating its exclusion for the purpose of computing the limitation prescribed in sub-section (1) of section 81 for presentation of election petitions.

In view of the basic premise that the election petitioner is entitled to avail the entire limitation of 45 days for presentation of the election petition as indicated by *Ramlal (supra)*, if the contrary view is taken, it would require the election petitioner to perform an impossible task in a case like the present, to present the election petition on the last day of limitation on which date the High Court, as well as its office, is closed. It is the underlying principle of this legal maxim which suggests the informed decision on this point, leading to the only conclusion that section 10 of the General Clauses Act applies in the computation of the limitation prescribed by sub-section (1) of section 81 of the R. P. Act for presentation of an election petition. So computed, there is no dispute that the election petition presented in the present case on 16.4.1990 was within limitation and there was no non-compliance of sub-section (1) of section 81 of the R. P. Act.

We have reached the above conclusion independent of the above decisions of this Court rendered on petitions presented subsequent to the amendment of sub-section (1) of section 81. It may straightaway be said that in all these cases applicability of section 10 of the General Clauses Act was either not doubted or was taken for granted. This is how the position has been understood for all these years and no case taking the contrary view has been cited at the Bar. This settled

position is in conformity with the view we have taken on this point. There is no basis in law to take a different view.

Re: Sub-section (3) of Section 81

Sub-section (3) of Section 81 requires 'every election petition to be accompanied by as many copy thereof' as there are respondents, obviously for the purpose of a copy of the election petition being served upon each respondent along with the notice of the election petition. The submission of Shri Jethmalani is that the election petition and, therefore, its accompanying copy, in accordance with section 81(3), should satisfy the requirement of sub-section (1) of section 83 as to the contents of the petition. He argues that if the contents of the election petition which has been filed and the copy accompany it do not satisfy the requirements of section 83(1), there is non-compliance of section 81(3) attracting section 86 for dismissal of the election petition. 'The argument is that the defect in such a case is in the accompanying copy of the election petition which is deficient in its contents as required by section 83(1). For this reason, he submits, it results in non-compliance of section 81(3) which attracts section 86 of the R. P. Act.

In the present case, there is reference in paras 32 and 33 of the election petition to certain video-cassettes, the contents of which are deemed to be incorporated by reference in the election petition, and since the video-cassettes or a transcript of its contents was not filed along with the election petition and was not supplied with the copy of the election petition to the respondent (returned candidate), it is argued, that it has resulted in non-compliance of Section 81(3) which attracts Section 86. No further reference to the audio-cassettes is necessary since the audio-cassettes were not produced even at the trial and were not relied on by the election petitioner for proof of the corrupt practice. These video-cassettes were later produced at the trial but the subsequent production of the video-cassettes at the trial, it is urged, does not cure the defect of non-compliance of section 81(3). In reply, Shri Ashok Desai submitted that the video-cassettes did not form part of the election petition as the contents thereof are not incorporated by reference in the election petition and, therefore, non-production of the video-cassettes or their transcript with the election petition and failure to annex the same to the copy of the election petition served on the returned candidate did not amount to non-compliance of section 81(3). Shri Desai submitted that section 81(3) merely requires the copy to conform with the election petition as presented in the court and not an election petition as required to be drafted according to section 83(1) of the R. P. Act. He further submitted that any defect or deficiency in the contents of the election petition found with reference to section 83(1) of the R. P. Act may have any other consequence requiring the court to act under Order 7 Rule 11 C.P.C. or Order 6 Rule 16 C.P.C., but there is no non-compliance of section 81(3) if the copy accompanying the election petition which is served on the respondent is identical with the election petition as it is actually presented in the court. In short, Shri Desai submitted that non-compliance of section 83(1) of the R. P. Act is not visited with the consequence of dismissal of the election petition at the threshold under section 86 and, therefore, the non-compliance of section 81 which attracts section 86 has to be seen without

reference to section 83 of the R. P. Act. Both sides have placed reliance on the same set of decisions to support the rival contentions.

There is no dispute that the election petition as presented in the court was accompanied by as many copies thereof as there were respondents in the election petition, and the copy of the election petition served on the returned candidate with the notice of the election was identical with the election as it was presented in the court. The requirement of the plain language of section 81(3) was, therefore, fully met. The object of the provision is clearly to ensure that each respondent of the election petition gets an identical copy of the election petition as presented in the court to acquaint the respondent with the actual and full contents of the election petition as it is presented in the court. On the basis of the identical copy the respondent can prepare his defence and also take the plea of deficiency, if any, in the contents of the election with reference to section 83 of the R. P. Act, in order to apply in the court for action being taken under Order 7 Rule 11 or Order 6 Rule 16, C.P.C., as the case may be. These provisions are attracted only after the election petition survives the liability for dismissal at the threshold under section 86 of the R. P. Act.

Section 86 empowers the High Court to dismiss an election petition at the threshold if it does not comply with the provisions of section 81 or section 82 or section 117 of the Act, all of which are patent defects evident on a bare examination of the election petition as presented. Sub-section (1) of section 81 requires the checking of limitation with reference to the admitted facts and sub-section (3) thereof requires only a comparison of the copy accompanying the election petition with the election petition itself, as presented. Section 82 requires verification of the required parties to the petition with reference to the relief claimed in the election petition. Section 117 requires verification of the deposit of security in the High Court in accordance with Rules of the High Court. Thus, the compliance of Section 81, 82, and 117 is to be seen with reference to the evident facts found in the election petition and the documents filed along with it at the time of its presentation. This is a ministerial act. There is no scope for any further inquiry for the purpose of Section 86 to ascertain the deficiency, if any, in the election petition found with reference to the requirements of Section 83 of the R.P. Act which is a judicial function. For this reason, the non-compliance of Section 83, is not specified as a ground for dismissal of the election petition under Section 86.

Acceptance of the argument of Shri Jethmalani would amount to reading into Section 86 an additional ground for dismissal of the election petition under Section 86 for non-compliance of Section 83. There is no occasion to do so, particularly when Section 86, being in the nature of a penal provision, has to be construed strictly confined to its plain language.

We may now refer to the decisions of this Court on which reliance is placed by both sides to support the rival contention on this point. In *Sahodrabai Bai v Ram Singh Aharwar*, 1968 (3) SCR 13, a translation in English of the pamphlet annexed to the election petition was incorporated in the body of the election petition and it was stated in the petition that it formed part of the

petition. Along with the copy of the election petition which contained the entire transcript in English of the pamphlet, a copy of the pamphlet had not been annexed. The respondent raised the objection that the copy of the election petition served on him was not a copy of the election petition presented in the High Court and, therefore, the election petition was liable to be dismissed under Section 86 of the R.P. Act. It was held by this Court that the pamphlet which was filed as an annexure to the election petition must be treated as a document filed with the election petition and not as part of the election petition in so far as the averments are concerned. Obviously, this view was taken because the contents of the pamphlet were incorporated in the body of the election petition of which a copy was duly served on the respondent. Accordingly, it was held that there was no non-compliance of Section 81(3) and the petition was not liable to be dismissed under Section 86 of the R.P. Act. In *A. Madan Mohan v Kalavakunta Chandrasekhara*, 1984 (2) SCC 288, the earlier decision in *Sahodrabai Rai (supra)* was followed. It was held that failure to furnish copy of schedules and documents which did not form an integral part of the election petition was not fatal to the petition and it was not liable to be dismissed under Section 86 of the R.P. Act. An earlier decision in *M Karunanidhi etc.etc.v Dr. H. V. Hande and others etc etc.*, 1983 (2) SCC 473 was distinguished and it was pointed out that *M. Karunanidhi (supra)* did not depart from the ratio laid down in *Sahodrabai Rai (supra)*. Para 15 of the decision in *A. Madan Mohan (supra)* is as under:

"This decision in no way departs from the ratio laid down in *Sahodrabai case*. The aforesaid case, however, rested on the ground that the document (pamphlet) was expressly referred to in the election petition and thus became an integral part of the same and ought to have been served on the respondent. It is, therefore, manifest that the facts of the case cited above are clearly distinguishable from the facts of the present case. Furthermore, the decision in *M. Karunanidhi case* has fully endorsed the same." (at page 292)

This decision by a three-Judge Bench also indicated that this stringent provision must be construed literally and strictly. Para 13 of the decision is as under:

"It is a well settled principle of interpretation of statute that wherever a statute contains stringent provisions they must be literally and strictly construed so as to promote the object of the Act. As extracted above, this Court clearly held that if the arguments of the appellant (in that case) were to be accepted, it would be stretching and straining the language of Sections 81 and 82 and we are in complete agreement with the view taken by this Court which has decided the issue once for all." (at page 291)

Another decision referred is *U. S. Sasidharan v K. Karunakaran and Another*, 1989(4) SCC 482. That was a case in which a document was incorporated in the election petition by reference and was filed with the election petition in a sealed cover but a copy was not supplied to the returned candidate along with a copy of the election petition. In such a situation, it was held to be non-

compliance of Section 81(3) rendering the election petition liable for dismissal under Section 86(1) of the R.P. Act. This conclusion was reached on the view that non-supply of copy of the document with a copy of the election petition was a fatal defect because the document was filed in the High Court with election petition and it formed an integral part of the election petition. This decision also indicates the distinction between a document forming an integral part of the election petition and being produced merely as evidence of an averment made in the election petition.

The distinction brought out in the above decisions is, that in a case where the document is incorporated by reference in the election petition without reproducing its contents in the body of the election petition, it forms a integral part of the petition and if a copy of that document is not furnished to the respondent with a copy of the election petition, the defect is fatal attracting dismissal of the election petition under Section 86(1) of the R.P. Act. On the other hand, when the contents of the documents are fully incorporated in the body of the election petition and the document also is filed with the election petition, not furnishing a copy of the document with a copy of the election petition in which the contents of the document are already incorporated, does not amount to non-compliance of Section 81(1) to attract Section 86(1) of the R.P. Act. In other words, in the former case, the document filed with the election petition is an integral part of the election petition being incorporated by reference in the election petition and without a copy of the document, the copy is an incomplete copy of the election petition, and, therefore, there is non-compliance of Section 81(3). In the other situation, the document annexed to the petition is mere evidence of the averment in the election petition which incorporated fully the contents of the document in the body of the election petition and, therefore, non-supply of a copy of the document is mere non-supply of a document which is evidence of the averments in the election petition and, therefore, there is no non-compliance of Section 81(3). In *U. S. Sasidharan (supra)* this distinction is clearly brought out as under:

"..... The material facts or particulars relating to any corrupt practices may be contained in a document and the election petitioner, without pleading the material facts or particulars of corrupt practice, may refer to the document. When such a reference is made in the election petition, a copy of the documents must be supplied in as much as by making a reference to the document and without pleading its contents in the election petition, the documents become incorporated in the election petition by reference. In other words, it forms an integral part of the election petition. Section 81(3) provides for giving a true copy of the election petition. When a document forms an integral part of the election petition and a copy of such document is not furnished to the respondent along with a copy of the election petition, the copy of the election petition will not be a true copy within the meaning of Section 81(3) and, as such, the court has to dismiss the election petition under Section 86(1) for non-compliance with Section 81(3)."

"On the other hand, if the contents of the document in question are pleaded in the election petition, the document does not form an integral part of the election petition. In such a case, a copy of the document need not be served on the respondent and that will not be non-compliance with the provision of Section 81(3). The document does not form an integral part of the election petition, but has been either referred to in the petition or filed in the proceedings as evidence of any fact, a copy of such a document need not be served on the respondent along with a copy of the election petition."

(paras 15 and 16 at p 489)

It may be mentioned that in all the above decisions cited at the Bar, the document in question had been filed in the court along with the election petition, but a copy of that document was not supplied to the respondent with the copy of the election petition forming an integral part of the election petition, non-supply of a copy of the document was held to be fatal, warranting dismissal of the election petition under Section 86(1) for non-compliance of Section 81(3). In the other cases, the document was filed with the election petition, but the contents thereof were also incorporated in the body of the election petition, a copy of which had been supplied to the respondent even though a copy of that document was not furnished in addition. In those cases, non-supply of a copy of the document was held not to be non-compliance of Section 81(3) because the document annexed to the election petition was treated as evidence of the averments contained in the body of the election petition, a copy of which had been furnished to the respondent. This is the gist of these decisions, which also indicates that the question has to be answered with reference to the kind of use made of the document annexed to the petition, whether as an integral part of the election petition or merely as evidence of the pleadings contained in the body of the election petition.

In the present case, the video-cassettes, non-supply of transcript of which is urged by Shri Jethmalani to be a ground for non-compliance of Section 91(3), were not even filed in the High Court with the election petition in the High Court. This is, therefore, not a case of non-supply of a copy of a document which was filed along with the election petition. What was supplied to the returned candidate in the present case, was a true copy of the election petition as it was presented in the court without the video-cassettes, of which mere mention was made without incorporating its contents by reference or enumerating it in the election petition. It is not the case of the election petitioner that the full contents of the video-cassettes or their transcripts are incorporated by reference in the election petition in order to make the video-cassettes an integral part of the election petition, inasmuch as no video-cassette was filed along with the election petition as it was presented in the High Court. Reliance is placed by the election petition on the video-cassettes produced later during the trial as only evidence of the pleading in paras 32 and 33 of the election petition. It is, therefore, clear that the contents of the video-cassettes, except to the extent pleaded in paras 32 and 33 of the election petition, cannot be treated to be incorporated by reference in the election petition as a part of the pleadings and their use is sought to be made by the election petitioner only as evidence of the averments contained in paras 32 and

33 of the election petition. Admittedly, a true copy of the election petition as presented in the High Court was furnished to the returned candidate along with the notice of the election petition. There was thus non-compliance of sub-section (3) of Section 81 of the R.P. Act. The election petition was, therefore, not liable to be dismissed under Section 86(1) even on the ground of non-compliance of section 81(3) of the R.P. Act.

The contention of Shri Jethmalani that the entire election petition is liable to be dismissed under Section 86(1) of the R.P. Act for non-compliance of sub-section (1) and/or sub-section (3) of Section 81 is, therefore, rejected.

Non-compliance of Section 83 (1) of the R.P. Act – its effect

The next question now is whether the contents of the election petition are as required by Section 83 of the Act or if there is any deficiency therein to attract Order 7 Rule 11 or Order 6 Rule 16, C.P.C. This question arises from the alternative submission of Shri Jethmalani who contended that the pleading of corrupt practice with reference to the use of video cassettes is deficient and is, therefore, liable to be struck out under Order 6 Rule 16, C.P.C. He submitted that this would leave for consideration only the speeches of Manohar Joshi, Bal Thackeray, Pramod Nawalkar and Chhagan Bhujbal on 24.2.1990 as the only basis for the charge of the corrupt practice under sub-sections (3) and (3A) of Section 123 for consideration in the election petition. He urged that there is no pleading of any part of the speech of Chagan Bhujbal in the election petition and, therefore, reference to his speech is innocuous. For the speeches of Manohar Joshi, Bal Thackeray and Pramod Nawalkar, he urged that the specific pleading contained in the body of the election petition alone requires consideration, excluding all other material brought on record during the trial, which is an impermissible addition to the record on account of a serious mistrial resulting from the unusual procedure adopted by the learned trial Judge in the High Court. Shri Jethmalani referred copiously to the evidence to support his submission that the learned trial Judge himself directed witness to search for certain documents and produce them, in addition to extensively cross-examining that witness himself to bring on record a lot of material which is wholly irrelevant and inadmissible. In short, his submission is that, on the basis of the only pleading contained in the body of the election petition and the admissible and relevant evidence alone, no corrupt practice under sub-section (3) or sub-section (3A) of Section 123 is made out.

Some other questions arising out of the remaining arguments of Shri Jethmalani and the reply of Shri Ashok Desai which are referred later, have to be considered with reference to the pleadings of the parties. It is, therefore, appropriate at this stage to quote the relevant pleadings in the election petition and the written statement of the returned candidate.

We must observe that the pleadings of the parties are frivolous and prolix of which only certain portions were relied at the hearing of the appeal by the learned counsel for the parties and, therefore, reference only to the relevant portions of the pleadings is necessary. We may add that

the failure to exclude from consideration the pleading which is prolix and irrelevant, has led to the reception of considerable evidence which too is irrelevant and inadmissible resulting in needless increase in the bulk of the record of the trial court and an excursion by the High Court into an irrelevant area. There has been a failure to invoke and apply the provisions in the Code of Civil Procedure at the pre-trial stage which has led to an improper frame of the issues resulting in a lack of focus on the real points in controversy alone confined to the actual pleadings.

According to Shri Ashok Desai, learned counsel for the respondents, the relevant pleadings relating to the allegation of corrupt practices pleaded in the election petition are in paras 2,5(o), 7, 8, 16, 17, 18, 30, 31, 32, 33 and the first sentence of para 35 as well as paras 59 and 60 of the written statement. According to Shri Jethmalani, learned counsel for the appellant, the relevant pleadings are only in paras 30, 31, 32, 33 of the election petition. At any rate, nothing more has to be seen in the election petition for this purpose in addition to the portions pointed out by Shri Desai. These portions of the election petition and the written statement are as under:

**From Election Petition No. 24/1990
(as typed in paper book)**

"(2) The Petitioner says that the petitioner had contested the general election to the Maharashtra Legislative Assembly held on 27/2/1990 (hereinafter referred to as "the said election") as a candidate of Indian National Congress (Congress-1) with the election symbol of "Hand". The Respondent was the candidate of Shiv Sena Party with the election symbol of "Bow & Arrow" put by the alliance of two parties viz Shiv Sena and Bhartiya Janata Party (BJP). The other candidates were either Independent candidates or belonging to other political parties like Janata Dal, etc."

"5: The Petitioner states that before setting out the nature of corrupt practices committed by the first respondent, it is necessary to give certain facts which have transpired in India over the last one decade, which are as under:

xxx

xxx

xxx

(o) The petitioner states that all the aforesaid facts show that the said two parties, viz BJP and Shiv Sena have systematically exploited various unfortunate disputes set out hereinabove so as to seek votes during the parliamentary election and the election in question in the name of 'Hindutva', i.e. Hindu religion."

"7. The petitioner states that accepting a candidature in the election of the said alliance meant that the said particular candidate had accepted the basic concept and plank on which the said two parties were jointly contesting the elections for the Assembly. It further meant that the candidate accepted Bal Thackeray, Pramod

Mahajan, Kirit Somaiya as their leaders and consented to the said leaders making an appeal to vote for the candidates of the said alliance. It further meant that the philosophy and ideology of the leaders of the alliance, and particularly Bal Thackeray, such as (a) Hindus are and Hindu religion is in danger; (b) that only alliance can protect Hindus and Hindu religion; (c) that the Congress-1 and Janata Dal have failed to protect, and will not protect Hindus and Hindu religion and their candidates are unfit to be elected; (d) that Hindus have suffered and will continue to suffer indignity, discrimination and unequal treatment; (e) that the problems in states like Kashirm Punjab, Assam etc. have arisen because of the pampering of the minorities; (f) that Hindus must come together and fight the attack on them and their religion and say with pride that they are Hindus; (g) that Hindus owed a duty to their religion and if necessary must give their life for it; (h) that minorities, and particularly the Muslims, were treated more favourably for their votes than Hindus.

"8. The petitioner states that the respondent being a candidate of the said alliance, has accepted the ideology and philosophy of the said alliance, some of which is set out hereinabove. The respondent also consented to the leaders of the said alliance such as Bal Thackeray, Pramod Mahajan, Kirit Somaiya, Gospinath Mundhe and others making appeals to the voters to vote for her. In fact, as more particularly set out hereinbelow the respondent herself has expressly made an appeal to vote for her to fight for Hinduism."

"16. The petitioner states that similarly another joint public meeting was held in the said constituency, i.e. at Shivaji Park, Dadar on 24.2.1990. At the said meeting most of the candidates of the BJP-Shiv Sena alliance, including the Respondent herein, were present. The said meeting was addressed by the leaders of the said alliance. At the said meeting Bal Thackeray reiterated that the said alliance was contesting the elections in the name of Hindu religion and to fight for Hindutva. The proceedings of the said meeting were widely reported in various dailies viz: 'Mumbai Sakal'; 'Nava Kal'; 'Navshakti'; 'Maharashtra Times'; 'Navbharat Times'; 'Loksatta'; 'Sunday Observer'; 'The Times of India'; 'Indian Express'; all dated 25.2.1990 and 'Samna', dated 25.2.1990 and 26.2.1990. The petitioner craves leave to refer to and rely upon the said press reports as and when produced.

17. Some of the most offending statements made at the said meeting by the leaders of the said alliance are as under:

- (a) To handle the Congress-1 hoodlums the Shiva Sainiks may take law in their hands and use firearms if necessary (Thackeray).

- (b) To save 'Hindutva' vote for BJP-Sena Nominees (Pramod Mahajan, BJP-MP).
- (c) Mr. Rajiv Gandhi does not know his own religion, and thus has no right to speak on Hinduism (Pramod Mahajan).
- (d) The result of these elections will not only depend on the solution to the problem of food, clothing but the same will also decide whether in the state the flame of Hindutva will grow or will be extinguished. If in Maharashtra the flame of Hinduism is extinguished, then anti-national Muslims will be powerful and they will convert Hindustan into Pakistan. If the flame of Hindutva will grow then in that flame the anti-national Muslims will be reduced to ashes (Pramod Mahajan).
- (e) We must protect 'Hindutva' at all costs and for that we must allow the saffron (Bhagwa) of Shri Chhatravathi Shivaji Maharaj to fall from our shoulders (Pramod Mahajan).
- (f) Rajiv Gandhi speaking on Hindutva is like a prostitute lecturing on fidelity. The country is again heading for partition. It is, therefore, necessary that in these circumstances and to keep the flame of Hindutva alive, the alliance of BJP-Shiv Sena should be elected (Mahajan).
- (g) (Referring to Rajiv Gandhi), wife Christian, mother Hindu, father a Parsee and therefore himself without any (Hindu) culture/teaching (vevarsi). (Pramod Mahajan).

18. The petitioner states that the proceedings of the said meeting were tape-recorded and taken down in shorthand by the police authorities. The petitioner craves leave to refer to and rely upon the said tape-recorded speeches and the speeches taken down in shorthand by the police authorities."

"30. The petitioner states that the respondent himself in his capacity as a candidate from the said constituency as well as the leader of the said alliance made appeals which offend the provisions of the said Act, e.g. in the meeting held on 24.2.1990 at Shivajai Park, the respondent stated the first Hindu State will be established in Maharashtra. Similarly in various other public meetings, the respondent herein made objectionable appeals. Some of the meetings were reported in newspapers. The petitioner states that such meetings were held at Khaddke Building, Dadar on 21.2.1990, Prabhadevi on 16.2.1990, at Kumbharwada on 18.2.1990, and Khed Galli on 19.2.1990. At all the said meetings, as well as meetings at other places, the other speakers who were present, e.g. Pramod Mahajan (M.P.-BJP), Dada Kondke (Marathi Actor), Jayantiben Mehta, Chandrika Kenia (MPs) made objectionable appeals to vote for the respondent.

31. In fact the speakers went on to say that on the respondent being elected and on the said alliance establishing a Hindu Government, we will give jobs to all Hindus. The petitioner craves leave to refer to and rely upon the election diaries maintained by the local police stations, the speeches recorded by the Special Branch – 1 on audio-cassettes, video-cassettes and the speeches recorded in Marathi shorthand. The petitioner also craves leave to refer to and rely upon the press reports of the said meetings.

32. The petitioner states that in addition to holding public meetings, the said alliance had also taken out video-cassettes and audio-cassettes. The video-cassettes were entitled "Challenge & Appeal "Shiv Sena" and the others were called "Ajinkya". The said video-cassettes and audio-cassettes discloses promises, appeals, exhortations and inducements to the voters to vote for the said alliance and their candidates. The said cassettes show that the said alliance has scant respect for the religious beliefs and practices of other religions like Muslims, Christians etc. Not only are the other religions ridiculed but the followers thereof are termed as "traitors" and "betrayers". Under the guise of protecting Hindu religion/Hindutva, the said cassettes attack other religions and whip up low-herd instincts and animosities. The concept of secular democracy is totally eliminated. It generates powerful emotions by appealing to the Hindu voters to vote for the candidates of the alliance on a false impression given to voters that only the alliance and its candidates can protect the Hindu religion. The petitioner will rely upon the visuals which have the aforesaid effect on the voters. The petitioner also craves leave to refer to and rely upon the said video-cassettes as and when produced.

33. The petitioner states that the said alliance had also issued audio-cassettes wherein the speeches of the leaders of the said alliance like Bal Thackeray, at various places in Maharashtra are recorded, e.g. Parbhani, Sely Aurangabad, Panvel, Girgaon, Vashi (New Bombay) etc. The said audio-cassettes as well as the video-cassettes were played in the said constituency, particularly at the Shakha offices, and on street corners after 6.30p.m. They were regularly exhibited at or near the places of residence of some of the active workers of the said alliance in the said constituency. The exhibition and playing of the cassettes was on a large scale in the said constituency. The petitioner craves leave to refer to and rely upon the said audio-cassettes as and when produced."

"35. The petitioner states that the aforesaid facts clearly prove that the respondent and his agents with his consent have indulged into corrupt practices listed under section 123 of the said Act."

**From Written Statement
(as typed in paper book)**

"59. With reference to para 32 of the Petition, it is true that the said alliance has taken two video-cassettes known as "AJIMKYA" and AVAHAN AND VAWHAN". However, it is totally

false to the knowledge of the petitioner to allege that the said alliance and/or Shiv Sena partly and/or I have and/or my election agent and/or any person has with my consent and/or election agent and/or knowledge has taken out any audio-cassettes as alleged. This respondent denies that the said video-cassettes disclose any promises and/or appeals and/or extortions and/or inducements which in any manner amount to corrupt practice and or any other offence under the Representation of People Act, 1951 as alleged or at all and puts the petitioner to the strict proof thereof. This Respondent denies that the said cassettes or either of them show any religious beliefs and/or practices as alleged. This Respondent categorically denies that the said cassettes or either of them show any scant or disrespect for any religion or any religions beliefs and/or practices as alleged. This Respondent categorically denies that the said cassettes or either of them show any scant respect for Muslims and/or Christian and/or any other religion as alleged or at all and puts the petitioner to the strict proof thereof. This Respondent categorically denies that any religion has been ridiculed and/or followers thereof are termed as "Traitors" and/or "Betrayers" as alleged or at all and puts the Petitioner to the strict proof thereof. This Respondent denies that the said cassettes and/or either of them attack other religions and/or whips up low-herd instincts and/or animosities as alleged or at all. This Respondent denies that the said cassettes or either of them had appealed to the voters in the name of religion as alleged. This Respondent denies that the said cassettes or either of them had appealed to the voters in the name of religion as alleged. This Respondent submits that it has been held by the Supreme Court of India innumerable cases that whenever a reference is made in the election petition to a document, and the document includes an audio or video cassette, copy of such document must be supplied along with the Election Petition to the concerned Respondent inasmuch as by making a reference to the document and without pleading its contents in the Election Petition, the documents becomes incorporated in the Election Petition, the documents becomes incorporated in the Election Petition by reference. It becomes an integral part of the Election Petition under Section 81 and as required by Section 81 when document forms and integral part of the petition and the copy of the said document is not furnished to the Respondent along with the Election Petition, copy of the Election Petition will not be true copy within the meaning of Section 81 and the same is liable to be dismissed under the provisions of Section 86. Paragraph 32 of the Petition does not give any material particulars about the allegations which are sought to be made. It is submitted that the test to be applied where the pleadings discloses material facts and cause of action is that in absence of answer from the Respondent, would the court be in a position to give a judgment in favour of the petitioner. It is submitted that in the instant case, the answer is emphatically no and hence the entire contents of para 32 are wholly irrelevant, vexatious and abuse of this Hon'ble Court. The said pleadings, therefore, are not a complete cause action and in breach of provisions of Section 81, 82 and 86 of the Representation of People act and the election petition is liable to be and should be dismissed.

60. With reference to para 33 of the Petition, this Respondent categorically denies that the said alliance and/or Shiv Sena Party and/or B.J.P. Party issued any audio cassette as alleged and this Respondent puts the petitioner to strict proof thereof. The said paragraph alleges that the said video and/or audio cassettes were played in the said constituency particularly at Shakha Office,

Street, corners. The said paragraph does not state the place, date and time when the said cassettes are alleged to have been played. It further does not mention the names of the persons who are alleged to have played the said cassettes. This Respondent submits that it has been held by the Supreme Court of India that the allegations of corrupt practice are in the nature of criminal charges, and it is necessary that there should be no vagueness in the allegations so that the returned candidate may know how the case he has to meet. If the allegations are bogus and general and the particulars of corrupt practice are not stated in the petition then in such a case the petition does not disclose any cause of action and the Petition does not disclose any cause of action and the petition is liable to be and should be dismissed. Furthermore, as mentioned in the above paragraph, it has been held by the Supreme Court of India that when a reference has been made in the Petition to any document including a video or audio cassette, a copy of the said document, must be supplied along with the Election Petition because by making a reference to such a document the same forms integral part of the petition and therefore, without a copy of the said document the petition is incomplete. This Respondent, therefore, submits that for the reasons mentioned above, the Petition is liable to be and should be dismissed with costs.

It would also be appropriate to quote the issues framed on 9.1.1992 by the High Court on these pleadings, as under:

- "1. Whether the Respondent has committed any of the corrupt practices as defined in Section 123(3) of the Representation of Peoples Act, 1951 as alleged in the Petition?
2. Whether the Election Agent or any other Agent of the Respondent has committed any of the corrupt practices as defined in Section 123(3) of the Representation of Peoples Act, 1951 as alleged in the Petition?
3. Whether any other person with the consent of the Respondent or his Election Agent has committed any of the corrupt practices as defined in Section 123(3) of the Representation of Peoples Act, 1951 as alleged in the Petition?
4. Whether the Respondent has committed any of the corrupt practices as defined in Section 123(3A) of the Representation of Peoples Act, 1951 as alleged in the Petition?
5. Whether the Election Agent or any other Agent of the Respondent has committed any of the corrupt practices as defined in Section 123(3A) of the Representation of Peoples Act, 1951 as alleged in the Petition?
6. Whether any other person with the consent of the Respondent or his election Agent has committed any of the corrupt practices as defined in Section 123(3A) of the Representation of Peoples Act, 1951 as alleged in the Petition?

7. Whether the Petitioner proves that the Respondent has committed the corrupt practices as defined in Section 123(7) of the Representation of the Peoples Act 1951 as alleged in the petition?
8. Whether the Election of the Respondent is to be set aside?
9. Generally?

It may be mentioned that issue No. 6(A) was framed *suo motu* by the High Court almost at the fag end of the trial, as under:

"6. (A) Whether the Hindutva as used by the Shiv Sena Party the Maharashtra Legislative Assembly Election 1990 is as alleged in the Petitioner as alleged in the Written Statement?"

After both sides closed their respective cases, on the submission of Shri Jethmalani, the following issues were also permitted to be raised by order dated 4 January, 1993:

"1.(A) Whether the Petition is filed beyond the period of 45 days fixed by Section 81 of the Representation of Peoples Act, 1951 and requires to be peremptorily dismissed under Section 86 thereof?

1.(B) Whether the Petition must be dismissed for its failure to plead or disclose under what part of Section 100 of the Act relief is claimed?"

It was strenuously argued by Shri Desai that there is admission of the returned candidate in his written statement about the existence and use of the video-cassettes during the election campaign in the constituency and even of its contents, the only dispute being related to the meaning of the contents. On this basis, it was urged that there is no deficiency in the pleading of the corrupt practice in the election petition and the requirement of its proof is reduced to a great extent by admission in the written statement. The High Court has taken this view which is supported and relied on by Shri Desai in his submission. The High Court's judgment proceeds on this basis. It is, therefore, necessary to examine this aspect at this stage.

Assuming the contents of the video-cassette amount to the kind of speech or act which is a corrupt practice under sub-section (3) or sub-section (3A) of Section 123, in order to constitute that corrupt practice it must further be shown that the act was done during the election campaign between 8.2.1990 when the returned candidate became a 'candidate' and 27.2.1990 the date of poll, and that it was the act of the candidate or his agent or any other person with his consent. Unless all these constituent parts of the corrupt practice are pleaded to constitute the cause of action raising a triable issue and are then proved by evidence, the corrupt practice cannot be held to be pleaded and proved. If the act attributed is by the display of a video-cassette recorded some

time earlier, the display being between the above dates in the constituency, a mere display of the video-cassette does not prove all the constituent parts of the corrupt practice, inasmuch as it must also be pleaded and proved that such display was by the candidate or his agent or any other person with his consent. Where the display of the cassette is attributed to any other person with the consent of the candidate, the liability of the candidate for commission of the corrupt practice results vicariously from the act of the other person done with the consent of the candidate. In such a case, the constituent part of the corrupt practice is the act done by any other person, not by the candidate himself or his agent for whose act the candidate's consent is assumed, with the authorisation for the act being done by any other person with the candidate's consent. This distinction between the act amounting to corrupt practice done by the candidate himself or his election agent and any other person with his consent has to be kept in view. This has relevance also for the purpose of Section 99 of the R.P Act with reference to which one of the arguments has been addressed.

It was argued by Shri Ashok Desai that, in the case of the provocative and incendiary speeches given by acknowledged leaders of the political party, the consent of the candidate set up by their party has to be assumed as being implicit from the relationship of the candidate with the speaker through the medium of the party. On this basis, it was urged that a party candidate must be held to have consented to such speeches made by the leaders of that party and, therefore, if the speech of the leader satisfies the other requirements of the corrupt practice, the consent of the candidate which *toto* is a constituent part of the corrupt practice, must be assumed to make out the ground under Section 100(1)(b) of the R. P. Act for declaring his election to be void. Shri Desai made a fervent emotive appeal that unless the law is so construed, a candidate of the party will get the benefit of appeal for votes on the ground of his religion on the basis that his consent has not been pleaded and proved, thereby frustrating the object of the enactment and adversely affecting that purity of elections which is of essence in a democracy. It was argued that leaders of the party must be assumed to be agents of the candidates of that party for the purpose of the ground of corrupt practice.

In our opinion, the fallacy in the argument is that it overlooks certain other provisions of the R. P. Act. Section 100 of the R. P. Act is as under:

- "100. Grounds for declaring election to be void – (1) Subject to the provisions of sub-section (2) if the High Court is of opinion –
- (a) that on the date of his election as returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union territories Act, 1963 (20 of 1963); or
 - (b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

- (c) that any nomination has been improperly rejected; or
- (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected –
 - (i) by the improper acceptance of any nomination; or
 - (ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent; or
 - (iii) by the improper reception refusal or rejection of any vote or the reception of any vote which is void; or
 - (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.
- (2) If in the opinion of the High Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the High Court is satisfied –
 - (a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent;
 - (b) Omitted;
 - (c) that the candidate and his election agent took all reasonable means to prevent the commission of corrupt practices at the election; and
 - (d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, then, the High Court may decide that the election of the returned candidate is not void."

The distinction between clause (b) of sub-section (1) and sub-clause (ii) of clause (d) therein is significant. The ground in clause (b) provides that the commission of any corrupt practice by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent by itself is sufficient to declare the election to be void. On the other hand, the commission of any corrupt practice in the interests of the returned candidate by an agent other than his election agent (without the further requirement of the ingredient of consent of a returned candidate or his election agent) is a ground for declaring the election to be void only when it is further pleaded and proved that the result of the election is so far as it concerns a

returned candidate has been materially affected. This ground is further subject to sub-section (2) of Section 100 of which the onus is on the returned candidate.

It is, therefore, clear that if the corrupt practice is committed in the interests of the returned candidate by any other person, even if he be an agent other than his election agent, without the consent of the returned candidate or his election agent, the law provides for the election to be declared void under Section(1)(d)(ii) provided it is also pleaded and proved that the result of the election of the returned candidate has been materially affected thereby. The apprehension expressed by Sari Ashok Desai is, therefore, ill-founded since the law clearly provides that the returned candidate would not get the benefit of a corrupt practice committed in his interests by anyone if the result of the election is shown to be materially affected thereby.

Apart from this aspect, it has also to be remembered that provision is made in the R. P. Act as well as in the general law to punish the makers of such incendiary speeches for the offences committed by them in the form of electoral offences, e.g. under section 125 of the R. P. Act and section 153A, 153B and 295A of the Indian Penal Code. Thus, even if the acknowledged leaders of a party have committed any corrupt practice which results in benefit to the returned candidate then of proof of the benefit having materially affected the election result in favour of the candidate, his election would be set aside on the ground under section 100(1)(d)(ii) of the R. P. Act. There is thus no occasion to read into the ground in section 100(1)(b) or the definition of "corrupt practice" the implied consent of the candidate for any act done by a leader of that party to dispense with a clear pleading and proof of the candidate's or his election agent's consent as a constituent part of the corrupt practice for the ground under section 100(1)(b) of the R. P. Act.

It may also be mentioned that the proposition suggested in the argument of Sari Desai does not appear to be correct. Whenever the requirement is of consent, it must be free consent given by the giver of the consent, of his own volition. Ordinarily, it also implies a subservient role of the person to whom consent is given and the authority of the giver of the consent to control the actions of the agent. It is difficult to ascribe to an acknowledged leader of the party a role subservient to the candidate set up by that party inasmuch as the candidate is ordinarily in no position to control the actions of his leader. However, if even without giving his consent, the candidate has received benefit from the leader's act in a manner which materially affects his election favourably, on pleading and proof of such material effect on the election, the candidate's election is liable to be set aside on the ground under section 100(1)(d)(ii) unless, as provided in sub-section (2) of section 100 he further discharges the onus placed upon him that, in spite of his opposition and taking due precautions, that act had been committed for which he cannot be responsible.

Reliance in the election petition on the allegations of corrupt practices was for the ground under Section 100(1)(b) and not Section 100(1)(d)(ii); and it is under Section 100(1)(b) that the election has been declared to be void by the High Court. There was no attempt to plead and prove that the result of the election of the appellant was materially affected for these reasons to make out

a ground under Section 100(1)(d)(ii) for declaring the election of the returned candidate to be void. It is in this manner the present case has to be viewed.

The pleading in paras 2, 5(o), 7 and 8 of the election petition is generally relating to the party of which the appellant was a candidate, and the plank of Hindutva which in the election petition is equated with Hindu religion. We have already indicated in the connected matters – Civil Appeal No. 2835 of 1989 – *Bal Thackeray v Prabhakar K. Kunte & Ors.* – (with Civil Appeal No. 2836 of 1989), decided today that the word "Hindutva" by itself does invariably mean Hindu religion and it is the context and the manner of its use which is material for deciding the meaning of the word "Hindutva" in a particular text. It cannot be held that in the abstract the mere word "Hindutva" by itself invariably must mean Hindu religion. The so-called plank of the political party may at best be relevant only for appreciation of the context in which a speech was made by a leader of the political party during the election campaign, but no more for the purpose of pleading corrupt practice in the election petition against a particular candidate.

In para 16 of the election petition, apart from some general pleading, there is reference to a speech at Shivaji Park, Dadar on 24. 2. 1990 by Bal Thackeray and some other leaders who have not been named therein except for the appellant (respondent in the election petition). In para 17, the alleged offending portions of the speeches of those leaders of the BJP-Shiv Sena alliance have been enumerated. These portions are from speeches alleged to have been made by Bal Thackeray of the Shiv Sena and Pramod Mahajan of the B.J.P. Thus, para 17 contains allegation of specific portions of speeches by Bal Thackeray and Pramod Mahajan for the purpose of pleading the corrupt practice. Further reference to it would be made later. Para 18 merely says that the proceedings of the meeting were tape recorded and taken down in shorthand by police authorities on which the petitioner would rely. Obviously, this relates only to evidence of what is pleaded and does not amount to incorporation by reference of the contents of the alleged tapes and there is no enumeration of its contents in the election petition. Para 30 refers to the speech by the appellant himself and names some other speakers at different meeting. Further reference to para 30 would be made later. Para 31 is a general statement referring to speakers in general without naming any one of them and mentions the existence of certain audio- and video-cassettes of the speeches. Paras 32 and 33 then refer to certain video-cassettes and audio-cassettes giving merely the title of the video-cassettes and generally their purport and say that the video-cassettes were displayed in the constituency, particularly at Shaka offices and on street corners after 6.30 p.m. and were regularly exhibited at or near the places of residence of some of the active workers of the said alliance in the said constituency. It is significant that neither these video-cassettes and audio-cassettes nor the transcript of their texts was reproduced in the election petition or annexed to the election petition so that the contents thereof were not pleaded in either of the required modes. That apart, there is nothing in the pleading to indicate the names of the persons who are alleged to have displayed the same or the dates on which they were displayed or in other words any other fact which would make the allegation clear and specific. The further requirement of consent of the returned candidate for those acts is not pleaded as required for the ground under Section 100(1)(b) of the R. P. Act and in the definition of the corrupt practices under sub-sections

(3) and (3A) of Section 123. Para 35 is the only other para in the election petition which is relied on by Sari Desai in this context and it merely says that the 'aforesaid facts clearly prove that the respondent (appellant in this appeal) and his agents, with his consent, have indulged into (sic) corrupt practice under Section 123 of the said Act.' This is a mere repetition of the statutory provision and not a pleading of any material fact.

We have no doubt that the requisite consent of the returned candidate or his election agent which is a constituent part of the corrupt practices under sub-sections (3) and (3A) of section 123, and an ingredient of the ground under section 100(1)(b) has nowhere been pleaded in the election petition, either in connection with the allegations based on the speeches by Bal Thackeray, Pramod Mahajan and any other leader or the display of video- and audio-cassettes in the constituency, when this is an essential requirement for raising a triable issue of corrupt practice to bind the appellant with the consequences of such a corrupt practice and to invalidate his election. In our opinion, this alone is sufficient to ignore the entire pleading in the election petition relating to speeches by Bal Thackeray, Pramod Mahajan and any other leader, as well as the display of video and audio-cassettes, since none of those acts is attributed to the appellant or his election agent. For this reason, it is also not necessary to consider the specific portions alleged to form parts of speeches of Bal Thackeray and Pramod Mahajan mentioned in paras 16 and 17 of the election petition. Same is the result of pleadings in paras 32 and 33 relating to the video- and audio-cassettes. In para 31 there is a general averment that the speakers went on to say that, on the respondent (appellant in this appeal) being elected and the said alliance establishing a Hindu Government, jobs would be given to all Hindus. No speaker is specifically named and what is alleged to have been said by the appellant in his speech in the meeting held on 24. 2. 1990 is contained only in para 30 relating to the appellant (respondent in the election petition) which has to be considered is as under:

"The petitioner states that the respondent himself in his capacity as a candidate from the said constituency as well as a leader of the said alliance made appeals which offends the provisions of the said Act, e.g. in the meeting held on 24. 2. 1990 at Shivaji Park, the respondent stated the first Hindu State will be established in Maharashtra. Similarly, in various other public meetings, the respondent herein made objectional appeals. Some of the meetings were reported in newspapers. The petitioner states that such meetings were held at Khaddke Building, Dadar on 21. 2. 1990, Prabbadevi on 16. 2. 1990, at Kumbharwada on 18. 2. 1990, and Khed Galli on 19. 2. 1990"

The High Court failed to appreciate that the only allegation of corrupt practice in this election petition which raised a triable issue is as indicated above and rest of the general averments deficient in requisite pleadings of all the constituent parts of the corrupt practice did not constitute a pleading of the full cause of action and, therefore, had to be ignored and struck out in accordance with Order 6, Rule 16, C.P.C. However, there being a specific allegation in para 30

of the election petition relating to the returned candidate himself, based on his speech made on 24.2.1990, to that extent a triable issue had been raised and had to be decided.

It is this failure in the High Court which has led to an unnecessary protracted trial and reception of considerable irrelevant evidence, which in turn has led to the errors found in the judgement. The reason for this error appears particularly from para 32 of the judgement in which the High Court has indicated its perception of the nature of trial of the election petition as under:

"It must be noted that this Election Petition is not based upon individual acts of Respondent or his Election Agent or any other person with his consent. This petition is based upon the above-mentioned plank and/or policy decision of the Shiv Sena and B.J.P. and the campaigning by the party and the Respondent on the basis of that plank....." (emphasis supplied)

In our opinion, it is this erroneous impression of the High Court which has led to the serious errors committed during the trial for which the parties are equally to blame inasmuch as both sides contributed to the expansion of the legitimate scope of the trial by introducing matters which have no relevance for the pleading and proof of the corrupt practices under sub-sections (3) and (3A) of section 123 for the purpose of the ground under section 100(1)(b) to invalidate the election, which is the true scope of this election petition.

Before we take up for consideration the corrupt practice attributed to the appellant himself in para 30 of the election petition based on his own speech on 24 2 1990, it would be appropriate at this stage to refer to the argument based on section 99 of the R. P. Act.

Non-compliance of Section 99 of the R. P. Act

Admittedly, no notice was given to Bal Thackeray, Pramod Mahajan or any other person against whom allegation was made of commission of corrupt practice in the election petition, even though the High Court has held those corrupt practices to be proved for the purpose of declaring the appellant's election to be void on the ground contained in Section 100(1)(b) of the R. P. Act. We would now indicate the effect of the combined reading of Section 98 and 99 of the R. P. Act and the requirement of notice under Section 99 of all such persons before decision of the election petition by making an order under Section 98 of the R. P. Act.

The combined effect of sections 98 and 99 of the R. P. Act may now be seen. These provisions are as under:

"98. Decision of the High Court – At the conclusion of the trial of an election petition the High Court shall make an order –

- (a) dismissing the election petition; or
 - (b) declaring the election of all or any of the returned candidates to be void; or
 - (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected.
99. Other orders to be made by the High Court – (1) At the time of making an order under section 98, the High Court shall also make an order –
- (a) where any charge is made in the petition of any corrupt practice having been committed at the election, recording –
 - (i) a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of that corrupt practice; and
 - (ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and
 - (b) fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid;

Provided that a person who is not a party to the petition shall not be named in the order under sub-clause (ii) of clause (a) unless –

- (a) he has been given notice to appear before the High Court and to show cause why he should not be so named; and
 - (b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the High Court and has given evidence against him, of calling evidence in his defence and of being heard.
- (2) In this section and in section 100, the expression "agent" has the same meaning as in section 123."

The opening words in Section 98 are "At the conclusion of the trial of an election petition the High Court shall make an order". There can be no doubt that Section 98 contemplates the making of an order thereunder in the decision of the High Court rendered 'at the conclusion of the trial of an election petition'. Declaration of the election of any returned candidate to be void in accordance with clause (b) is clearly to be made in the decision of the High Court rendered at the conclusion of the trial of an election petition and not at an intermediate stage. Clauses (a), (b)

and (c) in Section 98 contemplate the different kinds of orders which can be made by the High Court in its decision at the conclusion of the trial which has the effect of disposing of the election petition piecemeal and to declare the election of any returned candidate to be void at an intermediate stage of the trial when any part of the trial remains to be concluded.

Sub-section (1) of section 99 begins with the words "At the time of making an order under section 98 the High Court shall also make an order" of the kind mentioned in clauses (a) and (b) of sub-section (1) of section 99 is required to be made 'at the time of making an order under section 98'. As earlier indicated, an order under section 98 can be made only at the conclusion of the trial. There can be no doubt that the order which can be made under sub-section (1) of section 99 has, therefore, to be made only at the conclusion of the trial of an election petition in the decision of the High Court made by an order disposing of the election petition in one of the modes prescribed in clauses (a), (b) and (c) of section 98. This alone is sufficient to indicate that the requirement of section 99 is to be completed during the trial of the election petition and the final order under section 99 has to be made in the decision of the High Court rendered under section 98 at the conclusion of the trial of the election petition.

Clause (a) of sub-section (1) of section 99 provides for the situation "where any charge is made in the petition of any corrupt practice having been committed at the election." In that case, it requires that the time of making an order under section 98, the High Court shall also make an order recording a finding whether any corrupt practice has or has not been proved to have been committed at the election and the nature of that corrupt practice; and the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that corrupt practice. Clause (b) further requires the fixing of the total amount of costs payable and specifying the person by and to whom costs shall be paid. The net result is that where any charge is made in the petition of any corrupt practice having been committed at the election, the High Court shall 'at the time of making an order under section 98' also make an order recording a finding whether any corrupt practice has or has not been proved to have been committed at the election and the nature of that corrupt practice; and where the charge of corrupt practice has been found proved; it must also record the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice. Thus, the trial is only one at the end of which the order made by the High Court must record the names of all persons, if any, who have been proved at the trial to have been guilty of the corrupt practice and the nature of that practice.

It follows that the High Court cannot make an order under Section 98 recording a finding of proof of corrupt practice against the returned candidate along and on that basis declare the election of the returned candidate to be void and then proceed to comply with the requirement of Section 99 in the manner stated therein with a view to decide at a later stage whether any other person also is guilty of that corrupt practice for the purpose of naming him then under section 99 of the R. P. Act. It is equally clear that the High Court has not in the matter to decide whether it will proceed under section 99 against the other persons alleged to be guilty of that corrupt practice,

along with the returned candidate inasmuch as the requirement of section 99 is mandatory since the finding recorded by the High Court requires it to name all persons proved at the trial to have been guilty of the corrupt practice. The expression "the names of all persons, if any, who have been proved *at the trial* to have been guilty of any corrupt practice" in sub-clause (ii) of clause (a) of sub-section (1) of section 99 clearly provides for such proof being required 'at the trial' which means 'the trial of an election petition' mentioned in section 98, at the conclusion of which alone the order contemplated under section 98 can be made. There is no room for taking the view that the trial of the election petition for declaring the election of the returned candidate to be void under section 98 can be concluded first and then the proceedings under section 99 commenced for the purpose of deciding whether any other person is also to be named as being guilty of the corrupt practice of which the returned candidate has earlier been held guilty, leading to his election being declared void.

The rationale is obvious. Where the returned candidates is alleged to be guilty of a corrupt practice in the commission of which any other person has participated with him or the candidate is to be held vicariously liable for a corrupt practice committed by any other person with his consent, a final verdict on that question can be rendered only at the end of the trial, at one time, after the inquiry contemplated under section 99 against the other person, after notice to him, has also been concluded. Particularly, in a case where liability is fastened on the candidate vicariously for the act of another person, unless that act is found proved against the doer of that act, the question of recording a finding on that basis against the returned candidate cannot arise. Viewed differently, if the final verdict has already been rendered against the returned candidate in such a case, the opportunity contemplated by section 99 by an inquiry after notice to the other person is futile since the verdict has already been given. On the other hand, if the question is treated as open, a conflicting verdict after inquiry under section 99 in favour of the notice would lead to an absurdity which could not be attributed to the legislature.

The plain language of sections 98 and 99 of the R. P. Act indicates the construction thereof made by us and this is also supported by the likely outcome of a different construction which is an absurd result and must, therefore, be rejected. The High Court has overlooked the obvious position in law in taking a different view. No notice under section 99 was given by the High Court before making the final order under section 98 of the R. P. Act declaring the election to be void. This is a fatal defect.

This alone is sufficient to indicate that apart from the reasons given earlier, the election of the appellant in the present case could not be declared void by making an order under section 98 on the ground contained in section 100(1)(b) of the R. P. Act without prior compliance of section 99. Absence of notice under Section 99 of the R. P. Act vitiates the final order made under section 98 by the High Court declaring the election to be void.

However, in the present case, the remaining pleadings being ignored for the reasons already given, no further question arises of the effect of non-compliance of section 99 in respect of these other

persons because the finding of corrupt practices against the appellant based on the speeches of these other persons and the video- and audio-cassettes has to be set aside for the reasons already given. This is yet another instance of a serious defect in the trial of this election petition by the High Court.

Speech of appellant

We would not consider the only surviving question based on the pleading in para 30 of the election petition. The specific allegation in para 30 against the appellant is that in the meeting held on 24. 2. 1990 at Shivaji Park, Dadar, he had stated that "the first Hindu State will be established in Maharashtra". It is further pleaded therein that such meetings were held at Khaddke Building, Dadar on 21.2.1990, Prabhadevi on 16.2.1990, at Kumbharwade on 18.2.1990, and Khed Galli on 19.2.1990. These further facts are unnecessary in the context because the maximum impact thereof is to plead that the same statement was made by the appellant in the other meetings as well, even though such an inference does not arise by necessary implication. In our opinion, a mere statement that the first Hindu State will be established in Maharashtra is by itself not an appeal for votes on the ground of his religion but the expression, at best, of such a hope. However despicable be such a statement, it cannot be said to amount to an appeal for votes on the ground of his religion. Assuming that the making of such a statement in the speech of the appellant at that meeting is proved, we cannot hold that it constitutes the corrupt practice either under sub-section (3) or sub-section (3A) of section 123, even though we would express our disdain at entertaining such a thought or such a stance in a political leader of any shade in the country. The question is whether the corrupt practice as defined in the Act to permit negation of the electoral verdict has been made out. To this our answer is clearly in the negative.

As indicated by us, the only triable issue raised in the election petition is limited to this extent, which did not require the consumption of the considerable time, energy and expense involved in the trial of the election petition and the hearing of this appeal in this Court. However, the lack of proper perception of the limited scope of the trial and the election petition being filed and contested in the manner in which unfortunately the elections are being fought, contributed to the trial being converted into an electoral battle which misled even the High Court to commit several errors in conducting the trial. The erroneous perception of the position in law and the scope of the election petition also contributed to this end. Obviously, it was much ado about nothing when viewed in proper perspective after ignoring from consideration the copious, unnecessary, frivolous or vexatious pleading in the election petition and consequently in the written statement which was liable to be struck out under Order 6, Rule 16, C.P.C.

We may refer to the decision in *Jamaat-e-Islami Hind etc. v Union of India*, (1995) 1 SCC 428, wherein the requirement of valid adjudication by the Tribunal under Section 4 of the Unlawful Activities (Prevention) Act, 1967 was indicated for the purpose of confirming the declaration made by the Central Government under sub-section (1) of section 3 that Jamaat-e-Islami Hind is

an unlawful association as defined in the said Act. The Tribunal's order confirming the declaration made by the Central Government was quashed on the ground that the entire material on which the declaration was based was inadequate for the purpose, even though the Tribunal is not required to confine itself only to strict legal evidence admissible under the Evidence Act.

A three-Judge Bench, speaking through one of us (J.S Verma, J), held as under:

"..... The only material produced by the Central Government to support the notification issued by it under Section 3(1) of the Act, apart from a resumé based on certain intelligence report, are the statements of Shri T. N. Srivastava, Joint Secretary, Ministry of Home Affairs and Shri N. C. Padhi, Joint Director, IB. Neither Shri Srivastava nor Shri Padhi has deposed to any fact on the basis of personal knowledge. Their entire version is based on official record. The resumé is based on intelligence reports submitted by persons whose names have not been disclosed on the ground of confidentiality. In other words, no person has deposed from personal knowledge whose veracity could be tested by cross-examination....."

(at page 450)

It is significant that the mere production of the official record, including the literature of Jamaat-e-Islami Hind depicting its philosophy and aims, and the intelligence reports without examining any witness who could depose from personal knowledge to the alleged unlawful activities of the Association, was held to be inadequate to support the declaration that Jamaat-e-Islami Hind is an unlawful association as defined in the said Act. It need hardly be mentioned that the requirement of proof of a corrupt practice at the trial of an election petition is higher and confined to strict legal evidence, in comparison to the material on which the Tribunal can rely for its decision under Section 4 of the Unlawful Activities (Prevention) Act, 1967 to confirm the declaration by the Central Government of an association as unlawful.

The High Court misdirected itself by starting on a wrong premise in trying an allegation not in the pleading and then in admitting and relying on material which is not legal evidence for the proof of a corrupt practice. The error was aggravated by an incorrect appreciation of the legal principles and overlooking the meaning of certain terms explained in earlier decisions. The significance of the trial of a corrupt practice and the consequence of the finding thereon, appears to have been missed in the High Court.

As a result of the aforesaid discussion, the finding recorded by the High Court against the appellant that charge of corrupt practices under sub-sections (3) and (3A) of Section 123 of the R. P. Act has been proved to declare his election to be void on the ground contained in Section 100 (1)(b) of the R. P. Act, is contrary to law and is, therefore, set aside. The result is that no ground is made out for declaring the appellant's election to be void. Accordingly, this appeal is allowed with costs resulting in dismissal of the election petition.

.....
(J.S.VERMA)

.....
(N.P.SINGH)

.....
(K.VENKATASWAMI)

New Delhi
December 11, 1995

Footnotes

- * *Subs. by Act 27 of 1956, s 44, for sub-sections (1) and (2)*
- ** *Subs. by Act 27 of 1956, 39, for "Election commission" (w.e.f. 14 2 1996)*
- *** *Subs. by Act 27 of 1956, for certain words, i.e. "in such form and within such time but not earlier than the date of publication of the name or names of the returned candidate or candidates at such election under Section 67, as may be prescribed.*
- # *Sub-section (2) omitted by Act 47 of 1966, s 39 (w.e.f. 14 12 1966)*
- ## *Ins. by Act 40 of 1961, s 17 (w.e.f. 20 9 1961)*
- ### *Certain words omitted by Act 47 of 1966, s 39 (w.e.f. 14 12 1966)*

**IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

A.D. 1989

(C I V I L)

No. 34 of 1989

In the Matter of the Representation of the People Act, 1975

In the matter of a Parliamentary Election for the Constituency of St. John's City West held on the 9th day of March, 1989.

BETWEEN:

DONALD HALSTEAD – Petitioner

and

HENDERSON ST. CLAIR SIMON

HUBERT HENRY – Respondents

Dr. F. Ramsahoye S.C., Mr. S. Christian, Mr. C. Derrick and
Mr. A. James for Petitioner.

Mr. Rex McKay S.C., Miss B. Lake, Q.C., and Mr. E. Luckhoo for the
first named Respondent.

Mr. L. Luckhoo S. C., Mr. C. O. R. Phillips Q. C. and Mr. L. Osborne
for the second named Respondent.

Mr. A. Rose for the Director of Public Prosecutions.

1989, April 17, 18, 19, 20, 21, 24, 25, 26, 27, 28

May 2, 3, 4, 5, 8, 9, 10, 11, 12

June 30

Elections – Irregularities on polling day – shortage of ballot papers – Late opening of the poll – Extension of polling time by returning officer and other election officers – Polling not conducted in accordance with the election law and regulations.

Background facts

The petitioner claimed that the election of the first named respondent was invalid because of widespread election irregularities. These included late opening of the polls, shortages of ballot papers and illegal extension of polling beyond prescribed hours.

Held

That the election was invalid.

Cases cited in the Judgement

Morgan v Simpson (1974) 3 All ER 722
Gill v Reid and Another (1874) 2 OM & H77
Regina Ex Rd Dyck v Ell (1953) 9 WWR 101
The Limerick Case (1833) P&L 373
The Drogheda (1974) 20 M&H 201
Re Shaw and Portage La Praire (1910) 14 WLR 542
Islington Case 50 OM&H 120
Re Mullings and the City of Windsor 61 OLR (3) 601
Woodward v Sarsons 10 C.P. 733
Re Hickey and the Town of Rillia (1909) 17 OMR 317
The Akaroa Election Petition (1891) 10 NZLR 158
PI0 v Smith (1987) LRC (Const) 250
North Kensington Parliamentary Elections (1960) 1 WLR 762
Borough of Worcester 3 OM & H 189
Mtoba & Others v Sede & Others (1975) 4 A.A. 413
Evo v Supa and Another (1986) LRC (const.) 18
Rex rel Fennessey v Wade et al (1939) 3 DLR 424
Gribbin v Kirker 7 IRR 30
Rex el rel Smiley v Evans (1927) 4 DLR 629
Levers v Morris (1971) 3 All ER 1300
Lattham and Others v The Corporation of Glasgow and Others (1921) S.C. 692
Montreal Street Railway v Normandin (1917) AC 170
Phillips v Goff (1886) 17 K.B. 805
Re Wychhum Terrace (1974) 3 WLR 649
Radix v Gairy (1978) 25 WLR 553
Eastern Division of the County of Clare 19 OM & H 156
Borebecks v Boland (1886) 2 Times Reports
James v Davis 76 L.G.R. 184

**IN COURT
REDHEAD J**

The Petitioner, Donald Halstead, is now 52 years old. He began his active political career in or about the year 1965. Prior to and up to 1968 he was an active trade unionist. In 1968 there was a by-election for the city of St. John's City West. He won that seat which he contested for the Progressive Labour Movement (PLM). In 1971 and 1976, general elections were held in Antigua and Barbuda. Mr. Halstead contested the seat for St. John's City West, again for PLM. He won on both occasions, with majorities of about 600 over his nearest rival.

The Petitioner left Antigua in June 1978 for the United States of America where he remained until October 1986. Upon his return he again became involved in active politics.

A general election was held in Antigua and Barbuda on 9th March, 1989. There were three candidates for the constituency of St. John's City West. The Petitioner contested the seat, this time for the United National Democratic Party (UNDP); the first-named Respondent, Henderson St. Clair Simon contested the seat for the Antigua Labour Party (ALP) and Alister Thomas contested the seat for Antigua Caribbean Liberation Movement (ACLM).

In the constituency of St. John's City West there were some 2,829 registered voters. The Petitioner received 611 votes, the first-named Respondent 874 and Alister Thomas 67 votes. There were 9 rejected ballots. The first-named Respondent was therefore declared the duly-elected candidate by the Returning Officer.

The Petitioner, on the 15th March, 1989 filed an election petition. By paragraph 3 of the Petition he alleges as follows:

"3. That in the holding of the said election divers breaches of the statutory rules governing the conduct of elections were committed by the Returning Officer and/or his servants or agents in that :

- (a) Polling was not allowed or conducted continuously between the hour of 6 a.m. on election day in accordance with the Table provided in Rule 1 of the Election Rules and in particular there was no polling conducted or allowed by the Returning Officer, his servants and/or agents between the hours of 6 a.m. and 8.30 a.m. and between 12.55 p.m. and 5.40 p.m. on election day at Polling Division A at Pilgrim High School and between 6 a.m. and 8.30 a.m. and 1.10 p.m. and 5.40 p.m. at Polling Division B at Villa School;
- (b) Polling was carried out during hours other than those specified or allowed by the said Table in the Election Rules, to wit, polling was carried out

after the hour of 6 p.m. and until the hour of 9 p.m. on election day.

- (c) An indeterminate number of persons were unable or were not permitted to vote between the hours of 6 a.m. and 6 p.m. on election day because the Returning Officer, his servants and/or agents did not make available ballot papers for electors between the said hours when voting was not conducted or allowed in the two Polling Divisions mentioned and referred to above.
- (d) Ballots cast during a period when voting was not allowed in accordance with the said Table in the Election Rules, being ballots cast between the hours of 6 p.m. and 9 p.m. on the election day were counted by the Returning Officer, his servants and/or agents in declaring or making the return by the Returning Officer of the successful candidate.
- (e) The Returning Officer, his servants and/or agents wrongly and unlawfully relied upon an order of the High Court (Mitchell J) made on election day purporting to exercise a jurisdiction to extend time by three hours for voting on election day, the High Court having been imposed upon and misled into assuming a jurisdiction which by the *lex et consuetudo parlamenti* is committed to and vested only in Parliament itself.
- (f) The election was not conducted by the Returning Officer, his servants and/or agents in accordance with the law regulating the conduct of elections pursuant to the Representation of the People Act 1979 and the Election Rules in the First Schedule thereto.

I find as a fact, and it is beyond dispute, that voting in the St. John's City West constituency did not begin on time, that is at 6.00 a.m. as stipulated by Rule 1 of the Election Rules; that after voting had commenced, ballot papers ran out and that voting stopped at about 12.30 p.m. to 1.00 p.m.; that voting re-commenced at about 5.30 p.m. to 5.40 p.m. and continued until about 9.00 p.m.

As I said, it is beyond dispute as Mr. McKay, Learned Counsel for the first-named Respondent, said in his opening address:

"I do not think that there would be any issue as regards the commencement of voting, that it did not commence at 6.00 a.m. I do not think that there is any issue that at 12.30 p.m. or thereabout there was a shortage of ballot papers. Further, there can be no issue that there were voters waiting in line to vote and that their ballots must have been cast after 6.00 p.m."

Now, what were the reasons for this unfortunate occurrence? Nomination day for the General Election was on 27th February, 1989. Mr. Keithley Wentworth Alister Hill was the Supervisor of Elections. He first acted as such in 1978 for the by-election in Barbuda. Thereafter, he performed the functions of Supervisor of Elections for the General Elections of Antigua and Barbuda for 1980 and 1984. In my view, therefore, he is a person with some experience in this field.

On 2nd March, 1989 he requisitioned 2,600 ballot papers for St. John's City West constituency from the Government Printery. I think it is necessary to analyse in detail the requisitioning of the ballots by the Supervisor of Elections and the delivery of the ballots to him because this was the source of the problem. And in analysing that problem to determine whether any improper or corrupt motive could be imputed to the Supervisor of Elections. This requisition was in the form of a memorandum from the Supervisor of Elections to the Superintendent of the Government Printing Office, and reads in part as follows:

"Ballot Papers

General Elections

Would you kindly supply me with the number of Ballot Papers as shown against the respective constituencies, in accordance with the specimen enclosed, and in books of fifty:

1.	St. John's City West	2,600
		

I should be grateful if these could be delivered to me as soon as possible.

Keithley W. A. Hill,
Supervisor of Elections"

The specimen referred to in the memorandum was a statement of persons nominated (Exhibit 7). This statement contained all the constituencies with the names of the candidates, their occupation and residence. The names of the candidates, so far as the constituency of St. John's City West was concerned, were placed in the correct alphabetical order.

In the official Gazette of 2nd March, 1989 (Exhibit 6), there appeared the statement of persons nominated. The names of the candidates for St. John's City West appeared in the Gazette in the wrong alphabetical order. The Supervisor of Elections went to the Government Printery at about 8.00 p.m. on the 6th March, 1989 to proof-read the ballot papers for the constituency of St. John's City West. He then saw the Gazette for the 2nd March, 1989 for the first time. He proof-read the ballot papers against the Gazette on 2nd March, 1989 which contained the names of the candidates in the wrong alphabetical order, thereby compounding the error. It is reasonable to

assume that the ballot papers which he proof-read contained the names of the candidates in the wrong alphabetical order.

On the afternoon of 8th March, 1989 the Printery delivered the ballot papers for St. John's City West – all 2,600 of them to the Supervisor of Elections. The ballot papers were given to the Returning Officer, Mr. Hubert Henry, who in turn distributed them to the presiding officers of the polling stations for St. John's City West.

After Mr. Henry had distributed the ballot papers an amazing thing happened. He was on his way home when someone, whom he did not know, told him (Mr. Henry) that he heard that the ballot papers were not printed in alphabetical order. Mr. Henry then spoke with the Supervisor of Elections who instructed him to collect all the ballot papers and return them to him. This was done and the Supervisor of Elections discovered, in fact, that the rumour was well-founded.

Mr. Hill spoke with the Acting-Superintendent of the Printery, Mr. Charity, and requested that the ballot papers for St. John's City West be reprinted. In fact, during the course of the evening Mr. Hill discovered that the ballot papers for two other constituencies were not printed in alphabetical order. At about 11.00 p.m. he went to the Printery and requested the reprinting of the ballots for St. Jon's City West and the ballot papers for the other two constituencies. Mr. Charity agreed to and promised Mr. Hill that he would have 1,000 ballot papers for St. John's City West by 5.00 a.m. on 9th March, 1989. Mr. Hill believed that Mr. Charity would be able to keep his promise and, as he said, he acted on it. In my view, Mr. Hill was too optimistic having regard to the fact that he proof-read the ballots on 6th March, 1989 and it was not until the evening of the 8th March that 2,600 ballots were delivered to him. Taking into consideration also that other ballot papers had to be reprinted, I cannot see how he could have hoped to obtain about 6,000 ballot papers in six and a half hours. However, Mr. Hill said he believed that Mr. Charity would have been in a position to give him those ballot papers; if not, he would have gone elsewhere. Again, it is difficult for me to see where else he could have gone at that late hour.

Unfortunately, Mr. Charity did not, or perhaps it would be more correct to state, could not keep his promise and the 1,000 ballots were not delivered at 5.00 a.m. I find as a fact that the 1,000 ballots were not delivered until about 8.15 a.m. and that voting commenced in St. John's City West at about 8.30 a.m.

The constituency of St. John's City West is divided into two polling divisions – A and B. The 1,000 ballot papers were distributed between the two divisions and by 12.30 p.m. or thereabouts, ballots ran out in Polling Division A and at 12.55 p.m. ballots ran out in Polling Division B. Consequently, voting ceased at those times in the two polling divisions.

When the ballot papers were about to be exhausted, Mr. Henry, the Returning Officer himself, went to the Printery at about 11.45 a.m. to enquire whether the remaining ballot papers for St. John's City West were ready. He was told to wait. He had a long wait, as he said from 11.45

to 5.30 p.m. when the ballot papers were delivered to him. He received 1,500 ballot papers for St. John's City West. He went back to the constituency and delivered all 1,500 to the presiding officers. Voting re-commenced at about 5.40 p.m.

Having regard to what I have outlined above in relation to the facts concerning the names on the ballot papers being printed in the wrong alphabetical order, the late delivery of the ballot papers which resulted in the voting not commencing on time, this, in my view, was a matter of gross collective incompetence. Unfortunately, one cannot say how long Mr. Charity has been Acting-Superintendent and whether he has had experience in the printing of ballot papers. Mr. Hill was unable to give that information when asked. However, one can come to the conclusion that he may not have been in charge of the Printery for the previous general election because he is Acting-Superintendent of the Printery and by General Orders one should not be acting in any position longer than one year.

Although in the memorandum of request to the Printery for the ballot papers the Supervisor of Elections requested that the ballot papers should be delivered to him as soon as possible, it was seen that on the evening of 6th March, he was proof-reading ballot papers, barely two days before the general elections.

Yet again the ballot papers were delivered to him just a few hours before the general elections were due to commence. This could hardly be satisfactory in my view, although he said that ballot papers were delivered to him in the past on the very morning of the general elections. This, to my mind, is perilously close and does not leave any room to manoeuvre in case of human error. If, for argument's sake, the ballot papers were delivered two days before the general elections and the error was then discovered, there would have been ample time to reprint the ballot papers and have them ready in time for the voting to commence on time on 9th March, 1989.

It is inconceivable in my view that when the ballot papers were delivered to the Supervisor of Elections, neither he nor Mr. Henry bothered to check them to ensure that they were in order. I must say here, that these two men have obviously served their country well and long and this may very well have been an oversight on their part. This comment in no way is meant to cast aspersions on their past performances. The Returning Officer had to be told by someone other than an election official that the ballots were not in alphabetical order. One can draw that irresistible conclusion because Mr. Henry did not even know the identity of the person who told him that the ballot papers were not in alphabetical order.

I am, however, satisfied in my mind that what was done – that is to say, the error in the printing and the late delivery of the ballot papers for St. John's City West – was not deliberate but purely accidental and therefore one cannot impute a corrupt motive on the part of the Supervisor of Elections or the Returning Officer.

In the First Schedule to the Representation of the People Act, the Election Rules, it is stated:

"(1) The proceedings at the election shall be conducted in accordance with the following table In the case of general election between the hours of 6.00 a.m. and 6.00 p.m. on the ninth day after the delivery of nomination papers."

Prima facie there was an irregularity in the taking of the poll at St. John's City West. It is therefore of critical importance to determine whether that breach affected the result and whether the times fixed by Parliament for voting is mandatory or permissive.

Dr Ramsahoye submitted on behalf of the Petitioner that Parliament has provided that an election should take place between the hours of 6.00 a.m and 6.00 p.m. An election is not only for the young it is also for the old, sick and infirm. It is a matter of great importance, that the election should be held during daylight hours and that is what Parliament has provided, that the election should be conducted between the hours of 6.00 a.m. and 6.00 p.m.; and that the people should resort to the polling stations and there they should be allowed to vote. Once they present themselves at the polling stations, a ballot paper should be delivered to them. Learned Counsel referred to Section 35 (1) of the Election Rules which reads in part as follows:

"A ballot paper shall be delivered to a voter who applies therefor....."

Mr. McKay submitted that it is not axiomatic, that is to say a breach, that if voters are prevented from voting the election must be void. I yield to this submission. I agree entirely with this submission.

In my view, what must be decided is whether the breach affected the result of the election.

Dr. Ramsahoye submitted that the issues in this Petition concern whether breaches of the law as to elections caused by the loss of seven (7) hours of voting during polling day and an extension of voting hours from 6.00 p.m. to 9.00 p.m. at night on election day, together with other breaches established on the evidence, were so grave either separately or collectively to avoid the election.

An alternative issue is whether they were not so grave as by themselves, separately or collectively, to avoid the election. The Petitioner's case is that the election was not conducted substantially in accordance with the law as to elections in the first phase.

Learned Counsel referred to the case of *Morgan v Simpson* (1974) 3 All ER 722 at page 728. Lord Denning said:

"Collating all these cases together, I suggest that the law can be stated in these propositions:

- (1) If the election was conducted so badly that if it was not substantially in accordance with the law as to elections, the election is vitiated irrespective of whether the result was affected or not. This is shown by the *Hackney Case* where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote;
- (2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. This is shown by the *Islington Case* where 14 ballot papers were issued after 8 p.m.
- (3) But even though the election was conducted in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result, then the election is vitiated. That is shown by *Gunn v Sharpe* when the mistake in not stamping 102 ballot papers did affect the result.

Applying these provisions, it is clear that in that case, although the election was conducted substantially in accordance with the law, nevertheless the mistake in not stamping 44 papers did not affect the result. So the election is vitiated. The election of Mr. Simpson must be declared invalid. I would allow the appeal accordingly."

Gill v Reid and Another (The Hackney Case) (1874) 2 OM & H 77.

In this case, 2 of the 19 polling stations were closed all day. There were others that were opened part of the day. The result was that 5,000 out of 41, 000 persons were unable to vote.

At page 81 Grove, J said:

"Mr Bowen has I think I may fairly say, said everything which could possibly be argued in support of the election and has presented a most ingenious and able argument upon the words of the statute. Still he was bound to admit that if the irregularity was so great as to prevent the election being a true election, that would avoid it even at common law. I certainly should not here take advantage of any admission of counsel upon which to found my judgment, but I am perfectly certain as far as my judgment goes that an election which is conducted in such a way as (whether by accident or design) not to afford to a very large mass of the electors an opportunity of voting, cannot be true election of members. And therefore, for a moment leaving the Ballot Act out of the question, it appears to

me that there was not a real election here which was in any sense a fair representation of the views of the electors of the Borough of Hackney. Then, does the Ballot Act in any way alter that? The section of the Ballot Act on which Mr. Bowen relied was the 13th. He contended that no election may be declared invalid unless both the conditions named in the Act are fulfilled, that is to say, unless it appears 'to the tribunal having cognizance of the question that the election was not conducted in accordance with the principles laid down in the body of the Act' and also 'that such non-compliance or mistake affected the result of the election' in this sense, that but for such mistake, another candidate would have been elected. I have turned the matter over in my mind and I cannot see, assuming that argument to express the meaning of the section, how the tribunal can by possibility say what would or might have taken place under different circumstances. It seems to me a problem which no human mind has not yet been able to solve, namely, if things had been different at a certain period, what would have been the result of the concatenation of events upon that supposed changed of circumstances. I am unable at all events to express an opinion upon what would have been the result, that is to say who would have been elected provided certain matters had been complied with here which were not complied with."

Dr. Ramsahoye further submitted that in common law countries such as Antigua and Barbuda, breaches of the law as to elections and their effect are determined both by common law and under statute – The Representation of the People Act, 1975; that the meaning of Section 12(3) is that a substantial breach or breaches of the law as to elections avoids an election. Where the breach or breaches cannot be said to prevent an election from being conducted substantially in accordance with the laws as to elections, then the election court must uphold the election, if it is shown that the results were not affected. That the respondents' case that a breach or breaches of the code of proceedings laid down by Parliament cannot in law be substantial as long as the election is by ballot is wholly erroneous. So is the view that, whatever the nature of the breach or breaches of the law as to elections, it must be proved that the results were affected before the election can be avoided.

Mr. McKay submitted on behalf of the first-named respondent that breaches of the election law and rules do not, *ipso facto*, render an election void. The Court must go on to consider whether the election was so badly conducted that even though the result was not affected, the Court is obliged to render the election void, that there are several cases where polling commenced late and the courts held the election valid.

Regina Ex Rel Dyck v Ell (1953) 9 WWR 101
The Limerick Case (1833) P & L 373
The Drogheda (1974) 20 M & H 201
Re Shaw and Portage La Prairie (1910) 14 WLR 542

In one case, the presiding officer adjourned for lunch but still the election was held valid. He submitted that, if I find that the election was a sham, if it was conducted so badly that nobody can say it was an election, then I do not have to go on to consider anything else. If I do not, then I have to proceed to examine the circumstances which unfolded. I will have to go on to consider whether the curative section 12(3) applies. And in order to do so, I have to look at the circumstances unfolding.

Learned Counsel referred to the judgement of Kennedy, J in the *Islington Case* 50 OM & H 120 at page 125 and suggests that this is the proper approach which I should take when considering the emergency which arose. I now quote the passage referred to by Learned Counsel:

"Our opinion is, that an election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the elections where the court is satisfied that the elections were the election was, notwithstanding those transgressions, *an election really and in substance conducted under the existing law*, and the result of the election i.e. the success of the one candidate over the other, was not, and could not have been affected by those transgressions. If, on the other hand, the transgressions of the law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws *or it is open to reasonable doubt whether these transgressions* may not have affected the results and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void."

Counsel submitted that only in the latter circumstances will the court declare the election void.

Learned Counsel then referred to the case of *Re Mullings and The City of Windsor* 61 OLR (3) p 601 to which I shall return later in this judgement. This was a case which concerned, among other things, the late opening and postponement of the polls. The City of Windsor was hit by a severe snowstorm resulting in the late opening of the polls. It was said in that case that it was an emergency situation which the city clerk, the election official, had to deal with.

Learned Counsel submitted that Mr. Hill, the Supervisor of Elections in the instant case, like the officer in *Re Mullings*, was using his judgement, endeavouring to do his best, that it matters not

that the snowstorm was an act of God. What is important is that there was an emergency which called on the Returning Officer to do his best under the circumstances.

Mr McKay pointed out that in the *Re Mullings Case* there were serious breaches: boxes from 383 polling stations were in the possession of the city clerk from the previous evening, the late opening of the polls and putting off the elections to the next day. Yet the election was held to be valid.

Learned Counsel then referred to the case of *Woodward v Sarsons* 10 C.P. 733 at 743:

"As to the first, we are of the opinion that the true statement is that an election is to be declared void by the common law applicable to Parliamentary Elections, if it was conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real election at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be satisfied, i.e. that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if the majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as by polling stations being demolished, or not opened, or by other of the means of the voting according to law not being supplied or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred."

Mr. McKay submitted that by the sentence – "if it were proved to the satisfaction whether the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer" in the paragraph above quoted – says "proved" there means 'proved by evidence.' That no attempt was made to do that. He submitted that although a certain onus is cast upon the respondent, that onus does not arise until the evidential burden is satisfied.

Mr Phillips submitted that there must be facts of a *prima facie* case, that the result might have been affected. Evidence must first be given, not that there was just a breach, trivial or otherwise, but that the result might have been affected and when that is given, then the other side is called upon to show that it was not affected. That is what happens when the onus is placed upon the respondents. The Petitioner must first give evidence showing *prima facie* the result was affected.

In support of this submission Learned Counsel, referred to the case of *Re Hickey and the Town of Orillia (1909) 17 OMR 317 at page 322* where Meredith, C J said:

"When prima facie the result might have been affected by the failure to comply with the provisions of the statute, then and then only is the onus cast upon the persons supporting this by law to show that the irregularity did not affect the result...."

I do agree with the submissions of both Counsel, Mr. McKay and Mr. Phillips, that the Petitioner must establish a *prima facie* case. He should lead evidence which will show, on the face of it, that the result was or might have been affected. Of course, the Petition contains only allegations. What then does the Petitioner have to prove? In my view, the Petitioner must establish that there was a breach or breaches of the rules, that is that voting did not take place from 6.00 p.m. and that there was voting from 6.00 p.m. to 9.00 p.m.

For instance, if the allegation was that the Presiding Officer gave out 14 ballot papers after the statutory hours for voting, as in the *Islington Case*, then the Petitioner will have to establish by evidence that the Presiding Officer did in fact give out 14 ballots. He may also establish this if the other side admits it. Then the Court will go on to examine the circumstances in order to determine whether that affected the result of the election.

This is how the court dealt with the matter in the *Islington Case* at page 124:

"It is further alleged, as an illegality that after 8 p.m. ballot papers to the number of 40 to 50 were supplied to voters at Polling Section A in the Bingfield St. School and one ballot paper at each polling station B and C in the same place, six to ten ballot papers at polling station B in the Buckingham Street School and about four or five ballot papers at the single station in Blunden Street...."

page 129:

"..... After careful consideration of the evidence, we have formed the opinion that we can rely upon the evidence of the respondents in regard to the number of ballot papers which were supplied to voters at Polling Station A in Bingfield St. School came after 8.00 p.m. That number is 2.... It was, as we have already said, common ground that not more than two voters received ballot papers after 8.00 p.m. at polling stations B and C. It follows that the total number of votes which we think the presiding officers, while acting quite honestly did not rightly construe the election statutes, is 14."

Similarly, if the allegation of the Petitioner is that a number of ballot papers were rejected because they were not stamped, as in the *Morgan v Simpson Case*, then the Petitioner will have to lead

evidence to establish that fact. The court will then, on the basis of those facts, investigate whether the result of the election was affected.

Has the Petitioner led evidence to satisfy the Court that a breach of the rules has taken place? I think he has. That is in relation to his allegation of non-voting and the extension of voting hours from 6.00p.m. to 9.00 p.m. Moreover, it has been admitted by the respondents that voting did not take place in the constituency as alleged by the petitioner.

I now look at the allegation in paragraph 3(c) of the Petition, that is to say, "An indeterminate number of persons were unable to vote between the hours of 6.00 a.m. and 6.00 p.m..."

The petitioner said in evidence that:

"Between 6.00 a.m. and 8.30 a.m. there were large crowds of people standing in line in all five stations, others were standing in line waiting to vote. The officers conducting the election gave information that there were no ballot papers. I myself spoke to each presiding officer and was told that there were no ballot papers. I enquired from each of them when ballot papers would be available. They could give no answer.

I heard voters enquiring about ballots, at the same time complaining that they have to go to work and will not be able to return to vote. They were complaining to the presiding officer. They were complaining about the fact that there were no ballot papers for them to vote and they would have to go to work and they were not going to be able to return..... I know a substantial amount of the voters. I saw people that I know at the polling stations that day. I know the people who were complaining."

This is the extent of the evidence led by the petitioner in support of his allegation that an indeterminate number of persons were unable to vote. Mr. McKay, Learned Counsel for the respondent submitted that the petitioner has not produced even one voter. No attempt was made to do that, that he is not oblivious of the fact that a certain onus is cast on the respondent but that onus does not arise until the evidential burden is discharged.

The Akaroa Election Petition (1891) 10 NZLR 158 at page 166

Williams, J said:

"It is obviously absurd to suppose that a large number of voters have learned that they were, or at least have good grounds for believing that they were disfranchised by the wrongful act of the returning officer without their taking advantage of this opportunity of having the injury redressed. We know of no reason why people who have suffered by errors should not have come forward to say so, and no

reason why the petitioner's advisers should not have availed themselves of the information. We know enough of the spirit evoked by a closely contested election, and by an election petition, to justify us in saying that the difficulty in inducing witnesses to come forward is not one which is usually complained of."

I agree entirely with the submissions by Counsel. Even in the *Akaroa Case* notwithstanding what was said there, the petitioner in fact produced three witnesses.

At page 165 Williams, J said:

"The petitioner did produce one case, that of three brothers who stated, we believe truly that they informed that the hour was and were prevented from casting their votes by improper closing of the poll."

In *Pio v Smith (1987) LRC (Const) 250*, the petitioner in that case was seeking to have the election declared void because of the non-availability of claim forms at the polling stations for some six hours. At page 276 Mfalila, J said:

"That the witnesses complained that, as persons eligible to vote by virtue of this section they were prevented from doing so by the non-availability of the prescribed forms i.e. Form VI and that, had they been able to vote, they would have voted for the petitioner."

There was some evidence in the *Pio v Smith Case* where, as in the instant case, all the petitioner says is that there were large crowds of people at the polling stations; that the voters were enquiring about ballots and that some of them were saying that they would not come back. In my view, the fact that the Petitioner said the voters said they would not come back is not evidence of the truth that they did not go back to vote. On the contrary, Mary Clare Hurst said in her evidence:

"During the period from 2.00 p.m. until voting continued, I remained in the polling station throughout – Villa School Polling Station During that period I mingled around the station. I noticed potential voters at that point in time. I did not hear them say anything in relation to the period of non-voting. They were just waiting around. I did not observe any of them leave at that time. Those I saw in the afternoon at 2.00 p.m., I recognised a few from the morning at 6.00 a.m."

Dr. Ramsahoye referred to the case of *Re North Kensington Parliamentary Elections (1960) 1 WLR p 762* and submitted that the judgement in that case says three things:

1. that the election court is not bound by the rules relating to hearsay;

2. that where there is a breach of the statutory rules, the onus of proving that the result was not affected would lie on the respondent, where the petitioner established the breach; and
3. that by reason of the drafting of what is Section 12(3) of the Antigua Law, a question of onus of proof does not arise and the election court would look on the whole of the evidence to ascertain whether there was substantial compliance with the law or whether the result was affected.

In my view, the reception of evidence in the *North Kensington Case* was governed by statutory provision S. 137(2) of the Representation of the People Act 1949. There is no similar provision in the Representation of the People Act 1975 of Antigua and Barbuda. The Election Court is therefore bound by the rules of hearsay. I so hold. In the premises, therefore, the Petitioner has not established by evidence that an indeterminate number of persons were unable or were not permitted to vote between the hours of 6.00 a.m. and 6.00 p.m. on election day.

In the *Islington Case* on page 130 Kennedy, J said:

"We agree with Mr. Jelf that there being an infraction of the law in the supply of ballot papers at the polling stations in Bingfield Street, that burden of proving that this infraction did not and could not affect the result of the election vested in the case on the respondents..... We hold that the respondents have discharged themselves of the burden....."

In *Re Hickey v Town of Orillia (1908)* 12 OLR at page 327 Anglin, J said:

"The law certainly casts upon the party attacking a by-law on the ground that the vote upon such by-law has been irregularly taken that burden of establishing that there has been a disregard – not merely trivial but important, not merely of the letter but of the substance of the statutory provisions intended to regulate the conduct of the polling. Where such disregard has been shown those supporting the by-law are still permitted to satisfy the court, if they can, that notwithstanding any irregularity prove 'the election was conducted in accordance with the principles laid down in the Act and that such ... irregularity did not affect the result of the election. But the onus of satisfying the court upon both those points rests upon the respondents."

In *Gribbin v Kirker (1873)* 1 R p 30 Monaghan, C J said as referred to in *Islington case* at page 130:

"...is that in such a case as the present the petitioner is not called upon to prove affirmatively that the result of the election was affected by the proved

transgression of the law; but the respondents must satisfy the Court that it was not and could not have been affected by it."

Once the petitioner has led evidence to show that there was a breach then the onus is on the respondents to show that the breach does not affect the result.

I shall therefore carefully analyse the respondents' case to see whether they have discharged that onus. The respondents have led an abundance of evidence. This evidence in my view is intended to serve a two-fold purpose:

1. to discharge the onus placed on them; and
2. to show that notwithstanding the irregularity, the results could not have been affected.

First of all, the respondents' attempt to show that, notwithstanding that there were some 2,829 names on the voters list, many voters were absent from Antigua, in prison, too ill or were dead, and therefore were unable to vote on the 9th March, 1989.

It is, in my view, a difficult task to analyse that evidence but the Court cannot refuse to undertake such a task because it is difficult. I shall first of all analyse the evidence which was led by the respondents and then determine the cogency of that evidence.

The first-named respondent, Henderson Simon is a Civil Engineer. He graduated from Toronto University. After graduation, he returned to Antigua where he worked in the Public Works Department. He left Antigua and took up employment in Nassau, Bahamas as a Sanitary and Environmental Engineer from 1979 to 1982. While he was in Nassau approaches were made to him to contest the St. John's City West constituency. He became involved in active politics in 1983. He began to keep a record of the people in this constituency by means of a card system. On the cards he recorded the names of the constituents, their nicknames and their addresses. He updated the system every year. He had agents to assist him. He held weekly constituency meetings at which the system was updated from information received from his agents.

In 1984, Simon contested the St. John's City West constituency. He won the seat for the Antigua Labour Party. In 1986, he acquired a personal computer and transferred the information from the card system into the computer. For the 1989 General Elections he had about 20 agents. About a year before the General Elections of 1989 was due, he updated the information in the computer. He made house-to-house calls. The information which he obtained and information given to him by his agents was put in the computer.

The respondent produced in evidence a number of documents as exhibits. These exhibits, H.S. 1-9, show the names of persons who are on the electoral register but reside abroad, too ill to vote on election day, dead or in jail. To give an example – Exhibit H.S.1 is a list which contains

forty-seven (47) names – persons who reside abroad and who this respondent claims were not physically present in Antigua on election day.

Exhibit H.S.2 is a list which contains the names of sixty (60) persons who the respondent says reside overseas and who were not in Antigua on polling day. Exhibit, H.S.2 also contains twelve (12) persons who are shown as deceased.

Exhibits H.S. 3 and 4 are two lists with a total of fifty-three (53) names of persons who the respondent says were too ill to vote on election day.

The respondent, Henderson Simon said "I know Arah Armstrong, (Named on Exhibit H.S.1) very well. She has been a very close friend of mine and also of Mr. Halstead. In fact, Mr. Halsted is the godfather of her only child." He also said "I know Valerie King, Yvette King and Marva King. They have been very strong supporters of Mr. Halstead." These are names which appear on Exhibit H.S.1.

Exhibit H.S. 2 contains a list of sixty (60) persons represented by the respondent to be overseas. On the list the name Ricardo Mapp appears. The petitioner had said in cross-examination that he, the petitioner, had seen him in the English Harbour area recently. The first-named respondent says he knows Ricardo Mapp very well; that Ricardo Mapp writes to his grandmother Albertha John. The first-named respondent said that he would read the letters to Mapp's grandmother and he would reply to Mapp on behalf of Albertha John.

In relation to Exhibit H.S. 3, he said "I know personally eleven of them in Division A (on list) who were too ill to vote. I know personally Arthur Dorsett, Joseph Edwards, Ambrosine Rennie, Mildred Richards, Alice Richardson, Irvin Richardson, Anthony Samuel, Millicent Shaw, Lorna Mae Stevens, Gordon Tittle, and Sybil Usher. I know they were too ill to vote. Ambrosine Rennie, Joseph Edwards and Irvin Richardson have since died.

Similarly, in relation to Exhibit H.S. 4, Simon said "On that list I personally know twelve (12) persons on that list who were too ill to come out to vote." He names them and says "Joseph Solomon and Inez Pigott have since died."

The first-named respondent said that during his house-to-house campaign, he confirmed that these persons were too ill to vote. He made a list of those persons. He listed them in their respective divisions.

In reference to Exhibits H.S.5 and H.S.6, the persons listed by the respondent as untraceables, he said, "I have been able to trace Winston Walker. He now lives in Miami. I was able to trace Austin Gumbs and Jacintha McKay who is now married and is now Jacintha Hall. Austin Gumbs lives in Antigua on Fort Road in my constituency. Jacintha McKay, I can't say exactly where in Antigua she lives. I prepared the list. I extracted the names from the electoral register. When

we started in 1982 we did extensive research. We got information on these people. In our more recent search over the last year, none of these people I have been dealing with have any information of these people which goes back to 1982. This list relates to Polling Division A. I consistently update the information."

He also said, "For the eight (8) years I have been going into the constituency, I have not been able to trace any of these persons on the list." (Exhibit H.S. 5)

Mary Clare Hurst is the political secretary of Henderson Simon. She is 25 years old. She has, except for nine (9) years, lived all her life in the constituency. She has been associated with the first-named respondent from 1983.

As political secretary, she campaigns by paying house-to-house visits in the constituency. She speaks to people in the constituency. She finds out how they stand politically. There were about eight (8) other persons working along with Miss Hurst. The information which they received was passed on to the first-named respondent on Wednesday nights, when they held their weekly constituency branch meeting. That information was fed into the computer by Mr. Simon, assisted by his secretary.

Mary Clare Hurst said:

"We would use an electoral list on Wednesday nights. We catalogued that information which was brought back to Mr Simon. The persons who are overseas, deceased and those who were in Antigua and those who were in jail... we were not able to find all the persons on the register.

In Division A I know six (6) persons who are overseas. I extracted these names from the computer out of the overall list I supplied the names of these persons."

This witness produced in evidence five (5) exhibits (M.C.H.1-5). Exhibit M.C.H. 1 contains the names of 109 persons whom the respondent claims to be resident overseas at the date of the general election.

Mary Clare Hurst said in evidence:

"Apart from going out and doing the canvassing, I had other groups working in the constituency – City West Youth for Labour. I was the chairperson of the group. Apart from general canvassing, we have handed out food packages for the sick and ‘shut-in’, visited them monthly. Food packages given to them every three months. We canvassed those who were ‘shut-in’ with a view to voting. As election came closer, we find out their state of health and whether they were able

to come out to vote. If they were too ill we would take the information back to Mr. Simon and both him and myself would put them in the information as 'ill'."

In relation to Exhibits H.S.5 and H.S.6, this witness said, "Having taken names on H.S.5, I went out to canvass these people. I could not find them. They were not known. I went to the addresses as shown on the voters' list to look for them. I was not able to find any of them at the addresses shown on the register. For the years I have been living in the constituency, I have not come across any of them.... I assisted in compiling the list (Exhibit H.S.6). It relates to Division B. This was taken from D.H. 1 (Electoral Register). Having taken H.S.6, I tried to canvass them. I went to the addresses as shown on the electoral register. I made enquiries of persons who live on the same street. I got no information about them."

Mary Clare Hurst produced two lists in evidence, Exhibits M.C.H.4 and M.C.H.5. M.C.H.4 contains the names of 49 persons, M.C.H.5 contains 79 persons whom the respondents claim are dead. The witness said that she carried out a search in the registrar's office. In relation to M.C.H.4, she found the names of twenty-eight (28) recorded as dead and fifty-one (51) recorded as dead in relation to Exhibit M.C.H. 5.

Finally Mary Clare Hurst said, "I have seen that list Exhibit (H.S.9) before. It shows a list of constituents who were in jail. I know all of these persons on the list. They were in jail before election, and on 9th March, 1989."

In cross-examination, Mary Clare Hurst, on M.C.H. 1, said she personally saw fourteen (14) persons leave Antigua. She gave the names and addresses of these fourteen (14) persons. She also said of the fourteen persons whom she said had left the state, four of them are connected to her by family. All the others are close friends.

It is my opinion that, from the evidence, Mary Clare Hurst is very knowledgeable of the people in the constituency.

There were eight other witnesses who produced exhibits in evidence and gave evidence similar in nature to that given by Mary Clare Hurst. Their testimony was to the effect that they made enquiries from persons in the neighbourhood. As a result of these enquiries they concluded that they had gone away. In some instances, some of the persons whose names appear on the list told the witnesses that they were leaving Antigua. They knew them well and had not seen them in Antigua subsequently. In some instances the witnesses themselves had seen some of the persons leave the state.

Mr. McKay, Learned Counsel for the first-named respondent submitted that in relation to the evidence which the respondent Simon has led, it shows that on a balance on probabilities, certain persons whose names appear on the electoral register were either living overseas and were not in Antigua on 9th March, 1989 or were deceased or were in jail or were untraceable or were too ill

to vote; or whose names had been duplicated; that this evidence was properly accepted by the Court.

Dr. Ramsahoye on the other hand submitted that this evidence tended to falsify the accuracy of the register of voters as on 9th January, 1989 which was signed by the presiding officer. It is inadmissible because the Register of Electors is conclusive under Regulation 19(3) of the Registration Regulations, or, if admissible was not of sufficient probative force to establish that on election day a number of people were not able to vote, although they were on the list of electors; that it is impossible to find, with certainty, proof to a degree which a Court is entitled to expect, having regard to the matter to be proved that on election day a large number of electors were actually unable to vote in St. John's City West because they were overseas, ill or otherwise disabled; that the exercise would require proof in relation to each voter, and the proof tendered is weak and unreliable, bearing in mind that the evidence implies that the register of the voters, which by law is conclusive as to evidence at the time of registration.

Rule 19(3) of the Registration Rules states:

"The copy of the lists transmitted to the Supervisor of Elections shall be deemed to be the Register of Electors for the constituency and shall remain in force until the next list of electors have (sic) been revised and certified in accordance with the provisions of the Act and these regulations."

I agree entirely with Dr. Ramsahoye's submission that the register of voters is conclusive as to residence. In that, it is my view that if someone turns up at a particular polling station to vote, that voter cannot be challenged on the ground that the address shown in the register of voters is not his address and that he cannot vote in that constituency which corresponds to the address in the electors' register.

But the evidence led by the respondents is not to challenge in any way their right to be on the register and vote in the St. John's City West constituency Polling Division A or B. If any of these voters showed up on election day and demanded a ballot paper, the voter would have been entitled to a ballot paper and entitled to vote in St. John's City West.

The purpose of this evidence is, as I understand it, to establish that these persons were not physically present in Antigua and Barbuda on election day and therefore could not vote, not that they were not entitled to vote but could not because of their absence. By this evidence, the respondents are attempting to show that a determined number of persons could not vote in spite of the non-availability of ballot papers for the period stated.

As Mr. Phillips submitted:

"The respondents are not saying that on his petition the court must weed out on that list persons who were away because they were not eligible to vote on election day. That is not the purpose. The purpose of this evidence is not to invite the court to weed out of the list those persons because they were ineligible to vote on election day. Because in respect of those who are alive and those who are dead – those who are alive we recognise they had a right if they appeared at the polling station to be given a ballot and to be allowed to vote."

With this I agree entirely. (See the *Borough of Worcester 3 OM & H* p 189 at page 186.)

The question therefore is whether the evidence of Simon and his witnesses, who testified as to the number of persons living out of the state, those who are dead and those too ill to vote, those who are untraceable and those who are in jail, is admissible? And if admissible, what weight if any I should attach to it?

The gist of the evidence, as I have said before, given by these witnesses is to the effect that the persons who were on the electoral list and some of whom they knew told them that they were going away and that subsequently they were not seen in the constituency; that in some instances, they saw some of these persons leave the state and have not subsequently seen them in Antigua.

I have no doubt in my mind that evidence of intention is admissible. The respondents' case is that these people say they are leaving. They have not been seen in Antigua since then. There are other persons in the community who have not seen them in Antigua. Having regard to that, the closeness of the community, I formed the impression that the constituency of St. John's City West, particularly the Point Area, is a very closely-knit community and that population is concentrated. It is therefore my view that if these people who are allegedly out of Antigua were in Antigua they would have been seen in Antigua. Moreover, not one of them has come forward during the trial to say that, as alleged, he was away, too ill to vote, or in prison on that day and that this was not so. This, in my view, is not a unreasonable observation, viewed in light of the wide publicity which was given to this trial within and outside of Antigua and Barbuda, in the newspapers, on the radio and television, before and during the trial. Also during the trial, local newspapers (exhibits A and B) gave full coverage of the proceedings.

In this regard, I adopt the sentiments expressed by William, J in the *Akaroa Election Petition* para 59 at page 166 where he said:

"It is obviously absurd to suppose that a large number of others have learned that they were, or at least have good grounds for believing that they were disfranchised by the wrongful act of the Returning Officer without their taking advantage of this opportunity of having the injury redressed. We know no reason why people who have suffered by the act should not have come forward to say so, and no reason why the petitioner's advisers should not have availed themselves of the

information. We know enough of the spirit evoked by a closely contested election, and by an election petition, to justify us in saying that the difficulty in inducing witnesses to come forward is not one usually complained of."

In addition, I make the observation that the evidence was given in open court which was at times packed; names were mentioned publicly alleging that persons were away on election day, too ill to come out to vote or were in prison. In relation to the last category which I have mentioned, although it forms the least number of all the categories, yet I find it difficult to accept that if anyone is stigmatised in this way, that is by alleging that he was in prison whereas he was not, would not come forward and clear his name.

With reference to the persons whom the respondents claim were too ill to vote, Mary Clare Hurst said:

"My Youth Group has an on-going visitation group which visits the sick and 'shut-ins'. I personally visited all of these persons in Division B(H.S.4). Most of them told me that they were too sick and would not come out to vote..... I did not go to collect any of them (Division B) on election day."

I am of the view that on a balance of probabilities, the respondents have established that there were some persons who were in fact too ill to vote, out of the state, untraceable and in jail. There is no evidence that any of them turned up to vote on election day and were not given a ballot paper.

In determining whether the result was affected by the non-availability of ballot papers, I shall take into account the number of persons on the register who were not physically present in Antigua and Barbuda on election day. I find the number, from my calculation, to be 850 persons. I find support for this approach in the judgement of Riddle, J in *Re Hickey and the Town of Orillia* (1908) p. 317 at p 332 where he said:

"To deal with the second objection. The Town has three polling sub-divisions, containing the following number of names of voters: in polling sub-division No. 1 – 480; No. 2 – 438; No. 3. – 451; in all 1378. But from these numbers must be deducted the numbers of those who were not entitled to vote in the polling sub-divisions at the election in question with the following result: number as revised in polling sub-division No. 1 – 445; No. 2 – 414; No. 3 – 379: in all 1238.

Learned Counsel, Mr. McKay referred to the case of *Mtoba & Others v Sede and Others* (1975) 4 A.A. 413. In citing this case, Counsel was in, what I thought, a lot of agony. He said this is the first time in his practice at the Bar that he was referring to South African jurisprudence and I believe that Counsel has been at the Bar for many years. He said he was referring to this case

because it was very helpful. I understand Counsel's agony because I say unreservedly I shall be very reluctant myself to found any judgement based solely on South African jurisprudence. However, in this case, the judge referred to many English authorities, and as Counsel puts it, clothe the judgement with respectability.

At page 422 of the judgement Kotze, J said:

"The votes cast in the election in favour of the various candidates appear on the last page of Exhibit 29 and are correctly set out in paragraph 20 of the petition. These figures establish that the total number of votes cast in favour of an unsuccessful candidate (third respondent) exceed the highest number of votes cast in favour of an unsuccessful candidate (first applicant) by 5,347. It is common cause that the registered voters in the electoral division of Zwelitsha totalled 92,705 as referred in Exhibit 29. An aggregate of 269,728 votes were cast, which means that one-fourth of the total, i.e. 67,432 represent the number of registered voters who cast votes which were not rejected. This number swells to 69,586 if the 2,154 rejected ballots were added. It follows that (not allowing for contingencies such as death or registered voters prior to the polling period) 23,119 did not exercise their right to vote. On quarter of the votes of these voters added to the total votes cast in favour of the first applicant could therefore have resulted in his election instead of the third Respondent. Mr. Jannett, on behalf of the Respondents presented a series of calculations, which at first glance establish a strong improbability that the result would have been different if there were no ballot paper shortages. These calculations proceed on the assumption that there were no significant population shifts in the Ciskei between the date of registration of voters (i.e. July – August 1972) and the date of the election and that the number of the voters who were physically present in the affected area at the time of registration would have remained more or less stable until the election – an assumption of problematic validity."

From the above, Learned Counsel argued that the reasoning is clear. The judge is seeking to exclude persons who are on the register but are dead.

I now turn to consider the question of the burden of proof.

Mr. McKay, Learned Counsel for the first-named Respondent submitted that it is important for this Court to determine whether or not an evidential burden is placed on the Petitioner, to lead evidence to satisfy the Court that the breach or breaches complained of did affect the result. He referred the Court to *Woodward v Sarsons* and argued that this case is still good law for what it decides. Mr McKay argues that *Woodward v Sarsons* does not say that all a petitioner must establish is a breach and the court will axiomatically find that the results were affected; that the present case is not a case like the *Hackney Case*. Learned Counsel also referred to *Kensington*

North Parliamentary Case which decided that there is no burden on the respondent to establish that the breach did not affect the result. It does not say that the petitioner has no evidential burden; that this is in accord with a statement in Phipson on Evidence, 13th Edition, p 45 which states as follows:

"But it would seem in an election petition, alleging breaches of the rules made under the Representation of the People Act 1949, that the court will look at the evidence as a whole and that if breaches are proved by the petitioner, the burden of showing that the election was conducted substantially in accordance with the law, does not rest upon the respondent."

Mr. McKay then concluded that the respondent did not have to establish that the irregularity did not affect the result.

Dr. Ramsahoye, on the other hand, submitted that once the petitioner establishes that voting was going on between 6.00 p.m. and 9.00 p.m. he establishes a clear breach. The court will then look at the breach to see whether the breach was substantial. Learned Counsel then referred to the *Kensington North Parliamentary Case (supra)* and submitted that that case says three things, one of which is that by reason of the drafting of what is section 12(3) of the Antigua Law, a question of onus of proof does not arise and the Election Court will look at the whole of the evidence to ascertain whether there was substantial breach of the law or whether the result was affected.

In *Re Hickey and the Town of Orillia (Supra)* at p 322, Meredith, C J said:

"When prima facie the result might have been affected by the failure to comply with the provisions of the statute then and then only is the onus cast upon the person supporting the by-law to show that the irregularity did not affect the result."

In *Islington Parliamentary Election Case* Kennedy, J said at page 130:

"We agree with Mr. Jelf that there being an infraction of the law in the supply of ballot papers at the polling stations in Bingfield Street.... the burden of proving that this infraction did not and could not affect the results of the election rested in this case on the respondent."

I am of the opinion that the plaintiff will be required to lead evidence to show that there was a breach of the election law, except of course where the breach is admitted by the respondents, (*Woodward v Sarsons*). The respondents will then have to show that notwithstanding the breach the result was not affected.

I, however, agree with Dr. Ransahoye that by reason of the drafting of s. 12(3) of the Antigua Representation of the People Act, the question of burden of proof does not arise, and that the Court would look at the whole of the evidence to ascertain whether there was substantial compliance with the law or whether the result was affected.

As I have said above, the petitioner has failed to lead any evidence in relation to paragraph 3(c) of the petition. He cannot therefore rely on that paragraph.

Dr Ramsahoye said in his opening address to the Court:

"Now, some might have returned, some might have left from frustration and not returned."

If his statement was meant to show that voters were deprived of their right to vote because of non-availability of ballot papers, the petitioner has failed to establish that because he has led no evidence in relation to that allegation.

Mr. Luckhoo, Learned Counsel for the second-named respondent submitted that no evidence has been led of any act or omission on the part of the Returning Officer. That all the matters complained of relate to, and were the responsibility of the Supervisor of Elections; that no complaints have been made against the Supervisor of Elections, that the full amount of the 2,600 original ballot papers were delivered to the Returning Officer in time for the election of 9th March, 1989. The Returning Officer reported to the Supervisor that names were printed in the wrong order. The Supervisor recalled the ballot papers. The Returning Officer was duty-bound to return them. He did so.

Rule 27(1) of the Act states as follows:

"The returning officer shall provide each presiding officer with such number of ballot boxes and ballot papers as in the opinion of the returning officer may be necessary."

In my opinion, the Act therefore casts upon the Returning Officer the sole duty and responsibility for providing the ballot papers for the elections. In addition, the Returning Officer was the conduct of the elections. When the Supervisor of Elections gave him directions to keep the polls open until 9.00 p.m., he was not under any obligation to comply with the instructions of the Supervisor of Elections. It is my view, therefore, that the allegations contained in paragraphs 3a, b, d, and e are well-founded. I shall deal at a later stage with paragraph 3(f) of the Petition.

The failure of the Returning Officer to provide ballot papers for the St. John's City West is an omission of his official duty. The resulting non-voting from 6.00 a.m. to 8.30 a.m. and from 12.55 p.m. to 5.30 p.m. is a breach of the election rules. The extension of voting from 6.00 p.m.

to 9.00 p.m. is prima facie a breach. Was this a substantial breach? Was the election in St. John's City West conducted substantially in accordance with the law as to elections? If it was, was the result affected?

If the breach was substantial so as to render the election a sham or a travesty, then it is voided, that is if the breach falls within the first of the three principles enunciated by Lord Denning in *Morgan v Simpson*:

"if the election was conducted so badly that it was not substantial in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not...."

Mr McKay concedes this when he said in his opening address:

"If you find that this election was a sham and it was conducted so badly, that nobody can say it was an election, then you do not have to go further."

The evidence is that the ballot papers were delivered late in the St. John's City West constituency. One thousand (1,000) ballots were received by 8.15 a.m. – 8.30 a.m. Voting began about 8.30 a.m. By 12.30 p.m. and 1.00 p.m. ballots had run out. The irresistible inference therefore is that 1,000 votes were cast between 8.30 a.m. and 1.00 p.m. Voting resumed at about 5.30 p.m. The total number of votes cast in the constituency was 1,561. This means that 561 votes were cast between 5.30 and 9.00 p.m. There is a total of 2,829 persons registered in St. John's City West as voters. On the basis of my calculations, 850 were not physically present in Antigua to vote on election day. This means that about 318 persons did not cast their votes on election day in St. John's City West constituency for one reason or the other. I cannot say, I will not speculate, as to the reason but, as I have said earlier, the petitioner has not shown by any evidence that not one person was unable to vote because of the non-availability of ballot papers.

The instant case is not a case like the *Hackney Case* for two reasons: firstly, in the *Hackney Case* polling stations were closed all day and five thousand (5,000) persons could not get to the polls. The reason for their non-voting was known. They could not vote even if they wanted to, because the polls were closed. Five thousand (5,000) out of an electorate of 12,000 persons were disfranchised; and secondly, it cannot be said in this case, as was said in the *Hackney Case* (page 51):

".... that an election which is conducted in such a way as (whether by accident or design) not to afford a very large mass of the electorate an opportunity of voting cannot be a true election of members."

It cannot be so said because 318 not voting for whatever reason is not a very large mass of the electorate. In fact from the calculations above, 76 per cent of the electorate voted, taking into

account those who were not physically present to vote on 9th March. Even excluding that number, it is shown that about 50 per cent of the electorate cast their votes in the St. John's City West on election day.

In this regard, I am of the opinion that the election was not conducted in such a way as to make the ordinary condemn it as a sham or travesty.

In *Morgan v Simpson* (1974) 3 All ER p 722 at page 731 Stephenson, L J said:

"For an election to be conducted substantially in accordance with the law there must be a real election by ballot and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or travesty of an election. Instances of such a substantial departure would be allowing voters to vote for a person who was not in fact a candidate or refusing to accept a qualified candidate on some illegal ground or disfranchising a substantial portion of qualified voters..."

In this case, there is no doubt that there was a real election by ballot. There is no complaint that the secrecy of the ballot was violated in any way. I have already decided that there was not in this case a disfranchising of a substantial portion of the electorate.

Was the election so conducted as to be substantially in accordance with the law as to elections? If it was, then it is not vitiated by a breach of the rules provided it did not affect the result of the election (Lord Denning's second proposition in *Morgan v Simpson*).

The law as to elections in Antigua and Barbuda is purely statutory and is contained in the Representation of the People Act 1975, and the Election Rules. In *Morgan v Simpson* (*supra*) at page 730 Stephenson, L J said:

"Gone are the principles laid down in the body of the Act and in their stead is substantial accordance with the law as to elections. Blurred is the distinction between the Act and the rules, between the breaches of the rules. The law as to elections is to my understanding of the Section recognised as embodied in the Act and rules and an election will stand if there have been breaches of the law, but they are not substantial or they have not affected the result."

When, therefore, the Parliament of Antigua and Barbuda lays down that voting should be from 6.00 a.m. to 6.00 p.m., was there substantial compliance with the rule if voting took place from 8.30 a.m. to 1.00 p.m. and 5.30 p.m. to 9.00 p.m.? Is that rule mandatory or permissive?

Mr. McKay, Learned Counsel, referred to the *Mtoba Case* (*supra*) and contended that despite all the irregularities that took place in that seven hours were lost at several polling stations, the

Learned Trial Judge did not say the election is void and that's it. Evidence was led and after considering the evidence, he came to the conclusion that there was irregularity. He did not say immediately these elections were a sham or it would be travesty to call it an election by ballot. He went on to consider whether having regard to the circumstances, the irregularity materially affected the results. He came down on the side of the Petitioner and confirmed that it materially affected the results.

Mr McKay also submitted that it is not axiomatic that a breach, where voters are prevented from voting, the election must be declared void.

In the *Mtoba Case* at page 421, letter A, Kotze, J dealt with the problem thus:

"The collapse endured for many hours at some of the polling stations in some cases for as long as either and a half out of fourteen polling hours. In the aggregate voting could not proceed at 12 polling stations for 58 out of 168 polling hours i.e. for more than one third the polling time. On the evidence several of the areas where these elections were scheduled are densely populated. In not one instance was it suggested in evidence that the slightest attempt was made to improvise ballot papers in accordance with the enabling authority conferred by the proviso to S. 37. It is, in my view, impossible to conclude in the face of so extensive of a collapse – that in the Zwelitsha electoral division, the election as a whole was conducted in accordance with the laid-down principles that every voter be afforded a fair and free opportunity to exercise his vote. The departure from the principle was on a substantial scale..... I conclude therefore, that in the Zwelitsha electoral division a vital principle of the election proclamation was violated on an extensive scale. It follows that the curative provision is ousted and inoperative for the purpose of preserving the election. The interpretation placed on the curative provision requires the court to disregard the size of the majority. If an election is not a true election, the extent of the majority obtained by the successful party is irrelevant."

In that case, the judge is not saying that the election was conducted substantially in accordance with the law as to elections and therefore he will examine the circumstances in order to determine whether the result was affected. He is saying, as was said in the *Hackney Case*, that this election was conducted so badly that a substantial number of qualified voters was disfranchised, that the election was void *ab initio*, – in spite of the fact that he proceeded to examine the evidence. There was not need to apply the curative section.

In *Pio v Smith* (1987) L.R.C.p. 250, the petitioner was seeking to have the result of the election declared void on the ground, *inter alia*, that voting forms were not available at the polling station for some six hours on polling day.

In Zimbabwe, one was not deprived of the right to vote if he was not registered. He could exercise his right to vote by going into a polling station on election day and register on a claim form and so exercise his right to vote. With the absence of claim forms for many hours, it was the claim of the petitioner that many persons were deprived of that right to vote.

Mfalila, J said at 279:

"The question was therefore whether the election was conducted in accordance with the principles laid down in the Act and whether such non-compliance or mistake did affect the results of the election..... the question then is whether, if the petitioner's contention is to be accepted, the position in this case is the same as the position which was obtained in the Hackney Borough Election. In my view there are very strong and important differences between the election at Norton, in this case and that in Hackney. At the Norton Polling Station, the mistake involved the non-provision of claim forms for only part of the polling day, i.e. between 0915 and from 1600 hours. This means, the claim forms were available from opening time to 0915 and from 1600 hours to closing time. This contrasts with the position at Hackney where no facilities at all for the whole of the polling day were provided resulting in the voters of that area being absolutely prevented from voting. In the present case it was question of timing, with some inconvenience perhaps, but no voter who wanted to utilise the provisions of statutory instruments 155A of 1955 to register and vote, could have failed to do so. Thus, unlike the *Hackney Case*, the mistake only caused some inconvenience to the would be voters under section 6(1) of the Statutory Instrument 155A of 1955, but did not have the effect of absolutely preventing them from voting. Indeed none of the three witnesses said so."

It is, in my view, necessary for a proper determinant of the issues in this case, to consider separately the period of non-voting or the periods when voting took place.

The period of voting from 8.30 a.m. to 1.00 p.m. and 5.30 to 6.00 p.m. would have resulted in about 5½ hours' voting time out of 12 hours' voting. If, for instance, everyone on the voters' list had cast their ballots, in those circumstances without anything more, no Court despite the breach, would declare the election void.

There would certainly have been a breach of the rules because voting would not have been conducted in the constituency from 6.00 a.m. to 6.00 p.m., as stipulated by the Election rules. But, notwithstanding that breach, no Court would, in my view, declare the election void because it could not be argued that the results would be affected in any way. The Court must take a commonsense approach to the situation.

In the *Borough of Drogheda (1874) OM & H p 201* the polling stations were not opened at the statutory hour of 8.00 a.m., and in fact, no votes were (or could be) received until 8.45 a.m. It was clear that the fact of not opening the polling stations until three quarters of an hour after the appointed time had no effect whatsoever upon the result of the election and that not a single voter was in consequence prevented from, in fact the whole constituency was almost entirely polled out before the poll was closed.

In the instant case, it should be assumed that the voters would know that the time of voting in the constituency would be from 6.00 a.m. to 6.00 p.m. In considering, therefore, whether the breach, the non-voting hours, was substantial, it would, in my view, be relevant to consider matters such as the size of the constituency, the accessibility of the voters to the polls and lastly, whether news is easily disseminated in the community.

The evidence is that the constituency is relatively small in area, about two square miles. It is densely populated in parts. Everyone in the constituency owns a radio. When the electors turned up to vote at 6.00 a.m. and there were no ballot papers, they were told by officials at the polling stations that ballot papers were expected, although they were not told when. When ballot papers ran out at about 1.00 p.m., later on they were told that voting would resume. Notices were posted up, announcements were made on the radio and television stations that voting would resume and the voting time would be extended. It is a reasonable assumption that most of the electorate in the constituency were kept informed and had a good idea of what was going on in the constituency, because of the high percentage of voting and because of the large numbers that were present when voting resumed at about 5.30 p.m.

Applying the reasoning of Mfalila, J in *Pio v Smith (supra)* in the passage which I have quoted above and in regard to all the surrounding circumstances which I have just referred to, it is my view that the election in St. John's City West was conducted substantially in accordance with the law as to elections.

It is now left for me to decide whether the result of the elections was affected by the breach of the rule.

In the *Islington Case (supra)* the respondent, who was declared the winner, received a total of nineteen (19) votes over his rival, the petitioner. It was established that 14 votes were cast after the statutory hour of 8 o'clock. It was decided that even if the 14 votes were given to the petitioner, the respondent would still have a majority of 5 votes. Accordingly, the result was not affected by the irregularity.

In *Evo v Supa and Another (1986) LRC (Const.) p.18*, the petitioner had complained that 154 persons voted who were not lawfully entitled to vote. These persons were registered to vote because of a boundary error. The petitioner argued that the election was void because their votes

were illegal. It was there decided that there was substantial compliance with the law and that even if that 154 votes were given to the petitioner, the result would not have been affected.

In the *Akaroa Case* (*supra*) ten polling stations out of eleven were closed at 6.00 p.m. instead of 7.00 p.m. The total number of electors who voted at the election was 1,544 leaving 499 electors. The successful candidate had a majority of 107 votes over his nearest rival. The court held that there was no reasonable ground for believing that by reason of the premature closing of the ten (10) polling places, a majority have been prevented from voting or that the result of the election could have been affected in any appreciable degree; and accordingly declare the election void.

I am fortified in my view that on a careful analysis of the *Akaroa Case*, that in determining whether or not there is substantial compliance with the law or rule as to the opening and closing of the poll, one is not or should not be confined solely to the number of polling hours which were lost but with what was achieved, that is the number of votes which were cast during polling hours. Because in that case an aggregate of ten voting hours was lost. In my view, the reasoning is that in spite of the loss of ten hours, only 497 voters who might have voted, did not. It is my view that it is in light of that reasoning which prompted the Learned Judge in the *Akaroa Case* to observe:

"But the majority in the present case is 107. Sitting as judges of fact, and applying, in the words of one of the English Judges, one's commonsense to the circumstances of the case, to be reasonably possible that that number of voters could have been prevented from recording their votes by the irregularity complained of."

It is in this regard, too, that I view and adopt the statement of Rose, C J, H.C. in *Rex rel Fennessey v Wade et al* (1939) 3 DLR 424 at page 428:

"There is, then, no object in comparing the cases in the hope of extracting from them a formula that can with confidence be applied in every case that may arise. In each case, at it comes up, the tribunal I think, must try to form a practical conclusion as to whether upon the facts as they appear, there was a general endeavour to conduct the election upon the principles in accordance with which an election held under the Act ought to be conducted and whether that endeavour was so successful as fairly to call for the application of the Section."

In that case, the town clerk irregularly added five names to the assessment roll and issued voting certificates to the five, one of whom was not qualified and the reeve was elected by a majority of one vote.

At page 428 of the judgement, Rose, C J said:

"On the one hand care must be taken not to create the impression amongst those in charge of municipal elections that the courts will be astute to find excuses for the ignoring of the regulations prescribed by the Legislature.

..On the other hand it must be remembered that the section is remedial legislation which is to be given full effect. The finding of the middle ground may be difficult but the attempt must be made. In the present case, my opinion which I express with deference, is that in the judgment under review too narrow a meaning has been given to the section – a meaning which almost deprives that section of effect. It is true that as regard the five voters the Act was not obeyed, and that in that sense, the election was not conducted in accordance with the principles laid down in the Act; but in the wider sense, the election does seem to have been conducted in accordance with these principles, and my opinion is that the saving sections ought to be applied if, in fact the mistakes or irregularities in question are such as fall within any of these cases named in the Section."

In *Gribbin v Kirker* 7 IRR p 30:

"It appears that the poll was kept open after the proper hour so as to allow those who were then within the polling booth to vote. The Court of Common Pleas in Ireland set aside the election."

In the *Borough of Worcester Case* 3 OM & H 184 Lush, J said at page 185:

"The question which we have ultimately to decide is whether the poll was closed before the proper time or not and if so whether electors on the register were precluded from exercising their franchise in such numbers as to outweigh the majority of one or both of the respondents."

In trying to rationalise the decisions in the cases Mr. Justice Williams said in the *Akaroa Case* at page 163:

"The cases which apparently conflict with this view (the above view) are the *Harwick Case*, *Gribbin v Kirker* and the *New South Wales Case, Ex Parte Russell*. In the *Harwick Case* the majority was six, and the poll, was closed in consequence of a disturbance a few minutes only before the proper hour and no proof was given that other voters were waiting to vote, yet the election was set aside by a Parliamentary committee. It may well be, however, that the fact that the poll being closed in consequence of a disturbance would be sufficient to justify the reasonable inference that a number of voters sufficient to change such a narrow

majority might have been deterred from voting, though no direct evidence of the fact was given. The case does not, therefore, seem to be inconsistent, then as pointed out in *Rogers on Elections* it can hardly be supported since the *Warrington Case*."

It is my view that it is very difficult to reconcile the decisions in the cases. It is therefore, with respect that I prefer the view expressed in *Fennessey v Wade* quoted above.

In *Re Ex Rel Dyck v Ell* 9 WWR 162, two of the polls in a municipal district were not opened on time on election day. In one case, a blizzard delayed the arrival of the D.R.O. at the polling place. In the other case, the same blizzard caused the D.R.O. to doubt whether the election should be held at all and, with the acquiescence of the relator, he went somewhere to enquire what he should do.

On proceedings to have the election declared invalid, Sissons, D C J in giving judgement of the court beginning at page 165, said:

"In *Re Ex Rel Smith v Browne* the poll was closed at about three o'clock instead of four o'clock as required by statute. It was held that the election was void."

In *Re Hach and Oakland R.M. (1910)* 14 WLR 309, one of the polling places was closed for three quarters of an hour during the hours of polling, while the deputy returning officer, poll clerk and scrutineers were at lunch. There was no evidence that any person had been deprived of his vote by the closing, neither was there any evidence that some electors might not have been deprived.

In that case Mathers, C J K B said:

"If there was any satisfactory evidence that the closing of the poll at midday did not affect the result of the election, it would probably be saved by the curative section (200 of the Municipal Act). The closing of the poll was deliberate and intentional and the onus was on those supporting the by-law to show that such irregularity had not that effect and they have absolutely failed to do so."

A somewhat similar situation was before Mathers, C J in *Re Shaw and Portage La Prairie R.M.* 190 WLR 542. In that case, the poll was not opened until 10 a.m. (9 a.m. being the hour for opening). For three days a snowstorm had raged over the whole country. The D.R.O. had left home before 7 a.m. and made all possible speed but did not reach the polling place on time.

His Lordship said:

"I am satisfied that the failure to open the poll was not the deliberate act of the officer, but that he made an effort to comply with the statute and was prevented simply because the weather conditions were such as to make it impossible for him to comply. In the *Oakland Case* I held the deliberate closing of the poll for an hour at midday was fatal. That, however, was a deliberate and intentional violation of the Act. I think where an official makes an honest effort to comply with the statute that his default should not be visited with the same consequence unless it is shown that the result was probably affected.

In *Rex El Rel Smiley v Evans* (1927) 4 DLR 629, the D.R.O. closed the poll at 6 o'clock (instead of 7 o'clock) and went to his home for a lamp and stayed longer than he should have done..... It appears that one voter, Devitt did attempt to exercise his franchise and the poll being closed, he failed to be afforded the privilege. It is suggested that a number of voters might have voted at that point had the poll remained open during that period. But there is not evidence before me to show that there was any attempt and failure on the part of any other voters to exercise their votes through the temporary closing of the poll....

The election was held in accordance with the principles of the Act.... Upon all the facts as disclosed in the affidavits, while an irregularity or non-compliance as I have mentioned occurred in connection with the election, still I find that irregularity or non-compliance did not in the words of the statute 'materially affect the result of the election'.

It further appears to me that the irregularity did not entirely affect the result of the elections. As in *Rex El Rel Smiley v Evans* it is suggested in this case that some voters might have appeared at the Deer Park School pool before it was open. However, there is nothing to indicate any person did appear. All the evidence points the other way. It seems unlikely that any person interested enough to come out in a blizzard in order to vote would have left the polling place without waiting a reasonable length of time.... None of the witnesses has heard of any person who lost his vote through the poll being closed."

It is my view that the above cases should be looked at against the background that the judges were using their discretion to declare the election valid or invalid because they had the power so to do by the legislation.

In *Regina Ex Rel Dyck v ELL 161*, the headnote reads as follows:

" Sec 30 (2) of the Controverted Elections Act R.S.A 1942. Ch. 155 is not properly speaking a curative provision. What it does is to give the judge the power in his discretion to do one of two things, either

- (a) declare the election invalid or
- (b) declare it valid if he finds that it was conducted substantially in compliance with the Act and that the irregularity, if any, did not materially affect the result."

Section 30(2) reads as follows:

"In any case where the validity of an election or a voting upon a by-law is contested before a judge by reason of non-compliance with or violation of a provision of this Act or any other Act applicable to election or to the voting as the holding of the polls or the counting of the votes or by reason of mistake in the use of any of the forms requested in connection with the election or the voting or by reason of any irregularity, the judge, in his discretion may adjudge the election or the voting to be invalid or if it appears to him that the election or voting was conducted substantially in accordance with the requirements of the Act under which the election or the voting was conducted substantially in accordance with the requirements of the Act under which this Act applies, and that the non-compliance, violation or mistake or irregularity did not materially affect the result of the election or the voting he may adjudge the election or the voting upon the by-law to be void."

On a reading of s. 12(3) of the Antigua and Barbuda Act, I am of the view that it does not give a discretion to the judge to adjudge the election valid or invalid as the case may be. In my opinion once the judge is satisfied that the election was not conducted substantially in accordance with the law as to elections or even if conducted substantially as to the law as to election and that an act or omission did affect the results, then he has no option but to declare the election invalid. It is to be noted that the section [12(3)] says "affect" and not "materially affect" as in the Canada legislation.

In my view, therefore, I cannot be guided by statements of principle such as –

"I think that strictly speaking there was an irregularity in not opening the polls on time. In my discretion, I could adjudge the election to be void. However, I do not think that I would be exercising a proper judicial discretion if I make such an adjudication without considering the surrounding circumstances."

(Per Sissons, D.C.J. in *Rex Rel Dyck v ELL* at p 166).

I now turn to consider whether the rule relating to voting hours is mandatory or permissive.

In *Re Mullings and City of Windsor Et 6 DLR P.601*, Windsor was struck by a serious snowstorm. Election was to be held on 2nd December, with the polls opening from 11 a.m. and remaining open until 8.00 p.m. There were 445 polling places, 383 opened on time on 2nd December and 58 opened late. At least one polling booth did not open at all that day.

The city clerk instructed the Deputy Returning Officer not to count the ballots of the 383 polling places but to bring the boxes to his office and to attend at Clery Auditorium at 9.00 p.m. the following evening where the ballots would be counted. The 58 polling stations which opened late and the ones which did not open at all were directed to open on 3rd December at 11.00 a.m. and remain open until 8.00 p.m. The 58 polling officers who were unable to open their polls on time were directed to take the ballot boxes home with them and return to the poll the following morning. This was a violation of s. 76(6) under the Municipal Elections Act 1972 (Ont.) C. 95, which prohibits a deputy returning officer from taking the ballot box home after the close of the polls under any circumstances. It was conceded at the hearing that the election was not in any way affected by this procedure.

Donnelly, J in delivering the judgement of the Court at page 604 said:

"We accept that the burden of satisfying the Court that the election was conducted in accordance with the principles of the Act was upon the defendants. We believe that consideration must be given to the very exceptional circumstances which prevailed and the lack of precedents. It is essential that the elections be held fairly and openly and that the electors have free access to the polling stations. In directing that the 58 polling stations which opened late and the one that did not open be opened on December 3, the city clerk was endeavouring to give the electors of the city uninterrupted access to a polling booth for an uninterrupted access to a polling booth for an uninterrupted nine-hour period. It is probable that the city clerk, in taking the action that he did, was attempting to comply with s. 67 of the Act."

Section 67 of the Canadian Act is in substance the same as Rule 48 of the Representation of the People Act 1975 of Antigua and Barbuda which reads as follows:

"48 (1) When the proceedings at any polling station are interrupted or obstructed by riot or open violence, or by the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence or other calamity, the presiding officer shall adjourn the proceedings till the following day and shall forthwith give notice to the returning officer.

(2) (a) the hours of polling on the day to which it is adjourned shall be the same as for the original day....."

At page 605 Donnelly, J said:

"The city clerk may well have considered and believed that because the emergency commenced before the polls opened, and continued until after they closed on December 2, that he was authorised to direct that they be opened the following day. However, it may be that on a strict reading of the section, it will be found to have no application to the type of emergency that faces the city on that day..... We are of the opinion that there was a genuine endeavour on the part of the clerk to carry out the intention of the Act and that the election was conducted in accordance with the principles of the Act.

There were certain other infringements of the Act.....
No evidence was led to show that any of these acts of non-compliance affected the result, and the question arises as to the effect of such non-compliance in light of such lack of evidence."

Learned Counsel, Mr. McKay submitted that this judgement was not based on the clerk taking action under s. 67. This judgement was based on the city clerk doing his best, without a corrupt motive, to ensure that the elections were conducted substantially in accordance with the electoral provision; that by the judgement the provision for opening and closing of the poll must have been considered to be directory only.

It should be observed in the *Re Mullings Case* the court was not saying that it was not a breach to postpone the election from 2nd and 3rd December. What the court said was that in relation to the other irregularities discovered, that "no evidence was led to show that any of these acts of non-compliance affected the result.....".

Mr McKay submitted that the Supervisor of Elections in the instant case, like the city clerk in *Re Mullings*, was using his judgement endeavouring to do his best without a corrupt motive; that by the provision of s.3 of the Antigua Act, the Supervisor of Elections had the authority to extend the hours of voting.

S. 3 reads as follows:

"3. The Governor [now Governor-General] shall by notice published in the Gazette appoint a Supervisor of Elections who shall –

- (a) exercise general discretion and supervision over the administrative conduct of elections and enforce on the part of election officers, fairness, impartiality and in compliance with the provisions of this Act; and

- (b) issue to election officers such instructions as from time to time he may deem necessary to ensure the effective execution of the provisions of this Act."

Could it be said that if voting hours are lost, the Supervisor of Elections, in order to be fair to all the candidates, in order to make up for lost time, extend the voting hours? I find it very difficult to appreciate that s.3 gives him that power.

In my view, the language of s. 3(a) is very clear and unambiguous. It says that the Supervisor of Elections must enforce on all election officers impartiality and compliance with the Act. It means that the Supervisor of Elections must ensure that officials comply with the provisions of the Act. They must not favour one candidate over the other. They must observe the rules of fair play in the conduct of the election. It is difficult to find within the meaning of these words that power is given to the Supervisor of Elections to change the election rules. Neither do I find in the words of s. 3(b) of the Act that power is given to the Supervisor of Elections to change anything in the Election Rules.

Mr. Phillips submitted that this Court decided in *Walter v Humphreys*, No.30 of 1980 that the election rules and regulations are directory only. At page 22 of the judgement, Robotham, J (now Chief Justice) said:

"Mr. Hosein in his reply to the submission on behalf of the Petitioner that the election ought to be avoided under Section 12 (3) of the Act, pointed out that 12(2) of the Act requires the returning officer to do all such things as may be necessary for effectively conducting the election in the manner provided by the election rules. Section 12(3) makes it possible for an election to be avoided if there are breaches of the election rules. These rules have from time immemorial been held to be directory only. *Levers v Morris* [1971] 3 All ER page 1304, there is no provision he submitted in section 12(3) or in any other part of the Act, Rules or Regulations which provides for an election to be avoided for a breach of the registration regulations. It has always been a general rule that to whatever extent the provisions of an Act of Parliament are violated, even wilfully which do not enact that the consequences of these Acts avoids the election, the election will not be invalidated.

That being the case and there being no such provisions, the petitioner, he submits, cannot succeed on the basis that breaches by the Supervisor of Elections of any of the Registration Regulations, if indeed there were any, affected the results of the election. With this submission I am in complete agreement."

From this passage, the Learned Trial Judge, in my view, was agreeing with the submission that breaches by the Supervisor of Elections of any Registration Regulation cannot affect the results

of the election. He was not saying or agreeing with the submission that the election rules have from time immemorial been held to be directory only.

Learned Counsel also referred to the case of *Latham and Others v The Corporation of Glasgow and Others* p 694, "The Whiteinch Case" at page 795 where Lord Ashmore said:

"On the legal aspect of the question, I begin by referring to the statutory provision contained in Regulation 17 of the Statutory Rules and Orders relative to the Temperance Act. It reads as follows – 'the poll shall be opened from 8.00 a.m. to 8.00 p.m.' In the Election (Hours of Poll) Act 1885.... which applies to Parliamentary and Municipal Elections, the provisions is that 'the poll shall commence at 8 o'clock in the forenoon and be kept open till 8 o'clock in the afternoon of the same day and no longer'. But although the words 'and no longer' do not appear in the regulation applicable to the case, I am of the opinion that the hours in the regulation must be literally observed as regards the duration and the closing of the poll."

Learned Counsel asked me to reject that as being the law of Antigua and Barbuda, because that is at variance with the English case, the Canadian cases and the New Zealand case.

In the *Akaroa Case* at page 160 Williams, J said:

"The provision as to the hours of polling was not however, contained in the Schedule, nor was it in the body of the Act, but it had been enacted by a separate statute, the present English Statute on the subject being 48 Victoria C. 10. S.1. In New Zealand the enactment as to hours of polling are contained in the body of a statute and there is no provision in our legislation similar to section 13 of the English Ballot Act. Section 13 is stated by the Court of Common Pleas, in *Woodward v Sarsons* to be 'an enactment ex abundanti cautela, declaring that to be the law applicable to elections under the Ballot Act which would have been the law to be applied if this section had not existed.' An Election Court in England, however, in determining whether or not an election had been invalidated by closing the poll prematurely, would not be affected by section 13, as the premature closing is not a non-compliance with the rule in the Schedule. Although, therefore in England as here, the laws of polling are positively fixed by statute, yet there can be no doubt that election tribunals in England have frequently declined to declare an election invalid on the mere ground that the provisions on the statute in this particular had not been complied with."

In *Montreal Street Railway v Normandin* [1917] A.C. 170 at page 174 Sir Arthur Cannell said:

"The question whether provisions in a statute are directory or imperative has very frequently arisen in this context. It has been said that no general rule can be laid down and that in every case, the object of the statute must be looked at."

What is the object of Rule 1 of the Representation of the People Act? Is it to provide 12 hours daylight voting for the electors, as Dr. Ramsahoye contended, or is it simply to provide 12 hours in voting, in other words, to give the voters sufficient time in which to poll their votes? I hold the view that the latter view is to be preferred.

In *Levers v Morris* [1971] 3 All ER 1300 at page 1303, Walter, J said:

"In *Woodward v Sarsons* the election court had to consider whether under the old law an election had to be declared void by reason of non-observance or non-compliance with the rules which were contained in the schedule to the Ballot Act 1872. Lord Coleridge, C J said 'In order to determine this part of the case it is necessary to consider and determine the construction of the Ballot Act. Now, first the Act is divided into the principal part, which contains certain sections and two Schedules which contains certain rules and forms, and by s. 28 the Schedules and the notes thereto and directions therein shall be construed and have effect as part of this Act. 'The rules and forms are therefore, to be construed as part of the Act, but are spoken of as containing "directions". Comparing the sections and the rules, it will be seen that for the most part, if not invariably, the rules pointed out the mode or manner of doing what the sections enact shall be done. And in Schedule 2, the first note states that, "the forms contained in the Schedule or forms are nearly resembling the same as circumstances will admit, shall be used." And on the ballot paper as given in the Schedule, is directions as to printing ballot paper and "form of directions for guidance of voters in voting" etc. These observations lead us to the conclusion that the enactment as to the rules in the first Schedule and the forms in the second are directory enactments as distinguished from the absolute enactments in the sections of the body of the Act. And in such cases, in order to determine the preliminary question, which is, whether there has been a material breach of the Act ' and which must be determined before determining what effect such breach has upon a vote or on the election – the general rule is that an absolute enactment must be obeyed or fulfilled exactly but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

In the Antigua Act – the Representation of the People Act 1975 – the rules are outside of the body of the Act. There is no provision as in s. 28 of the English Act which states that:

"the Schedules to this Act, and the notes thereto and directions therein shall be construed and have effect as part of this Act."

In the *Islington Case*, the provision as to voting is contained in the body of the Act and by s.1 of the Elections (Hours of Poll) Act, 1885 it is stated that the poll 'shall commence at 8 o'clock in the forenoon and be kept open till 8 o'clock in the forenoon and be kept open till 8 o'clock in the afternoon of the same day and no longer'.

It is decided that voting after 8.p.m. was a breach of the law.

In Antigua by the Representation of the People Act 1975, Rule 1 states as follows:

"The proceedings at the election shall be conducted in accordance with the following table... In the case of a general election between the hours of 6 a.m. and 6 p.m."

In New Zealand, the enactments as to the hours of polling are contained in the body of a statute per Williams, J (*Akaroa Case*, p. 166).

In *Re Mullings*, the provision as to voting is not clearly stated in the judgement. All that is stated is, "the election was to be held on December 2, with the polls opening at 11.00 a.m. and remaining open until 8.00 p.m." In my view, it is difficult to determine whether that provision is couched in mandatory or directory terms.

In *Latham v Glasgow Corporation* [1921] S.C. 692 the provision in relation to the hours of poll is in the following terms:

"The poll shall be open from 8.00 a.m. to 8.00 p.m. of the same day."

The court interpreted that provision as mandatory. Lord Ashmore at page 705 said:

"I am of the opinion that the hours stated in the regulation must be literally observed as regards the duration and the opening and closing of the polls."

In *Phillips v Goff* [1886] 17 K.B. 805, Lord Colridge said:

"Where the object of a statute is clear and contains absolute and mandatory enactment, the terms of the enactment must be strictly followed. But in *Woodward v Sarsons*, the court held that a different principle applied to the schedules of the Ballot Act which contained rules and regulations for carrying out the object of the statute in the body of the Act."

The provision as to voting is in the first Schedule to the Antigua Act.

While I cannot agree with Mr Phillips' submission that *Walter v Humphreys* decided that the election rules have from time immemorial been held to be directory only, I accept that it was there decided that breaches by the Supervisor of Elections of the Registration Regulations did not affect the results of the election and that the Registration Regulations were directory.

The registration regulations are contained in the Schedule to the Act. It is therefore in keeping with the view expressed by Lord Colridge in *Phillips v Goff* that a different principle of interpretation applied to the schedules of the Act.

In *Dyck v Ell*, the provision as to the hours of voting was construed as directory. The provision is s. 54 of the Municipal District Act R.S.A. 1942 Ch. 151 which reads as follows:

"When a poll is required, it shall be held upon the fourth Saturday following the day of nomination from nine o'clock a.m. to five o'clock p.m."

This provision seems to have been contained in the body of the Act, yet the Court construed it as directory only.

Having regard to the foregoing, I hold that the rules and regulations in the Representation of the People Act are directory only. Mr. Phillips submitted that if I accept that the rules as to the opening and closing of the polls and the provision of ballot papers are directory only, then it is not a breach of these provisions if there is substantial compliance with the law as to elections. I am in total agreement with the submission that the rule as to the opening and closing is directory and it is not a breach if there is substantial compliance with that rule.

The meaning of s. 12(3) in its positive form in my opinion is that an election would be avoided if there is a substantial breach of the election rule and the result is affected.

Section 12 (3) reads as follows:

"(3) No election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the Election Rules if it appears to the Election Court having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections, and that the act or omission did not affect the result."

Levers v Morris at page 1303 Waller, J said:

".....The general rule is, that an absolute enactment must be obeyed or fulfilled exactly but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

Was there substantial compliance with the rule as to the hours of voting or, to put it in another way, was the election conducted substantially in accordance with the law as to elections?

Dr. Ramsahoye submitted that the loss of 7 hours or more out of 12 hours and that the extension of voting from 6 p.m. to 9 p.m. are separately or cumulatively grave breaches of the law as to elections and therefore the election was void.

What is substantial in my view, must be a matter of degree. Even hours of non-voting plus three hours of voting outside of the statutory hours must be considered, in my view, as substantial. In my judgement, therefore, there was substantial non-compliance with the rule as to the hours of voting.

I now consider the order made by the trial judge granting the extension of time from 6.00 p.m. to 9.00 p.m.

Dr. Ramsahoye submitted that the order is unprecedented; that there was no cause of action between parties. An *ex parte* application was made without any action in being and therefore the order could not bind anyone (See *Re Wycham Terrace* 1974 3 WLR 649 at 653-4 & 657-9). There was no adversarial proceedings under the Representation of the People Act 1975 which would give the High Court jurisdiction. The order was of no effect. I agree with this submission. It is therefore my view that the order for extension of time was of no effect.

In determining whether the result was affected it is necessary to analyse the votes cast between 6.p.m. and 9 p.m.

Mr. McKay said in his submission:

"I agree with him (Dr. Ramsahoye) the pivotal issue in this case is that area between 6.p.m. and 9.p.m."

Before determining that issue, there are two issues I wish to dispose of:

1. whether there was acquiescence by the Petitioner in the Supervisor of Elections extending the time of voting; and
2. whether the Petitioner can rely on paragraph 3(f) of the Petition or whether he can rely on breaches which were discovered during the hearing of the Petition, that is, breaches which he did not allege in his petition.

I accept the evidence of the Supervisor of Elections that the Petitioner had requested an extension of time for voting because at the time he did so two and one half hours were lost. That is from 6.00 a.m. to 8.30 a.m. I also accept the evidence of Barrymore Stevens to the effect that there

was a heated discussion between him and the Petitioner that, he, the Petitioner, was trying to convince him that the Supervisor of Elections had the power to extend the time for voting.

The important question however, is does this amount to acquiescence? The fact that the Petitioner was agreeing with or suggesting to the Supervisor of Elections that he should extend the time for voting.

Mr. McKay submitted that that amounts to an acquiescence by the Petitioner. He refers to a number of authorities in support of his submission. Among the authorities are: *Radix v Gairy* [1978] 25 WLR 553 at 556, *Eastern Division of the Country of Clare 19 OM & H* at p 156 and *Dyck v ELL 9 WWR* at page 161.

In *Dyck v ELL*, the election court upheld the election to be valid notwithstanding that there was a breach in regard to the hours of opening of the polls.

At page 167 the Learned Judge said:

"He was not wilfully and purposely avoiding the provisions of the Act as in the *Oakland Case*. He was acting consciously and in what he considered were the interest of the elections and the candidates. The candidate who complains acquiesced in what the D.R.O. did."

It is seen from the reports that what the candidate acquiesced in was in the late opening of the polls because of a blizzard on election day. The D. R. O. and his clerk made the suggestion that they should go a distance of about 12 miles to telephone the Municipal Office for instructions. The candidate thought it was a good idea. This resulted in the further delay in the opening of the polls.

This situation, to my mind, is different from the instant case. It is important, in my view, to analyse the judge's reasoning in that case. Immediately after saying that the candidate acquiesced, he went on to say:

"I do not think that, under the circumstances, I should adjudge the election to be invalid if I can properly adjudge it to be valid."

In my view it is quite obvious that the judge was calling in aid his discretionary power.

As I said above, the Canada cases must be looked at against the background that the statute gives the judge a discretionary power to declare an election valid or invalid whereas under the Antigua Law there is no such power.

In the *Radix v Gairy* case the list of voters was published. The Petitioner did not challenge the accuracy of the list. An election was held and he lost. He then challenged the validity of the list.

Morris, C J said at page 556:

".... I cannot accept that the legal position is the candidate who went as a contestant on an existing list of electors, may be allowed to accept the list as valid if he wins but would be allowed to argue that the list is invalid if he loses."

In the *County of Clare Case*, the returning officer made a mistake in appointing the polling day less than two clear days after nomination day. The Petitioner noticed the error but made no complaint.

Mr. Justice O'Brien at page 165 said:

"It is clear that the notice was not the proper one on account of it having been overlooked that Sunday was excluded from the computation of time under the Act.... the petitioner said on the day of nomination that the notice was insufficient.... and stated that he would make no objection to it, as it was in his interest to have it as it was. The petitioner now insists upon a defect which he not only acquiesced in but directly conveyed a suggestion that for his own advantage it should be left as it was... I do not at all admit as certain the doctrine that the law of estoppel does not apply to such a case, mainly on the ground that the matter is one in which the public are concerned or because it may happen that a person who is not affected as for instance one of the public at large."

It is quite clear that the extension of voting hours was obtained after the Supervisor of Elections took legal advice. It is my view that acquiescence is not applicable.

I now turn to consider paragraph 3(f) of the Petition. During the course of the hearing of the Petition, certain matters surfaced which the Petitioner argued that he should be able to rely on as evidence of irregularity. It was discovered that the Presiding Officer voted for persons whom he said were nervous.

Dr. Ramsahoye submitted that nervousness not being a form of physical incapacity within the meaning of the Election Rules and therefore the Presiding Officer could not properly vote for such persons, the secrecy of the ballot was therefore violated. That alone should be enough to avoid the election.

Mr Phillips submitted that if the Petitioner is allowed to rely on evidence given at the trial under his sub-paragraph 3(f), the Court in effect will be allowing the Petitioner to rely on new facts as if he had been allowed an amendment; that the Court was not allowed to grant an amendment

after 21 days. Learned Counsel referred to a number of authorities including *Norwich Case – Borebecks v Boland* (1886) 2 Times Law Reports.

Paragraph 3(f) of the Petition contains no particulars. I agree entirely with Mr. Phillips' submission. The Petitioner therefore cannot rely on new matters which arose during the course of the hearing.

I now consider whether the result was affected by the breach of the law. As I have said above, it is a reasonable assumption that 1,000 ballots were cast between 8.30 a.m. and 1.00 p.m. But unfortunately it cannot be determined which of the candidates received what votes up to 1.00 p.m. It is a reasonable assumption that 561 votes were cast between 5.30 p.m. when voting resumed and 9.00 p.m. when the polls were closed because the total number of votes cast in the St. John's City West constituency was 1561.

Bearing in mind that the Petitioner got 611 votes, the Respondent got 874, the other candidate, Alister Thomas, received 67 votes. It is impossible to say what proportion of the votes went to each candidate by 1.00 p.m. Neither can it be ascertained when the 9 rejected ballots were cast.

Having decided that voting from 6.00 p.m. to 9.00 p.m. was irregular voting, in breach of Rule 1, on the principle of the cases, *Morgan v Simpson* and *Islington Case* is it possible to calculate how many votes were cast between 6.00 p.m. and 9.00 p.m.? Because if it is, and if that number of votes does not exceed the margin by which the Respondent won, then clearly the result would not have been affected.

Mr McKay submitted that the Court can ascertain on a reasonable probability, on the evidence, the number of votes which were cast before 6.00 p.m. He submitted as follows:

" The evidence of Mary Clare Hurst was that there were about 45 people in each of the three lines and those votes were cast before 6.00 p.m. That is at Villa..... 135 cast before 6.00 p.m. So we deduct those from 561 leaving 426. I must remind the Court at this stage also that that is the barest minimum on the evidence because the evidence of the Gene Gould was to the effect that about 60 in one line had gone through..... Gene Gould had said that he could not see all three lines. He could only see one.

Then there is the evidence of Hendy Simon in respect of Pilgrim. I think he said about 45 or 50 had voted before 6.

So whatever, taking the barest minimum of either of these witnesses so 90 from 426 would leave 336. I bear in mind that the majority is 263, notwithstanding that the remaining number of votes which were cast after 6.00 p.m. were in

excess. This Court can still hold that if there was a breach it did not affect the result."

In fact Gene Gould said from about 5.15 to 6.00 p.m. about 60 persons had voted in his section. He could not see the other sections from where he was.

These figures are only estimates, but even accepting Mr. McKay's calculation, about 225 persons would have voted before 6.00 p.m. This would mean that 336 persons would have voted after 6.00 p.m. On the principle of the authority referred to above, if the 336 votes are given to the Petitioner, the result would have been affected. But Mr. McKay relies on the case of *James v Davis* 76 L. G. R. 184.

I now analyse in detail this case.

On 5th May, 1977 an election was held for two candidates for electoral division of G. County Council. Four candidates stood for the election. Notices were displayed, one to the effect that if the voters voted for more than one candidate his vote would be void. The other to the effect that the voters may vote for not more than two candidates. The total number of ballot papers counted was 3,366, which could have contained a total of 6,732 votes. The total number of votes cast was 6,367 thus 3,365 votes were unused. Peter Davis received 1,675 votes; Noel Francis Trigg 1,666; Kenneth Samuel James received 1,585; Michael John Lewis received 1,441 votes. Peter Davis and Noel Francis Trigg were declared to be duly elected. The number of votes separating Peter Davis and Michael John Lewis was 234 votes. The number of votes separating Noel Francis Trigg and Michael John Lewis was 225 votes.

The number of votes separating Noel Francis Trigg and Kenneth Samuel was 81. It is clear that if the 365 votes were given to Samuel or Lewis the result would have been different. But the Court decided that Peter Davis and Noel Francis Trigg were duly elected because the election was so conducted as to be substantially in accordance with the law and that on the evidence it was impossible to find that there was any real likelihood of the result being affected by the discrepancy in the notice.

At page 193 Nield, J. said:

"The court takes the view that the real issue here, and the more difficult one, is the second, namely whether the act or omission which is admitted did or did not affect the result of the election. We have looked at the cases including *Morgan v Simpson* and in particular to the observations of Lord Denning M.r.....??? It is plain that we cannot be certain as to answer to this but must look wholly at the evidence and say whether being fair to everyone, there is a real likelihood that the result of the election was affected as to require the court to declare this election invalid."

The Court then analysed the evidence and accepted among other things that about 90 per cent of the voters going to vote did not read the notices. The court also considered the election addresses by the candidates who urged the voters to vote for two candidates.

The Court had no difficulty in coming to the conclusion that it would be really impossible to find that there was a real likelihood of the result of the election being affected by the admitted discrepancy."

This case is different in my view from the instant case because on the basis of the calculations, if I am correct that there was substantial non-compliance with the voting hours and that in particular the voting from 6.00 – 9.00 p.m., I find it impossible to say definitely that the result was affected, or would not have been affected by the irregularity.

I have analysed all the authorities carefully, thereby sacrificing brevity (I apologise) with the hope that in the end I would have been able to save this election. I realise the seriousness of declaring an election invalid. I realise that a lot of tax-payers' money would have been spent on the election. I realise that a lot of valuable time and effort would have been spent.

Finally, I realise it is not the Court's function to say who should win or lose. The Court's function is to declare on the basis of the evidence and the law whether the result was affected or might have been affected by the irregularity.

Having regard to the foregoing, I hereby declare the election of St. John's City West constituency held on the 9th March, 1989 to be invalid.

Costs fit for counsel and two juniors to be taxed if not agreed.

.....
Albert J. Redhead
Puisne Judge

THEME 7

POLITICAL PARTIES

IN THE FEDERAL COURT OF CANADA
TRIAL DIVISION

BETWEEN

CHARLES CAVILLA

Applicant

– and –

THE CHIEF ELECTORAL OFFICER OF CANADA

Respondent

Elections – Change of Party Leadership – Registration of new Party Leader – Right of Chief Electoral Officer to register new leader.

Background facts

A dispute about this leadership for the Christian Heritage Party arose. A new leader was apparently elected at a valid party meeting. The applicant questioned the right of the Chief Electoral Officer to register his purported successor or replacement as party leader.

Held

The Chief Electoral Officer had not committed an error in law in allowing the registry to record a change in the leadership of the Christian Heritage Party based on a report submitted by the new leader and the accompanying material filed.

Reasons for Judgement Proceedings held before the Honourable Madam Justice J. Simpson., at the Federal Court of Canada, Calgary, Alberta, on the 21st day of September, A.D. 1993.

The Honourable
Madam Justice J. Simpson

Federal Court of Canada

D. C. Cavilla, Esq
(Huckvale & Company)

For the Applicant

G. C. Hawco, Q. C.
(Howard Mackie)

For the Respondent

Sherril R. Knox CSR(A)

Official Court Reporter

THE COURT

I'm going to give you my reasons for the leadership for the Christian Heritage Party. The applicant was the leader of that party, and he may have been replaced in a valid party meeting. Whether or not that is true is the subject of litigation in the Province of British Columbia.

This application arises because the Chief Electoral Officer has registered his purported successor or replacement as the new party leader.

The applicant asked for judicial review and it alleges that the Chief Electoral Officer of Canada, hereafter "the CEO," has erred in law in making the registration by reason of his misinterpretation of Section 26.(1) and (2) of the Canada Elections Act.

The section as amended in June of 1993 reads as follows:

"(1) Where, as a result of a change in the leadership of a registered party or other change, any of the information or material provided by that party to the Chief Electoral Officer pursuant to paragraphs 24(1)(b) to (g) or pursuant to this subsection ceases to be applicable, the registered party shall, within thirty days after the change occurs, send a report in writing, signed by the leader of the party, setting out the details of the change to the Chief Electoral Officer and, on receipt of the report, the Chief Electoral Officer may vary the registry referred to in subsection 24(1) in accordance with the information contained in the report.

(2) Where a change referred to in subsection (1) is a change to the leadership of the party, the report required by that subsection must be accompanied by a copy of resolution of an official meeting of the party appointing the new leader, certified by the new leader and by another officer of the party."

The change of relevance today is that sub-section (2) is a new provision. The application notes that the term "new" is used to describe the noun "leader" in sub-section (2) and the adjective "new" is not found before the word "leader" in sub-section (1).

He urges the application of one of the normal rules of statutory interpretation to this situation and suggests that if different words are used, parliament must have intended different meanings. In this case, if sub-section (2) deals with the new leader, he argues that sub-section (1) must concern the former or old leader.

He, therefore, argues that the section requires that after a leadership change, the CEO cannot vary the register to reflect the new leader's selection without a report signed by the former or old party leader.

It is my opinion that the normal rule of statutory interpretation described above cannot be applied to override the clear meaning of the section. Section 26(1) contemplates that the report is to be filed as a result of a leadership change. Accordingly, at the time of the report, the only leader is the new leader. It is also unreasonable to read the section to require a former leader to perform administrative tasks in his former capacity up to 30 days after the termination of his position.

To read Section 26.(1) as requiring an old leader to sign a report would be contrary to the language of the section and contrary to sensible administrative practice.

It is worth noting that the affidavit of Mr Slattery filed in this proceeding on behalf of the respondent and sworn on September 9th, 1993, notes in paragraph 23 that when the applicant assumed leadership of the Christian Heritage Party, he signed a report in his capacity as the new leader under Section 26.(1) of the Canada Elections Act which was substantially the same prior to the amendments.

The Chief Electoral Officer has not committed an error in law in my opinion in bearing the registry to record a change in the leadership of the Christian Heritage Party based on a report submitted by the new leader pursuant to paragraph 26.(1) of the Elections Act and accompanying material filed under paragraph 26.(2).

The application is, therefore, dismissed.

Are there any submissions as to costs?

MR HAWCO: With respect, My Lady, without pouring salt on the wounds, I think it's an appropriate application to make at this time. We would ask for costs in this cause. Thank you.

MR CAVILLA: My Lady, the applicant would rely on rule 16.18. Costs are generally not paid on judicial review applications unless there is a special reason shown. I would respectfully submit that there was merit to the position by the applicant. It's not a frivolous or vexatious application in my respectful submission, and there is not special reason for the Court to go outside the provision of Rule 16.18 and award costs in this case.

THE COURT: Any reply?

MR HAWCO: No, thank you, My Lady.

THE COURT: If not having been argued that there are special reasons in this case for costs awarded, there will be none.

MR CAVILLA: Thank you, My Lady.

PROCEEDINGS CONCLUDED.

Certificate of Transcript

I, the undersigned, hereby certify that the foregoing pages 1 and 6 are a true and faithful transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Calgary, Province of Alberta, this **6th** day of **October**, A.D 1993.

Sherril R. Knox, CSR(A)
Official Court Reporter

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1629 (NEC) OF 1993

Janata Dal (Samajwadi)

.....Appellant

v

The Election Commission of India

.....Respondent

Before: J. S. Verma, J, N.P.Singh, J and K Venkataswami, J.

Elections – Registration of Political Parties – withdrawal of recognised status as a national party
– Symbol – Forfeiture of right of political party to exclusive use of symbol.

Background facts:

The appellant was recognised as national political party on 16.4.1991. General elections were to the Lok Sabha and to the Legislative Assemblies of six States and the Union Territory of Pondicherry in the months of April-June 1991. A statement showing the member of votes polled by the appellant at those elections, showing the performance of the appellant at the poll was prepared by the Election Commission and thereafter a show-cause notice dated 4.12.1991 was issued to the appellant by the Election Commission as to why the recognition of the appellant as a national party should not be withdrawn under the provisions of the Symbols Order. The impugned order was passed by the Election Commission withdrawing the recognition of the appellant as a national party and forfeiting the right of the party to the exclusive use of the symbol 'woman carrying pot on her head', which had earlier been reserved for the appellant.

The appellant questioned the validity of the order passed by the Chief Election Commissioner withdrawing the recognition of Janata Dal (Samajwadi) as a national party.

Held:

The Election Commission, on the materials produced before it, rightly came to the conclusion that the appellant had ceased to be a national party or a State party and as such was not entitled to the exclusive use of the symbol. The appeal failed.

Cases cited in the Judgement:

Kashiya Lal Omar v R K Trivedi (1986) AIR SC 111 = (1985) 4 SCC 628

JUDGEMENT

N. P. SINGH J

The validity of an order dated 21.2.1992 passed by the Chief Election Commission of India withdrawing the recognition of Janata Dal (Samajwadi) as a national party, in exercise of the power vested in the Election Commission under paragraphs 6 and 7 of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as the 'Symbols Order') is being questioned in this appeal.

The appellant was recognised as a national political party on 16.4.1991. The general elections to the Lok Sabha and to the Legislative Assemblies of the States of Assam, Haryana, Kerala, Tamil Nadu, Uttar Pradesh, West Bengal and the Union Territory of Pondicherry were held in the months of April–June, 1991. A statement showing the number of votes polled by the appellant at the aforesaid general elections held in the months of April–June, 1991 showing the performance of the appellant at the poll, was prepared by the Election Commission and thereafter a show cause notice dated 4.12.1991 was issued to the appellant by the Election Commission as to why the recognition of the appellant as a national party should not be withdrawn under the provisions of the Symbols Order. The General Secretary of the appellant responded to the aforesaid notice by his letter dated 15.1.1992 seeking three months time to submit the reply on behalf of the appellant, as the party was collecting information from its state units. The time for filing the reply to the show cause notice was extended. It was filed on 5.2.1992. A stand was taken on behalf the appellant that once recognition has been given to the party as a national party there was no provision in the Symbols Order for withdrawal of the said recognition. It was also asserted that the performance of a party for purpose of recognition or de-recognition has to be judged when the elections are held in all the states within Union of India and not only on the basis of elections held in only some of the states. It was pointed out that no elections have been held in respect of State Assemblies of several states like Andhra, Pradesh, Bihar, Goa, Orissa, etc. However, the impugned order was passed by the Election Commission withdrawing the recognition of the appellant as a national party and forfeiting the right of the party for the exclusive use of the symbol 'woman carrying pot on her head,' which had earlier been reserved for the appellant. The Election Commission held in the impugned order that a party once recognised cannot claim the recognition in perpetuity and it has to show a minimum electoral support for continued recognition in terms of paragraphs 6 and 7 of the Symbols Order.

Paragraph 2(h) of the Symbols Order defines "political party" to mean an association or body of individual citizens of India registered with the Commission as a political party under Section 29(A) of the Representation of the people Act, 1951. Paragraph 3 requires every association or body of individual citizens of India to make an application to the Commission for its registration as a political party under Section 29(A) of the aforesaid Act. Symbol is to be allotted to a contesting candidate in accordance with the provisions of the said Order. Paragraphs 6 and 7 which are relevant for the present dispute are reproduced below:

6. Classification of political parties –

(1) For the purposes of this Order and for such other purposes as the Commission may specify as and when necessity therefor arises, political parties are either recognised political parties or unrecognised political parties.

(2) A political party shall be treated as a recognised political party in a State, if and only if, either the conditions specified in clause (A) are, or the condition specified in Clause (B) is, fulfilled by that party and not otherwise, that is to say –

(A) that such party –

- (a) has been engaged in political activity for a continuous period of five years; and
- (b) has, at the general election in that State to the House of the People, or, as the case may be, to the Legislative Assembly, for the time being in existence and functioning returned –

either

(i) at least one member to the House of the People for every twenty-five members of that House or any fraction of that number elected from that State; or

(ii) at least one member to the Legislative Assembly of that State for every thirty members of that Assembly or any fraction of that number;

(B) that the total number of valid votes by all the contesting candidates set up by such party at the general election in the State to the House of the People, or as the case may be, to the Legislative Assembly for the time being in existence and functioning (excluding the valid votes of each such contesting candidate in a constituency as has not been elected and has not polled at least one-twelfth of the total number of valid votes polled by all the contesting candidates in that constituency) is not less than four per cent of the total number of valid votes polled by all the contesting candidates at such general election in the state (including the valid votes of those contesting candidates who have forfeited their deposits).

(3) For the removal of doubts it is hereby declared that the condition in Clause (A) or (B) of sub-paragraph (2) shall not be deemed to have been fulfilled by a political party if a member of the House of the People or the Legislative Assembly of the State becomes a member of that political party after his election to that House, or, as the case may be, that Assembly.

7. Two categories of recognised political parties – (1) If a political party is treated as a recognised political party in accordance with paragraph 6 in four or more States, it shall be known as, and shall have and enjoy the status of, a "National Party" throughout the whole of India; and if a political party is treated as a recognised political party in accordance with that paragraph in less than four States, it shall be known as, and shall have and enjoy the status of, a "State party" in the State or States in which it is a recognised political party.

(2) Notwithstanding anything contained in sub-paragraph (1), every political party which immediately before the commencement of this Order is a multi-State party shall, on such commencement, be a National party and shall continue to be so until it ceases to be a National party on the result of any general election held after such commencement.

(3) Notwithstanding anything contained in sub-paragraph (1), every political party which immediately before the commencement of this Order is in a State a recognised political party, other than a multi-State commencement, be a State party in that State and shall continue to be so until it ceases to be a State party in that State on the result of any general election held after such commencement."

In view of the paragraph 6(2), a political party shall be treated as a recognised political party in a state, if and only if either the condition specified in Clause (A) or the condition specified in Clause (B) is fulfilled by the party. Clause (A) requires such party to have been engaged in political activity for a continuous period of five years and has at the general election in that state to the House of People, or, as the case may be, to the Legislative Assembly, for the time being in existence and functioning returned at least one member to the House of the People for every twenty-five members of that House or any fraction of that number elected from that state or at least one member to the Legislative Assembly of that State for every thirty members of that Assembly or any fraction of that number. The alternative condition as specified in clause (B) is regarding the total number of valid votes specified in the said Clause (B) polled at the General Election in the State to the House of the People or to the Legislative Assembly for time being in existence and functioning. The conditions for being recognised as a 'national party' or 'state party' have been specified in paragraph 7 (1), saying that if a political party is treated as a recognised political party in accordance with paragraph 6 aforesaid in four or more states, it shall be known as, and enjoy the status of a 'national party' throughout the whole of India; on the other hand if a political party is treated as a recognised political party in accordance with paragraph 6 aforesaid in less than four states, it shall be known as, and shall have and enjoy the status of, a 'state party' in the state or states in which it is a recognised political party.

There is no dispute that when the appellant was recognised as a national party on 16.4.1991 it fulfilled the conditions prescribed in paragraphs 6(2) and 7(1) of the Symbols Order. It is also an admitted position that when the show cause notice was given by the Election Commission to

the appellant as to why it should not be de-recognised as a national party on the basis of the election results of the Legislative Assemblies in the states mentioned above in the months of April-June, 1991, the appellant did not fulfil the conditions prescribed in paragraphs 6(2) and 7(1), for being recognised as a national party. As such, the question which is to be answered is as to whether once a political party is recognised as a national party having fulfilled conditions prescribed for the same in the Symbols Order can it be de-recognised as a national party under the provisions of the same Symbols Order?

It is true that there is no specific provision under the Symbols Order vesting power in the Election Commission after having recognised a political party as a national party to declare that such political party has ceased to be a national party, not being entitled to the exclusive use of the symbol allotted to it. But at the same time, it cannot be conceived that a political party having been recognised as a national party or state party as the case may be on having fulfilled the conditions prescribed in paragraph 6(2) shall continue as such in perpetuity although it has forfeited the right to be recognised as a national party or a state party. In paragraph 2(2) of the said Symbols Order it has been specifically provided that the General Clauses Act, 1897 shall as far as may be applicable in relation to the interpretation of the said order as it applies in relation to the interpretation of a Central Act. Section 21 of the General clauses Act provides that where by any Central Act of Regulation, a power to issue notifications, orders, rules, or by-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction, and conditions if any to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued. As paragraph 2(2) of the order in clear and unambiguous term makes provision of the General Clauses Act applicable to the Symbols Order, it need not be impressed that provisions of Section 21 of the General Clauses Act, also become applicable vesting power in the Election Commission which had issued the aforesaid order dated 16.4.1991 recognising the appellant as a national party to rescind the said order as appellant in the elections to the Legislative Assemblies of the States mentioned above ceased to fulfil the conditions prescribed in paragraph 6(2) of the Order read with 7(1) thereof.

The learned counsel, appearing on behalf of the appellant, submitted that even if it is assumed that Election Commission can exercise the power of de-recognising a national party after it has ceased to fulfil the conditions prescribed in paragraph 6(2) that power can be exercised only after the general election which means when elections are held in all the States within the Union of India and not only in some of the States, as was the situation in the months of April-June 1991. This argument appears to be attractive specifically in view of the expression "General Election" as defined in paragraph 2 (f) and used in paragraph 6(2), but on proper analysis and scrutiny, according to us, it cannot be accepted. The General Elections in all the States at one time in India has now become a matter of history. For one reason or other the elections are being held in group of States under different situations prevailing from time to time. Apart from that as the condition prescribed in paragraph 7(1) for recognising a political party as a national party is that it should be treated as a recognised political party in accordance with paragraph 6, in four or more States; then for the purpose of withdrawing such recognition also it has to be examined as to whether

after elections the said political party can be treated as a recognised political party in accordance with paragraph 6 in four or more states. If for the purpose of recognising a political party as a national party the performance of such party in four or more states has to be examined in accordance with paragraphs 6 and 7, then it cannot be urged that for withdrawing such recognition it must await till elections are held in all the states within Union of India. If this stand is accepted then even for recognising a political party as a national party, such recognition should wait until elections are held in all the states in India. Can recognition of a political party as a national party be not given, no sooner it fulfils the conditions specified in paragraph 6(2), in four or more states in view of paragraph 7(1) of the Symbols Order? If, for the purpose of recognition of a political party as a national party, the conditions of paragraph 6(2) have to be fulfilled only in four or more states, then on the same principle, even for withdrawing the said recognition the question has to be examined in the light of paragraph 6(2) on the basis of the results in four or more states. Once the Election Commission is satisfied that a political party, recognised as a national party, has ceased to fulfil the conditions prescribed in paragraph 6(2) of the Symbols Order not even in four states as a result of any election, it can de-recognise such a political party as national party. After any election such party must continue to be a recognised political party at least in four states, otherwise the Election Commission has to de-recognise it as a national party. There is no dispute that in the months of April–June, 1991 elections were held in more than four states and on the basis of the results in those elections, the appellant could not be held to be a recognised political party in terms of paragraph 6(2) of the Symbols Order in at least four states. The Election Commission was justified in passing the impugned order in the light of paragraphs 6(2) and 7(1).

This Court has examined the nature of the provisions of the Symbols Order in the case of *Kanhiya Lal Omar vs R. K. Trivedi*, AIR 1986 SC 111 = (1985) 4 SCC 628. It was said that the Election Commission was empowered to recognise political parties and to decide disputes arising amongst them or between splinter groups within a political party. It was further said that the Election Commission was empowered to issue the aforesaid Symbols Order because the said power was comprehended in the power of superintendence, direction and control of elections vested by Article 324 of the Constitution in the Commission. In that connection it was observed:

"Even if for any reason, it is held that any of the provisions contained in the Symbols Order are not traceable to the Act or the Rules, the power of the Commission under Article 324(1) of the Constitution which is plenary in character can encompass all such provisions. Article 324 of the Constitution operates in areas left unoccupied by legislation and the words 'superintendence', 'direction' and 'control' as well as 'conduct of all elections' are the broadest terms which would include the power to make all such provisions. See *Mohinder Singh Gill v Chief Election Commissioner, New Delhi* (1976) 2 SCR 272: (AIR 1978 SC 851) and *A.C. Jose v Sivan Pillai*, (1984) 3 SCR 74: (AIR 1984 SC 921).

The Election Commission on the materials produced before it rightly came to the conclusion that the appellant had ceased to be a national party or a state party and as such shall not be entitled to the exclusive use of the symbol "woman carrying pot on her head", earlier reserved for the appellant. We find no reason to take a different view. Accordingly, the appeal fails and it is dismissed. In the facts and circumstances of the case, there shall be no orders as to cost.

.....
(J.S. VERMA)

.....
(N.P. SINGH)

.....
(K. VENKATASWAMI)

New Delhi,
November 23, 1995

IN THE HIGH COURT OF JUDICATURE OF ANDHRA PRADESH:
AT HYDERABAD

WRIT APPEAL NO. 1207 OF 1994

1. All India Majlis-E-Ittehadul
Muslimeen, a Political Party
Registered under Section 29A of
the Representation of the People
Act, 1951, represented by its
General Secretary, Nizamuddin
2. Sultan Ssalahuddin Owaisi S/o Late
Abdul Wahed Owaisi, aged about
58 years, Member of Parliament,
residing at 3-6-149, Himayatnagar,
Hyderabad
3. Ibrahim Bin Abdullah Muskati,
Member of Andhra Pradesh Legislative
Assembly, c/o Darus-Salam,
Hyderabad
4. Virasat Rasool Khan S/o Late
Fazal Rasool Khan, aged 40 years,
Member of A.P. Legislative Assembly,
c/o Daruls-Salam, Hyderabad
5. Syed Sajjad S/o Syed Ahmed aged
35 years, Member of A.P. Legislative Assembly,
c/o Darussalam, Hyderabad
6. Mir Zulfekhar Ali S/o Late Mir Wajid Ali,
aged about 30 years, Former Mayor of
Hyderabad, c/o Darussalam, Hyderabad
7. Alampally Pochaiah S/o Mallaiah,
aged 45 years, Former Mayor of
Hyderabad
8. Mohd, Bahadur Khan S/o Late Naseeb Khan,
aged, about 30years, Former Chairman
of the Standing Committee of the Hyderabad

Municipal Corporation of Hyderabad C/o
Darussalam, Hyderabad

9. M. A. Basith S/o Late Mohd. Siddiq,
aged about 45 years, Former Chairman
of the Standing Committee, Hyderabad Municipal
Corporation of Hyderabad C/o Darussalam
Hyderabad
10. M. A. Rahman S/o Mohd. Khaleelul-Rahman,
aged about 54 years, Ex-Councillor, C/o
Darussaalm, Hyderabad

Appellants
Petitioners

— **versus** —

1. The Chief Election Commission of India,
Nirvachan Sadan, Ashok Road,
New Delhi
2. The Chief Electoral Officer
Andhra Pradesh, Secretariat
Hyderabad

Respondents

Elections – Symbols – Free Symbol – Whether Election Commission can withdraw a particular symbol from list of free symbols.

Background facts

The appellant No. 1 was registered as a political party by the Election Commission, and it had contested general elections since 1960. The party had used the "Scales" in general elections since 1962.

The Election Commission had from time to time published a list of free symbols under "the Election Symbols (Reservation and Allotment) Order, 1968" for every State, and the symbol "Scales" had always been shown as a free symbol available in the State of Andhra Pradesh.

The said symbol was withdrawn from the list of free symbols and appellant No. 1 and other appellants filed a writ petition No 6474 of 1994 praying, *inter alia*, that a writ in the nature of a mandamus may be issued directing the Chief Election Commissioner of India, and the Chief Electoral Officer of Andhra Pradesh, to include the symbol "Scales" in the list of free symbols for the State of Andhra Pradesh and allot it to the appellant No. 1 and candidates sponsored for Parliament or Assembly elections or elections to municipal corporations and other local bodies.

Held

That there was no merit in the appeal and the order passed by learned Single Judge was upheld with the observation that it would be open to the appellants to approach the Election Commission of India for reconsideration of its decision to delete the symbol "scales" from the list of free symbols and for its restoration for the Assembly elections in the State of Andhra Pradesh proposed to be held in 1994.

Cases Cited in the Judgement

Badiq Ali v Election Commission of India (1972) AIR SC 187

Roop Lal Sathi v Rackhattar Singh (1982) AIR SC 1565

N.P. Ponnuswamy v Returning Officer & Others (1952) SC 64 = 1, E.L.R. 133

Samant M Balakrishna v George Fernandes (1969) AIR SC 1201

Jyoti Basu v Debi Ghosal (1982) AIR SC 983

M Karunanibhi v H.V. Hande (1983) AIR SC 558

Mohinder Singh Gill v Chief Election Commission (1978) AIR SC 851

The 2nd day of November, 1994

Oral Judgement: (Per the Hon'ble The Chief Justice):

This appeal was disposed of by us by a short order dated 27.10.1994. We now proceed to give reasons today (2.11.94).

The facts set out in the writ petition indicate that appellant No. 1 was Registered as a Political Party by the Election Commission of India under the provisions of Section 29A of the Representation of the People Act, 1951 (for short 1951 Act), and it had been contesting General Elections since 1960. In 1962 it contested elections for five seats for the Andhra Pradesh Legislative Assembly, out of which one candidate, namely the present President who is appellant No. 2, was declared elected. Late Abdul Wahed Owaisi who was the then President of the Party, had contested General Elections in 1962 for a seat in Parliament, but he lost the election. His election symbol was "Scales". In the 1962 General Elections for Assembly and Parliament, the same symbol "Scales" was allotted to the Party and its candidates. The Party also contested elections in 1972, 1978, 1983, 1985, 1989 and the mid-term poll for Parliament in 1991. In all these elections "Scales" was allotted as a symbol to the Party and its candidates. In the Municipal Elections also the Party was allotted the symbol "Scales".

The Election Commission has from time to time published a list of free symbols under "The Election Symbols (Reservation and Allotment) Order, 1968" (for short symbol order) for every State, and the symbol "Scales" has always been shown as a free symbol available in the State of Andhra Pradesh. But the said symbol was withdrawn from the list of free symbols and, therefore, appellant No. 1 and other appellants filed Writ Petition No. 6474 of 1994 in this court praying, *inter alia*, that Writ in the nature of mandamus may be issued directing the respondents, namely, the Chief Election Commission of India, and the Chief Electoral Officer Andhra Pradesh, to include the symbol "Scales" in the list of free symbols for the State of Andhra Pradesh and allot it to appellant No. 1 and candidates sponsored by it for Parliament or Assembly elections or elections to Municipal Corporations and other local bodies.

The writ petition was contested by the opposite parties, namely, the Chief Election Commission of India, and the Chief Electoral Officer of the State of Andhra Pradesh and a counter on their behalf was filed in which it was, *inter alia*, pleaded that All India Majlis-E-Ittehadul Muslimeen (appellant No.1) was a registered but unrecognised political party and, therefore, it was not entitled to the reservation of any specific symbol. The list of free symbol which was issued for the State of Andhra Pradesh included the "Scales" as a symbol for several years, but the list was reviewed in 1991 in exercise of the power under paras 5 and 17 of the 1968 Order, and on 5th March, 1991 the symbol "Scales" was removed from the list of free symbols for all the States and Union Territory as the Commission was of the opinion that the symbol "Scales" was associated with justice and judiciary which should not be involved in electoral propaganda and process.

The writ petition was dismissed by a learned Single Judge by Judgement and Order dated 30.9.1994 and it is against this judgement that the present appeal has been filed.

Learned counsel for the appellants has contended before us that the appellant No.1 had all along been allotted "Scales" as a symbol for its candidates in the Parliamentary and Assembly elections as also elections to the Municipal Corporation and, therefore, the symbol which had become synonymous with appellant No. 1 and its candidates could not be legally withdrawn from the list of free symbols for the State of Andhra Pradesh. He has also contended that in 1991 when the Election Commission had withdrawn "Scales" from the list of free symbol, the appellant No. 1 had represented to the Commission and the latter, namely, the Commission had allowed the representation and restored "Scales" in the list of free symbols to enable appellant No. 1 and its candidates to contest the 1991 General Elections on this symbol. Thereafter, the appellants had represented to the Commission to allot "Scales" as a permanent symbol to them but the Commission arbitrarily and without assigning any reason rejected the representation and did not restore the said symbol in the list of free symbols. It is contended that the order of the Commission is liable to be quashed for the reason that the order does not disclose any reason and was, therefore, arbitrary. It is also contended that the symbol "Scales" is still available to "Shiromani Akali Dal" in the State of Punjab and therefore its use should be allowed to the appellants also, particularly as the Commission cannot favour one political party and refuse the same favour to the other in the matter of allotment of symbols.

Election is a process through which the will of the people in the matter of formation of a Government is determined.

The conduct of all the elections to Parliament and to the legislature of every state including the superintendence, direction and control of the preparation of the electoral rolls are vested in the Commission under Article 324 of the Constitution.

Article 326 provides that the elections to the use of the People and to the Legislative Assembly of every state shall be on the basis of adult suffrage. Parliament has been given power under Article 327 of the Constitution to make law concerning all matters relating to the elections to either House of Parliament or the legislature of a state, including the preparation of electoral rolls, delimitation of constituencies and all other matters necessary for securing the due constitution of the Legislature, namely, Parliament or the State Legislature. In exercise of this power, Parliament has made the Representation of the People Act, 1950 (for short "1950 Act") dealing with delimitation of constituencies, preparation of electoral rolls, registration of electors etc., and the Representation of the People Act, 1951 (for short "1951 Act") dealing with the manner and conduct of election.

Under section 169 of the 1951 Act, power has been given to central government to make Rules in consultation with the Election Commission of India (for short "Commission"). Conduct of

Election Rules, 1961 have since been made in exercise of the power, and Rule 5 thereof provides as under:

Rule 5: Symbols for elections in Parliamentary and Assembly constituencies:

- (1) The Election Commission shall, by notification in the Gazette of India, and in the Official Gazette of each State, specify the symbols that may be chosen by candidates at elections in Parliamentary or Assembly constituencies and the restrictions to which their choice shall be subject.
- (2) Subject to any general or special direction issued by the Election Commission either under sub-rule (4) or sub-rule (5) of rule 10, where at any such election, more nomination papers than one are delivered by or on behalf of a candidate, the declaration as to symbols, made in the nomination paper first delivered, and on other declaration as to symbols, shall be taken into consideration under rule 10 even if that nomination paper has been rejected".

A perusal of this Rule will show that the Election Commission has been given power to specify by notification in the Gazette of India and in the Official Gazette of each State the symbols that may be chosen by candidates at elections in Parliamentary or Assembly constituencies.

Rule 10 of 1961 rules, *inter alia*, provides as under:

"Rule 10: Preparation of list of contesting candidates:

- (1) xx xx xx
- (2) xx xx xx (deleted)
- (3) xx xx xx
- (4) At an election in a parliamentary or assembly constituency, where a poll becomes necessary, the returning officer shall consider the choice of symbols expressed by the contesting candidates in their nomination papers and shall, subject to any general or special direction issued in this behalf by the Election Commission –
 - (a) allot a different symbol to each contesting candidate in conformity, as far as practicable, with his choice, and
 - (b) If more contesting candidates than one have indicated their preference for the same symbol, to decide by lot to which of such candidates the symbol will be allotted.

- (5) The allotment by the returning officer of any symbol to a candidate shall be final except where it is inconsistent with any directions issued by the Election Commission in this behalf in which case the Election Commission may revise the allotment in such manner as it thinks fit.
- (6) Every candidate or his election agent shall forthwith be informed of the symbol allotted to the candidate and be supplied with a specimen thereof by the returning officer".

Under the aforesaid Rule every contesting candidate has to be allotted a symbol by the Returning Officer in conformity, as far as practicable, with the choice expressed in the nomination paper. But, such allotment of symbol has to operate subject to any general or special direction issued in this behalf by the Election Commission.

Now, the Commission in exercise of its power under Article 324 of the Constitution read with Rules 5 and 10 of the 1961 Rules, has already issued the Election Symbols (Reservation and Allotment) Order, 1968. Para 4 of the 1968 Symbols Order requires every political party to be registered with the Commission. The political parties have been categorised as "recognised political parties" or "unrecognised political parties". This categorisation has been specified in Para 6 of the Symbols Order. A recognised political party has been further categorised as a "national party" or a "state party".

Para 4 of the Symbols Order provides that in every contested election, a symbol shall be allotted to a contesting candidate and different symbols shall be allotted to different contesting candidates in the same constituency. Para 5 provides that symbols shall be either reserved or free. It is also provided that a reserved symbol is a symbol which is reserved for a recognised political party for exclusive allotment to contesting candidates set up by that Party, while a free symbol is a symbol other than a reserved symbol.

It is provided by Para 8 of the Symbols Order that a candidate set up a national party shall choose, and shall be allotted the symbol reserved for that party, and no other symbol. Similarly, a candidate set up by a state party shall choose and shall be allotted the symbol reserved for that Party in that state, and no other symbol. It is also provided that a reserved symbol shall not be chosen by, or allotted to any candidate other than the candidate set up by a national party or a state party for which such symbol has been reserved.

It is provided by para 9 that symbol reserved for a state party may be included in the list of free symbols in any state in which that party is not a state party, and such symbol may be allotted either to a candidate set up by an unrecognised political party, or to any other candidate.

Para 10 provides that if a candidate is set up by a party which is not a state party in the state in which elections are intended to be held but is, nevertheless, a state party in some other state and

the candidate set up by it chooses the symbol reserved for that party in the state in which it is registered as a state party, then that symbol shall be allotted to the candidate set up by that party to the exclusion of all other candidates.

Para 12, *inter alia*, provides as under:

"12 Choice of Symbols by other candidates and allotment thereof:

- (1) Any candidate at an election in a constituency in a State other than –
 - (a) a candidate set up by a national party; or
 - (b) a candidate set up by a political party which is a state party in that state; or
 - (c) a candidate referred to in paragraph 10;

shall choose and shall be allotted in accordance with the provisions hereafter set out in this paragraph, one of the symbols specified as free symbols for that state by notification under paragraph 17.

- (2) xxx xxx xxx
- (3) xxx xxx xxx ".

The "free symbols" referred to in Para 12(1) extracted above are symbols which are specified by a notification issued by the Commission under Para 17 of the Symbols Order for a particular State or States.

Para 17 is quoted below:

"17. Notification containing lists of political parties and symbols:

- (1) The Commission shall by one or more notifications in the Gazette of India publish lists specifying –
 - (a) the national parties and the symbols respectively reserved for them;
 - (b) the state parties, the state or states in which they are state parties and the symbols respectively reserved for them in such state or states;
 - (c) the un-recognised political parties and the state or states in which they function; and
 - (d) the free symbols for each state.
- (2) Every such list shall, as far as possible, be kept up-to-date."

This para contemplates the preparation and publication of the lists of political parties, recognised and unrecognised and the symbols allotted to them as also the list of free symbols.

An analysis of the statutory provisions considered and referred to above by us clearly brings out that the Commission has exclusive jurisdiction to draw up a list of free symbols for every state. The list has to be published under a Notification in the Gazette of India. The lists may be published through one or more notifications. The statutory jurisdiction of the Commission to prepare and publish the aforesaid lists also includes the jurisdiction to add to, subtract from, or in any other manner vary, the lists.

It is in the background of the above legal position that the argument of the learned counsel for the appellants that the Commission having allowed the use of "Scales" as a symbol to appellant No. 1 and the candidates sponsored by it in various elections since 1960, could not legally withdraw that symbol from the list of free symbols for the State of Andhra Pradesh, is to be considered.

The contention contemplates a "right" to use "Scales" as a symbol in the forthcoming Assembly elections and the enforcement of that "right" through this petition.

Before coming to this question we will again go to the background of certain other statutory provisions to understand the significance of "symbols" in the Parliamentary and Assembly elections in our country.

Under Section 14 of the 1951 Act, the election machinery is set into motion by a notification published in the Gazette of India on such date as is recommended by the Commission through which the President, in the case of the House of the People, calls upon all parliamentary constituencies to elect members for constituting a new House. Similarly, in the case of the State Legislative Assembly, the Governor by a Notification issued under Section 15 of the Act and published in the State Official Gazette, calls upon all Assembly constituencies to elect members for the new Assembly. Thereafter, the Commission, by another Gazette Notification, issue the election programme comprising, *inter alia*, of the last date of nomination; date of scrutiny of nominations; last date for the withdrawal of candidature; and the date on which the poll, if necessary, is to be held.

A candidate enters into the election arena by a nomination filed through a nomination paper on the prescribed form as required by section 33(1) or 33(1A). The form of nomination paper is prescribed under Rule 4 of the 1961 Rules and the candidate is required to indicate not only the party which has set up but also the choice regarding symbol. It is obvious that if he has been set up a national or state political party, the symbol reserved for that party is to be allotted to him. But if he is a candidate set up by an unrecognised, though registered, political party, a symbol will be allotted to him in accordance with the provisions of Symbols Order, 1968.

After a scrutiny of nomination papers and immediately after the expiry of the period within which candidatures may be withdrawn, the Returning Officer has to publish a list of contesting candidates among whom the election is to be held through poll on the date and during the hours

fixed by the Commission. In this list, the names of the candidates are to be arranged alphabetically according to the script of such one of those languages as the Commission may direct. Rule 10(4) of the 1961 Rules requires the Returning Officer to consider the choice of symbols and allot a different symbol to each contesting candidate in conformity, as far as practicable, with his choice but subject to general or special direction that might have been issued by the Commission. The Returning Officer has to inform the candidate or his election agent of the symbol allotted to the candidate and also to provide a specimen of the symbol to him.

Section 59 of the 1951 Act provides that at every election where a poll is taken, votes shall be given by ballot in such manner as may be prescribed. Section 62 specifies the persons who have the right to vote.

Rule 30 of the 1961 Rules provides that the ballot paper shall be in such form and shall contain such particulars in such language or languages as may be prescribed by the Commission. It is also provided that the names of the candidates shall be arranged on the ballot paper in the same order in which they appear in the list of contesting candidates. The ballot papers are issued to the voters at an election on the date of the poll and every elector to whom a ballot paper has been issued is required, in order to maintain secrecy of vote, to proceed to one of the Voting Compartments and there make a mark on the ballot paper with the instrument supplied for the purpose on or near the symbol of the candidate for whom he intends to vote, and thereafter to fold the ballot paper and insert the folded ballot paper into the ballot box.

The aforesaid scheme would indicate the significance of symbol at an election. The respondents in their counter affidavit have stated as under:

- 5.1 A ballot paper has the name of contesting candidates printed on it and the voter has to record his vote for the candidate of his choice by placing the voting mark against the name of such candidate. The percentage of illiteracy being very high in the initial stages when India achieved independence, it would have been almost impossible for the vast majority of voters to mark their votes on the ballot papers with only the names of contesting candidates printed on the ballot papers. A system had, therefore, to be devised which was suitable to the Indian conditions and under which even illiterate voters could intelligently cast their votes in secret in favour of the candidates of their choice. The Election Commission thus devised the 'election symbol system'. Under this system, each contesting candidate is allotted a different election symbol which is printed along with his name on the ballot paper. The Commission decided that the election symbols should be such commonly known objects as are familiar to, and easily recognisable by, illiterate and ignorant voters and readily

distinguishable by them from each other and at the same time no object having any religious or sentimental associations should find place in the list of approved symbols".

The above pleading is in consonance with the observations of the Supreme Court in *Sadiq Ali v Election Commission of India (1)* in which it was observed as under:

" It is well known that overwhelming majority of the electorate are illiterate. It was realised that in view of the handicap of illiteracy, it might not be possible for the illiterate voters to cast their votes in favour of the candidates of their choice unless there was some pictorial representation on the ballot paper itself whereby such voters might identify the candidate of their choice. Symbols were accordingly brought into use. Symbols or emblems are not a peculiar feature of election law of India. In some countries, details in the form of letters of alphabet or numbers are added against the name of each candidate while in others, resort is made to symbols or emblems. The object is to ensure that the process of election is as genuine and fair as possible and that no elector should suffer from any handicap in casting his vote in favour of a candidate of his choice."

These observations have since been followed by the Supreme Court in *Roop Lal Sathi v Nachhattar Singh (2)*.

The Supreme Court also in the aforesaid two decisions has laid down that the Symbols Order, 1968 as also the provisions regarding allotment of symbols under Rule 10 of the 1961 Rules contain general directions of the Commission regarding allotment of symbols which have to be followed, and a Returning Officer while allotting symbols to different contesting candidates has to keep in view the general or the special directions of the Commission, so that the allotment of symbol may not be in contravention of the directions of the Commission as the allotment of symbol by the Returning Officer has always to operate subject to the general or special directions of the Commission.

Reverting now to the contention of the learned counsel for the appellants that the symbols "Scales" having been allotted to appellant No. 1 and its candidates in all previous elections should not have been withdrawn by the Commission from the list of free symbols for the State of Andhra Pradesh, it may be observed that the contention does not fall in line either with the statutory provisions discussed above or with the judgements of the Supreme Court in the case of *Sadiq Ali* (supra) and *Roop Lal Sathi* (supra).

At the risk of repeating ourselves, we may say that under the Symbols Order, 1968 a reserved symbol is a symbol reserved for a political party for exclusive use by that party, while a symbol other than the reserved symbol is treated a "free symbol". Political parties have been classified as "recognised political parties" and "unrecognised political parties". The recognised political

party is either a national party or a state party. The right therefore, if any, has been created only in favour of either the national party or the state party by making a specific provision in the Symbols Order, 1968 as also the 1961 Rules that the reserved symbol shall not be allotted to any other party or candidate and shall be allotted only to the recognised political party either of the state level or the national level, and to the candidates sponsored by those parties at the parliamentary or Assembly Elections. An unrecognised political party has no right to insist on the allotment of a particular symbol either to the party or to the candidates sponsored by it, as the party or the candidate sponsored by it have to be allotted a free symbol in accordance with the provisions of the Symbols Order, 1968 and the 1961 Rules, or any other statutory provision in that regard.

Filing of nominations, preparation of the list of contesting candidates, allotment of symbols, poll, casting of vote through ballot, counting of votes and the result of poll constitute different stages of Election either to Parliament or the State Assembly. Each stage or component is regulated by the constitutional provisions or the law made thereunder. The entire election machinery including the entire election process is controlled by the Commission under its power of superintendence etc., under Article 324. The common law right is at no stage involved.

It is well settled that in the matter of election there is no common law right involved; (see *N.P. Ponnuswamy v Returning Officer & Others* (3)). Right to elect and right to be elected are statutory rights and not common law rights. The election contest, as held by the Supreme Court in *Samant M Balakrishna v George Fernandez* is not an action at law or a suit in equity but is a purely statutory proceeding unknown to common law.

In *Jyoti Basu v Debi Ghosal* (5) it was laid down that a right to elect, fundamental though it is to democracy is, anomalously enough, neither a fundamental right nor a common law right, but is pure and simple statutory right. Concepts familiar to common law and equity must remain strangers to election law unless statutorily are embedded. It was further laid down that the entire election process commencing from the issuance of the Notification calling upon a constituency to elect member or members, right upto the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1961, different stages of the process being dealt with by different provisions of the Act; (see also *M Karunwnidhi v H.V.Hande* (6)).

The contention of the learned counsel for the appellants that the appellant No. 1 and the candidates intended to be set up by it at the forthcoming Assembly elections are entitled to be allotted "Scales" as a symbol as the said symbol was allotted to them in previous elections, cannot be accepted as no right has been created in favour of the appellants under the 1950 Act, or the 1951 Act or, for that matter, under any other statutory provision including the Rules made under the aforesaid Acts.

Learned counsel for the appellants next contended that in certain states, especially in Punjab and Pondicherry, the "Scales" symbol is still available for allotment to political parties and the

candidates set up by them, but this facility has been denied to the appellant No. 1 and its candidates in the State of Andhra Pradesh, as the "Scales" symbol has been withdrawn by the Commission from the list of free symbols with the result that it cannot be allotted to appellant No.1 or its candidates in the State of Andhra Pradesh where they intend to contest the Assembly elections. This, it is contended, constitutes a discriminatory attitude on the part of the Commission and is thus violative of Article 14 of the Constitution, inasmuch as the Commission has allowed the use of "Scales" as a symbol in other States but the same is not being allowed in the State of Andhra Pradesh. According to the notification issued by the Commission under para 17 of the Symbols Order, 1968, Shiromani Akali Dal, which is a political party in Punjab, has been recognised as a 'state party' and, therefore, it has been allotted a permanent symbol for elections in that state.

Appellant No.1, on the contrary, is an unrecognised, though registered, political party and is, therefore, not entitled to allotment of any symbol on a permanent or regular basis. There can, therefore, be no equation between appellant No. 1 and Shiromani Akali Dal of Punjab, as both are not similarly circumstanced. The plea of Art. 14 cannot, therefore, be invoked. It may be stated that in Pondicherry also the symbol has been withdrawn and is no longer available either as a permanent symbol to any party or as a free symbol as pleaded by the respondents.

Learned counsel for the appellants then assailed the order of the Commission on the ground that it is devoid of reasons. It is contended that every executive order must conform to certain standards, one of which is that it must contain reasons so that the person against whom the order is passed may know on what basis has the order been passed against him. With reference to the plea raised by the Commission on their counter-affidavit that the symbol "Scales" was withdrawn because of its being associated with judiciary, learned counsel for the appellants has contended that the inherent defect in the order cannot be cured by setting out reasons for passing that order in the counter-affidavit, as the reasons should have been set out in the order itself. It is also contended that it is one of the principles of natural justice that the person against whom an order is passed would be informed of the reasons why the order has been passed against him, and since the order passed by the Commission does not contain reasons, the same is liable to be set aside as being violative of the principles of natural justice. It is also contended that the Commission before withdrawing the symbol from the list of free symbols ought to have first issued a notice to the appellants, and this having not been done, the order passed by the Commission is liable to be quashed.

We have already referred to the constitutional and statutory provisions and the relevant Rules relating to election symbols. We have already held above that an unrecognised political party like appellant No. 1 has no right to be allotted a permanent symbol or the same symbol each time at every election. The candidate sponsored by it can be allotted only one of the free symbols from out of the list available for the state in which it proposes to contest the election. In this view of the matter, the contention that appellant No. 1 should have been given an opportunity of hearing by the Commission before withdrawal of "Scales" from the list of free symbols cannot be

accepted. A discussion of the factual position hereinbelow will also indicate that in the particular circumstances of the case, notice was not required to be given to the appellants. The absurdity of this argument will also be apparent from the fact that, if requirement of issuance of prior notice was adhered to as a legal requirement before the exercise of jurisdiction by the Commission for withdrawal of free symbol, notice would have to be issued to hundreds of unrecognised parties all over India or to their candidates to whom free symbols might have been allotted at one or the other time.

The symbol "Scales" which was available as one of the free symbols for the State of Andhra Pradesh was omitted from the list of free symbols with effect from 5.3.1991. This omission was made from the list of free symbols for all the states and Union territories. It is set out in the counter-affidavit that the appellant No. 1, vide their letter dated 18.4.1991 (Annexure R-II to the counter-affidavit) made a request to the commission that the symbol "Scales" may be included in the list of free symbols for the State of Andhra Pradesh to enable it to contest the General Election to the House of the People which was due to be called on 18.5.1991, but the Commission informed the appellant, vide its letter dated 20.4.1991 and, therefore, at that stage no symbol could be added in the list of free symbols. But appellant No. 1 again made a request on 25.4.1991 through their letter (copy whereof has been filed as Annexure R-IV to the counter-affidavit) for the inclusion of symbol "Scales" in the list of free symbols for the State of Andhra Pradesh on the ground that the Party, in anticipation of getting the said symbol for its candidates had already incurred a lot of expenditure on publicity etc., and some of its representatives also met the Chief Election Commissioner on 24.4.1991 and made a request for the inclusion of "Scales" in the list of free symbols for the State of Andhra Pradesh as a special case for the General Election then in progress. The Commission acceded to their request and decided to include "Scales" in the list of free symbols for the State of Andhra Pradesh as a special case for purposes of that General Election. Annexure R-V to the counter-affidavit is the letter of the Commission which was sent to the President of appellant No.1. The relevant portion of the letter is quoted below:

".....With reference to your letter dated 18th April, 1991 I am directed to inform you that the Commission has acceded to your request and the symbol "Scales" is being included in the list of free symbols for the State of Andhra Pradesh as a special case for the purposes of the present General Elections. Necessary notification in this behalf is being issued today separately....."

It is also pleaded in the counter-affidavit that a similar request for the inclusion of "Scales" in the list of free symbols for the State of West Bengal was also made to the Commission by two registered unrecognised political parties, namely, Democratic Socialist party, and West Bengal Socialist Party, and the Commission acceded to their request also and included "Scales" in the list of free symbols for West Bengal for that General Election.

Immediately after the elections to the House of the People, the Commission, vide its notification dated 16.4.1992 which was published in the Gazette of India and in the Official Gazettes of all

the States including the States of Andhra Pradesh and West Bengal, where the said symbol was included as a special case only for purposes of the said General Election, where the said symbol was included as a special case only for purposes of the said General Election, withdrew the symbol "Scales" from the list of free symbols. The petitioner-party (appellant No.1) was specifically informed about the said deletion by the Commission, by its letter dated 16.4.1992 contained in Annexure R-VI to the counter-affidavit; but the petitioner-party, namely, appellant No.1, made a request in its letter dated 17.4.1992 (Annexure R-VII to the counter-affidavit) for the restoration of "Scales" in the State of Andhra Pradesh and for its allotment to appellant No.1; but the Commission vide its letter dated 7.5.1991 (Annexure R-VIII) informed the petitioner (appellant No.1) that its request cannot be acceded to as it being an unrecognised registered party had no claim for any free symbol and, therefore, "Scales" which had already been withdrawn from the list of free symbols could not be allotted to it on regular basis.

From the above it would be apparent that "Scales" had already been withdrawn from the list of free symbols in 1991 and was restored as free symbol only for purposes of General Election held in that year to constitute a new House of the People only at the request of appellant No 1 who, in anticipation of the symbol being allotted to its candidates, had already incurred huge expenditure on publicity etc.

Appellant No.1 itself wanted restoration of "Scales" as a free symbol for the State of Andhra Pradesh as a special case in 1991. Immediately after the General Elections, when the Commission withdrew "Scales" from the list of free symbols vide its letter dated 16.4.1992, a copy whereof was also sent to the president of appellant the latter, namely, the president, vide his letter dated 27.4.1992 wrote to the Commission for the restoration of that symbol on the ground that this request for allocation of this symbol on regular basis was pending with the Commission. The Commission, however, rejected the request vide its letter dated 7.5.1992. It was thereafter that the President of A.I.M.I.M. wrote to the Chief Electoral Office, Andhra Pradesh, Hyderabad, on 22.11.1993 as under:

".....You are aware of the fact that the election commission of India has deleted Scales Symbol during the Parliament elections and for all practical purposes it seems this symbol will not be included in the free symbol list.

The M.I.M. party has been allotted and using the scale symbol since last several years and on account of deletion of this symbols the party deprived of its traditionally popular election symbols.

I would like to know from you whether is there any possibility of re-inclusion of the symbol in list of free symbols and if so I wish you to consider allotment of the same in favour of our party. In case there existed no such proposals I request you to consider and recommend allotment of any free symbol exclusively for our party in view of the next Assembly Election and in this connection I further

request that you may kindly provide us with the free symbol lists as approved by the Election Commission of India to enable us to choose one among several such symbols.

I need not mention here that the All India Majlis Ittehad Muslimeen has been accepted and registered as a political party and therefore a common symbol of our choice require to be provided to our party. I earnestly hope that this representation received your immediate favourable action.

Thanking you in anticipation".

This was replied to by the Chief Election Office on 16.12.93 as under:

"....I am directed to enclose a list of free symbols allotted to Andhra Pradesh State as desired in the reference cited. With regard to allotment of a specific symbol to your party I am to state that powers are vested with Election Commission of India, New Delhi, vide para 17 of the Election Symbols (Reservation and Allotment) Order, 1968. As the Election Commission of India has listed the All India Majlis-E-Ittehad-Ul-Muslimeen as a registered unrecognised political party, it is not entitled to a reserved symbol.....".

The facts stated above would indicate that the appellants had full knowledge of the withdrawal of "Scales" from the list of free symbols. They knew it in 1991 that this symbol had been withdrawn, and they also knew it that it was restored only on their request as a special case for the General Elections held in that year. They further knew it that the symbol be withdrawn after the elections in 1991. The Commission did withdraw the symbol on 16.4.1992 and the appellant No.1 was informed of it. In this situation therefore, it cannot be legally insisted on behalf of the appellants that notice of withdrawal should first have been issued to them before actually withdrawing the symbol from the list of free symbols, or that reasons for its withdrawal should have been indicated in the order by which their application for allotting the symbol on a permanent basis was rejected by the Commission.

Learned counsel for the appellants then adverted to the counter-affidavit and contended that the order by which application for allotment of "Scales" as a permanent symbol to appellant No. 1 was rejected by the Commission, does not contain any reason, and the defect in the order is sought to be cured by reasons set out in the counter-affidavit which procedure is not permissible under law as the reasons should have been disclosed in the order itself. He has in this connection placed reliance on *Mohimder Singh Gill v Chief Election Commission* (7), in which it was laid down:

"When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented

by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out..."

The appellants had written to the Election Commission for allotment of symbol "Scales" to them on a permanent basis. Their application was rejected by the Commission on the ground that this symbol could not be allotted to them on permanent basis as theirs was only an unrecognised political party which was not entitled to allotted any symbol on permanent basis. The order, therefore, does contain a reason. The decision of the Supreme Court referred to above cannot, therefore, be pressed in aid.

Learned counsel for the appellants drew our attention to the application of the President of appellant No.1 dated 27.4.1992 (Annexure VII to the counter-affidavit), and contended on the basis of the last paragraph that application that a request was made to the Commission for restoration of "Scales" for the State of Andhra Pradesh, but the Commission by its reply dated 27.5.1992 did not, while rejecting the request for allotment of "Scales" on a regular basis, say a word about restoration of the symbol. The last paragraph of the letter of the President of appellant No. 1 written to the Commission on 27.4.1992, is quoted below:

".....As a time when our petition for allocation of this symbol on regular basis, is pending with the Commission and we have presented a letter in this connection on 19.4.1992 for consideration, it is earnestly hoped that the symbol of "Scales" shall be restored in respect in the State of Andhra Pradesh and in favour of A.I.M.I.M. Party.....".

This would indicate that there was an application of appellant No.1 pending with the Commission for allotment of "Scales" as a symbol to it on a regular basis and that, pending disposal of that application, a hope was expressed that "Scales" as a symbol to it on regular basis would be restored in Andhra Pradesh in favour of appellant No.1. It was, therefore, not a mere request for restoration of "Scales" as a symbol in the list of free symbols, but a request for restoration of that symbol in favour of appellant No.1 pending disposal of its application for allotment of that symbol on regular basis. The Commission's reply dated 27.5.1992, in our opinion, disposes of both the prayers. It categorically says that appellant No.1 was an unrecognised registered party and had no claim for any free symbol and, therefore, the question of allotting "Scales" to this party on a regular basis did not arise. Restoration of "Scales" as a symbol in its favour was sought by appellant No.1, pending disposal of its application for allotment of that symbol on a regular basis. Restoration was, therefore, sought as an interim measure. Once the application for allotment of this symbol on a regular basis was rejected, there was no occasion to consider the request for restoration of this symbol in favour of appellant No. 1 pending disposal of its application. In any case, learned counsel appearing on behalf of the Commission had placed before us the relevant extracts of the official record to indicate that the reasons set out in the counter-affidavit for withdrawal of "Scales" as a symbol from the list of free symbols were also

contained on the original letter, and the "Scales" was withdrawn for the reason that it was synonymous with justice and judiciary and, therefore, it should not be made available to any political party for being used as a symbol at the time of General Elections.

It would thus be seen that in the counter-affidavit respondents had not invented fresh reasons, but they had merely pleaded the "reasons" which were already contained on the original file.

The appellants' counsel then contended that the reason for withdrawal of "Scales" from the list of free symbols was not reasonable, just and proper as "Scales" is associated with many trades and commercial activities and its use cannot be attributed only to justice and judiciary. It is contended that, if the reason is to be bad, the withdrawal, as a necessary consequence, would also become bad. It is pointed out that persons dealing in general merchandise or other commercial goods, or persons involved in various trades have always have to use "Scales" and, therefore, "Scales" being exclusively associated with justice or judiciary cannot be said to be correct.

It may be pointed out that "Scales" from times immemorial is regarded as a symbol and attribute of justice. This is how one speaks of holding the scales even to emphasise the idea of impartiality. An insight into the origin of this concept would reveal that **Libra**, a constellation of the **Zodiac**, is portrayed as holding a scale and the term "**Libra**" is synonymous with the symbols "Balance". In Encyclopedia Britannica, Vol. VI 15th Edition, "Libra" is described as under:

"Libra or the Balance in astronomy is a constellation of the Zodiac. In Astrology, Libra is the seventh sign of the Zodiac. It is represented by a woman (sometimes identified with Astraea, the Roman Goddess of justice) holding a balance scale".

The Oxford English Dictionary, Third Edition, Vol.II, describes "Scales" as the sign of Libra. It also quotes from Shakespeare the following lines:

"Your vows to her, and me (put in two scales). Will even weigh and both as light as tales".

In view of the above, the contention of the learned counsel for the appellants that "Scales" cannot be said to have any association with justice or judiciary, is wrong. The reasons adopted by the Commission for the withdrawal of the symbol "Scales" from the list of free symbols cannot, therefore, be said to be irrelevant.

In view of the above, we find no merits in this appeal. It is, accordingly, dismissed, and the order passed by the learned Single Judge is upheld with the observation that it would be open to the appellants to approach the Election Commission of India for reconsideration of its decision to delete the symbol "Scales" from the list of free symbols and for its restoration for the Assembly elections in the State of Andhra Pradesh proposed to be held in 1994. If such a representation

Chief Justice

is filed, the Election Commission of India, it is expected, will dispose of it with utmost expedition.

No order as to costs.

27.11.1994

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

(CIVIL WRIT JURISDICTION)

CIVIL WRIT PETITION NO. 4091 OF 1993

Shiromani Akali Dal (Simranjit Singh Mann) through its President S. Simranjit Singh Mann,
Office S.C.O. 152, Sector 26, Chandigarh.

.....Petitioner

versus

Election Commission of India through its Secretary, Nirvachan Sadan, New Delhi.

.....Respondent

Before

A.L. Bahari, J, Ashok Bhan, J and G.C. Gorg J.

Election Symbols – De-recognition of political party – validity of order of Election Commission withdrawing recognition of party.

Background facts:

Two writ petitions filed by two political parties, (i) Shiromani Akali Dal (Sunranji Singh Mann) and (ii) Shiromani Akali Dal (Badal) were admitted to be heard by the Full Bench, as common substantial questions of law are involved therein. The grant of interim relief encountered a difference of opinion and the matter was referred to another judge. The Full Bench took the view that that Court was not concerned with the issues relating to the grant of interim relief of postponing the elections.

The petitioner party was de-recognised by an order dated 20 November 1992 passed by the Deputy Election Commission under the provisions of Election symbols (Reservation and Allotment) Order, 1968, with the further direction that the part (facts taken from petition filed by Shiromani Akali Dal (Simranjit Singh Mann) should not be entitled to the exclusive use of the symbol "Lion: earlier reserved for it in the State of Punjab. The said political party was to be treated as unrecognised until its poll performance was again reviewed at the next general election.

The petitioners questioned the validity of the order. They also alleged that the order was not duly served in the proceedings and that amounts to violation of the principles of natural justice.

Held

That the impugned orders de-recognising the petitioners – political parties in the two cases were valid and in accordance with law.

Cases cited in the Judgement

Kanhiya Lal Omar v R.K. Tivedi & others (1986) AIR SC 111

Sadiq Ali v Election Commission of India (1972) AIR SC 187

Mohinder Singh Gill v Chief Election Commissioner (1978) AIR SC 851

A.C. Jose v Sivan Pillai (1984) AIR SC 921

A.K. Roy v Union of India & Another (1982) AIR SC 710

M/s Girdhari Lal & Sons v Balbir Nath Mother & Others (1986) AIR SC 1499

Asif Hameed & Others v State of Jammu and Kashmir & Others (1989) AIR SC 1899

N.P. Ponnuswami v The Returning Officer, Namakhal Constituency (1952) AIR SC 64

Election Commission of India v Shivaji and Others (1988) AIR SC 61

Porkash Singh Badal & Others v Union of India & Others (1987) AIR Punjab & Haryana 263

Civil Writ Petition under Article 226 of the Constitution of India praying that:

- (i) need for advance notices may please be dispensed with;
- (ii) operation of the impugned order whereby petitioner party has been de-recognised may please be stayed;
- (iii) need for certified copy of Annexure may also be dispensed with;
- (iv) issue writ of certiorari or any other writ, order or direction as this honourable Court may deem fit, quashing the impugned order Annexure P-1 whereby the petitioner party has been de-recognised and paras 6 and 7 of the Election Symbols (Reservation and Allotment order, 1968 as ultra vires of the Constitution of India.

And for this, the petitioner as duty bound shall ever pray.

C.W.P. NO.4091 OF 1993

(This Writ Petition was considered by the Division Bench consisting of Hon. Mr. Justice Nmarjeet Chaudhary and Hon. Mr. Justice N.K.Sodhi. Finding an important question of law involved in the case, their Lordships observed vide separate orders dated 29.4.1993 that the petition be admitted to be admitted to Full Bench for disposal. Their Lordships also expressed difference of opinion on the point of interim relief and dictated two separate orders. The petition was then laid before Hon. The Chief Justice for appropriate orders. Under the Orders dated 29.4.1993 of Hon. the Chief Justice, the case was referred to the third Hon. Judge, Hon. Mr. Justice M.S. Liberhan. Hon. Mr. Justice M.S. Liberhan vide order dated 3 May, 1993 disagreed with the opinion expressed by Hon. Mr. Justice N.K.Sodhi. Finally, the case was decided by the Full Bench which was constituted of Hon. Mr. Justice A.L. Bahri, Hon. Mr. Justice Ashok Bhan and Hon. Mr. Justice G.C.Carg vide judgement dated 8th September, 1993).

Dated the 8th September, 1993

PRESENT

THE HON. MR.JUSTICE A.L.BAHRI

THE HON. MR. JUSTICE ASHOK BHAN

THE HON. MR. JUSTICE G.C. GARG

For the petitioner: Mr. Ranjan Lakhanpal, Advocate

For the respondent: Mr G.K. Chatrath, Sr. Advocate with

Shri Vikrant Sharma, Miss Anu Chatrath, Miss Alka Chatrath,

Mr. Sushant Maini and Mr. Adarsh Malik, Advocates.

Dated the 29th April, 1993.

PRESENT
THE HON. MR. JUSTICE AMARJEET CHAUDHARY
THE HON. MR. JUSTICE N. K. SODHI

For the petitioner: Mr. G.K. Chatrath, Sr. Advocate
(Ms. Alka Chatrath, Ms. Anu Chatrath and Mr. Sushant Maini,
Advocates with him)
for the respondent

Dated the 3rd May, 1993

PRESENT
THE HON. MR JUSTICE M. S. LIBERHAN

For the petitioner: Mr. Ranjan Lakhanpal, Advocate
For the respondent: Mr G.K. Chatrath, Sr. Advocate
(Ms. Alka Chatrath, Ms. Anu Chatrath and Mr. Sushant Maini,
Advocates with him)
for the respondent

(Judgement of Division Bench Consisting of Hon. Mr. Justice Amarjoet Chauhary and Hon. Mr. Justice N. K. Sodhi dated 29.4.1993)

Amarjseet Chaudhary, J

ORDER

The Shiromany Akali Party (M' was recognised as a state party in Punjab under the provisions of the Election Symbols (Reservation and Allotment) Order, 1968. A political party as a national party or state party is governed by paragraphs 6 and 7 of the Election Symbols Order. The petitioner-party was de-recognised and reasons for de-recognition are that the party failed to secure 4 per cent of the valid votes in the Parliamentary/Legislative Assembly Elections which is in existence and is functioning. The petitioner-party did not challenge the impugned order dated 20.11.1992. However, notifications for holding parliamentary election to the Jalandhar parliamentary seat was issued on 19.4.1993. On the said date, election programme was also notified. The petitioner filed the writ petition subsequent to the issuance of the notification seeking direction for quashing the impugned order and also for declaring the Constitution of India, and have prayed that the party be permitted to contest as a political party.

On notice, the respondent has put in appearance and filed a detailed written statement. We have heard the learned counsel for the parties.

On consideration of the matter, we find that in this writ petition substantial questions of law are involved which deserve consideration. As such, the writ petition is admitted to Full Bench for 11.5.1993.

The case be posted for hearing on 11.5.1993 after obtaining appropriate orders from Hon. the Chief Justice.

Meanwhile, we are not inclined to stay the operation of the impugned order in toto as that would virtually amount to allowing the write petition. However, the petitioner-party may contest the election as a Political Party on any Symbol other than 'Lion'. The interim order dated 22.4.1993 passed by this Court is modified to that extent.

It is a settled principle of law that once the election process is set in motion, the High Court under Article 226 of the Constitution of India, shall not invoke its extra-ordinary jurisdiction to pass any interim order.

sd/-Amarjeet Dhaudhary
Judge

29.4.1991

ORDER

I agree that important questions of law are involved in this petition and that the same be admitted and heard by a Full Bench.

As regards the prayer for interim relief, I do not agree with the order proposed by my learned brother. It is a common case of the parties that the petitioner before us did not participate in the last general elections held in February, 1992 in the State of Punjab. As at present advised, I am *prima facie* of the view that a party which did not participate in the last general elections cannot be de-recognised under the provisions of para 6 of the Elections Symbols (Reservation and Allotment) Order, 1968 as the said order does not provide for such a situation. I also do not agree with the contention of the learned Advocate General, Punjab that by staying the operation of the impugned order this Court would be interfering in the election process in regard to the Jalandhar Parliamentary Constituency which has already commenced. Accordingly, I directed that the operation of the impugned order passed by the respondent shall remain stayed during the pendency of the petition. The interim order dated 22 April, 1993 stands superseded.

sd/-N.K. Sodhi
Judge

April 29, 1993

Difference of Opinion

Since there is difference of opinion, this writ petition be put up before Hon. Chief Justice for appropriate orders today.

sd/-Amarjeet Chaudhary
Judge

sd/-N.K.Sodhi
Judge

29.4.1993

(Judgement of Hon. Mr. Justice M.S. Liberhan dated 3.5.1993)

M. S. Liberhan J

ORDER

This is a matter which has arisen in the course of proceedings under Article 226 of the Constitution of India in Civil Writ petitions 4091 of 1993 and 4587 of 1993.

In substance, the allegations and grounds of challenge of the impugned order of the Election Commission dated 20.11.1992, withdrawing – recognition as a state party are the same.

Shiromani Akali Dal (Mann Group) as well as Shiromani Akali Dal (Badal Group) were treated recognised political parties for the State of Punjab provisionally and each of them was allotted reserved symbols under Section 29-A of the Representation of People Act, 1951.

It was for a limited purpose, viz. for contesting the general elections to Lok Sabha and the by-election to the Legislative Assembly and notification in this regard was issued on 19.4.1991. On 20.11.1992 the Election Commission withdrew the recognition as political parties in the State, with respect to both the parties. On 19.4.1993, notification for 4-Jalandhar Parliamentary seat was issued, calling upon to elect a member of Parliament. The Election Commission fixed the following programme vide the aforesaid notification:

- (a) the 26th April, 1993 (Monday, as the last for making nominations);
- (b) the 27th April, 1993 (Tuesday) as the date for the scrutiny of nominations;
- (c) the 29th April, 1993 (Thursday), as the last date for withdrawal of candidatures;
- (d) the 19th May, 1993 (Wednesday) as the date on which the poll shall, if necessary, be taken, and;
- (e) the 24th May, 1993 (Monday) as the date before which the election shall be completed.

In civil writ 4091 of 1993 of Shiromani Akali Dal (Mann Group) on 24.4.1993 notice of motion for 26.4.1993 was issued. Further, the respondents were directed to allot the symbol of 'lion' for the purpose of by-election to the Parliamentary Constituency of Jalandhar. Similarly, in civil writ 4587 of 1993 of Shiromani Akali Dal (Badal Group) notice of motion for 29.4.1993 was issued. It was further observed as under:

"The petitioner may file his nomination papers as a member of recognised party. This order will, however, be subject to the final decision of the writ petition. Orders be given dasti."

On the 29.4.1993, when both the writ petitions came up for preliminary hearing, the Hon. Division Bench observed as follows:

"On the consideration of the matter, we find that in this writ petition substantial questions of law involved which deserve consideration. As such, the writ petition is admitted to Full Bench for 11.5.1993."

So far, the interim prayer for stay of the operation of the impugned order, Hon. Justice Amarjeet Chaudhary, J observed:

"Meanwhile we are not inclined to stay the operation of the impugned order in toto as that would virtually amount to allowing the writ petition. However, petitioner party may contest the election as the political party on any symbol other than 'Lion'. The interim order dated 22.4.1993 passed by this Court is modified to that extent.

It is settled principle of law that once election process is set in motion, the High Court under Article 226 of the Constitution of India, shall not invoke its extra ordinary jurisdiction to pass any interim order."

Observation made by brother N. K. Sodhi J, with regard to the interim stay are as under:

"As regards the prayer for interim relief, I do not agree with the order proposed by my learned brother. It is common case of the parties that the petitioner before us did not participate in the last general elections held in February 1992 in the State of Punjab. As at present advised, I am prima facie of the view that the party which did not participate in that last general elections cannot be de-recognised under the provisions of para 6 of the Elections Symbols (Reservation and Allotment) Order, 1968 as the said order does not provide for such a situation. I also do not agree with the contention of the learned Advocate General, Punjab that by staying the operation of the impugned order this Court would be interfering in the election process in regard to Jalandhar Parliamentary Constituency which has already commenced. Accordingly, I direct that operation of the impugned order passed by the respondent shall remain stayed during the pendency of the petition. The interim order dated April 22, 1993 stands superseded."

Similarly, in civil writ 4587 of 1993, the party was allowed to contest the election as a recognised political party in the state but not on a symbol of 'Bow and Arrow'. While Hon. Justice N. K. Sodhi J, as observed in the earlier petition, stayed the operation of the impugned order passed by the Election Commission dated 20.11.1992 and thus modified the orders earlier passed on 22.4.1993 as well as on 26.4.1993.

In view of the above circumstances and on account of difference of opinion with respect to stay regarding operation of the impugned order, the matter has been placed before me, under the orders of Hon. the Chief Justice.

I have heard the learned counsel for the parties at length.

Substantially, as the ground of challenge to the order dated 20.11.1992 withdrawing recognition to the political parties in the state, is that clause 6 of the Election Symbols (Reservation and Allotment) Order, 1968 suffers from insufficiency in dealing with the present situation, i.e. when a recognised political party in a state boycotts the election or does not contest the prior election, could its recognition as a political party in the state can be withdrawn for the purpose of the symbol order; the order dated 20.11.1992 is against the principles of democratic value; and the impugned order was passed in violation of principles of natural justice. Further reference to the *vires* of Order 6 of the symbol order was made.

It is conceded by the learned counsel for the parties that the petitioners to the writ petitions did not contest the last parliamentary or assembly elections held in 1992. They have not got a single member representing their parties either in the Parliamentary or in the Assembly of the State of Punjab. Neither of the parties has secured the requisite number of votes as envisaged by para 6 of the Symbols Order in the last Assembly elections.

Learned counsel for the Election Commission of India refuted the grounds of challenge and in the course of arguments argued that in view of the provisions of Articles 324 read with Article 329 of the Constitution of India, this Court cannot go into the question of legality or illegality of the order of the Election Commission withdrawing the recognition of a political party in the state. The *vires* of the symbols order were upheld by the Supreme Court. The impugned order dated 20.11.1992 being by a quasi-judicial tribunal, no writ petition is maintainable.

In order to support his contentions, the learned counsel for the respondent, relied upon *The Elections Commission of India v Shivaji and Others* AIR 1988 S.C.61; *Jyoti Basu and Others v Debi Ghosal and Others* AIR 1982 S.C. 983; *Rama Kant Pandey v Union of India* JT 1993(1) S.C.440; *N.P. Ponnuswami v The Returning Officer Namakkal Salem Distt. & Others* AIR 1952 S.C.64; *Kanhiya Lal Omar v R.K. Trivedi and Others* AIR 1986 S.C. 111; *Samanath Lal v The Chief Election Commissioner and Others* 78 E.L. 1; *S.T. Muthusami v K Natarajan and Others* AIR 1988 S.C. 616; *Nanhoo Mal and Others v Hira Mal and Others*, AIR 1975 S.C. 2140; *Malam Singh v The Collector Sehora, M.P and Others* AIR 1971 M.P.195; *The Republic Party of India*

v The Election Commission of India 54 ELR 141; *Mohd. Yunus Saleem v Shivkumar Shastri and Others* AIR 1974 S.C. 1218 and Civil writ petition 6390 of 1991 (*Gurtej Singh etc. v Union of India etc.*) decided on 6.6.1991.

It has become jurisprudentially and precedently an established axiom in election law, it is not an action at law or a suit in equity. These are statutory proceedings, unknown to common law. The Courts possess no common law powers. No general or equitable considerations can be imported into election proceedings or law. The statutory requirement of election law must be strictly observed. It is not an ordinary law between the private parties. Right to contest, right to vote and right to challenge an election are not common law rights. They are creations of the Statute which confers limits on these rights. These rights can be exercised and enforced in accordance with the provisions of law.

The Representation of People Act is a completed Code and election can be challenged in accordance with it. Election as understood and envisaged by the Act, includes all proceedings upto the declaration of result. An Act which is not allowed to be directly carried out should not be allowed to be carried out indirectly.

It may further be observed that when there are specific provisions for doing certain things in a particular manner, then doing it in any other mode or substantial compliance is excluded.

In a democracy, and for that matter in an election, perennial vigilance should be the watchword for all. If appropriate action was not taken at an appropriate time, in accordance with the provisions of election law which is envisaged to be construed strictly, irrespective of immediate or mediate consequences discretionary indulgence cannot be sought later. References may be made to *Nripandra Bahadur Singh v Jai Rah Verma and Others* AIR 1977 S.C. 1192. It is again a sound principle that in public interest the sword of Damocles should not be kept hanging and in election matters orders should attain finality in order to attain certainty, at the earliest.

Courts are debarred from interpreting the election law in their own terms and give effect to in spite of the fact that election law is full of anomalies.

Keeping the above principles in view, the undisputed factual position that emerges is that the petitioner was provisionally recognised and registered as a political party in the state as such. Recognition was withdrawn *vide* order dated 20.11.1992, which fact was in the knowledge of the petitioner. In case of *Shiromani Akali Dal (Badal)*, it averred that no opportunity of hearing was granted, which is not so in the case of *Shiromani Akali Dal (Mann)*. It is accepted that before the order dated 20.11.1992 was passed, an appropriate hearing was granted. There was no challenge to the withdrawal of recognition of the parties right up to 19.4.1993 when the constituency was called upon to elect a member to parliament. Under Symbols Order 1968, recognised national political parties and state political parties have reserved symbols which are notified. Similarly, for others, large number of free symbols are notified. The symbols 'Bow

and Arrow' or 'Lion' do not find mention in the notified symbols, i.e. either in reserved symbols list or in free symbols for the State of Punjab as notified on 7.1.1993. The petitioners are registered unrecognised political parties and are thus entitled to a symbol of their choice in preference to the independent candidates out of the free symbols notified under the Symbols Order, 1968. I may venture to observe that issuance of notification prescribing symbols either for recognised political parties at national or state level or free symbols for others is a step in the conduct of an election which is within the sole purview of the Election Commission as provided by Article 324 of the Constitution of India. Courts cannot in exercise of writ jurisdiction *prima facie*, issue a mandate of allotting particular symbols to the particular parties particularly when it has been notified by the Election Commission of India. Going through the Conduct of Election Rules 1961, the Representation of People Act, 1951 and Articles 324 to 329 of the Constitution, I am of the considered view that, irrespective of the fact that the petitioner failed to assert and show either by a judgement or by anything else, nor I am aware of, to persuade me that he has a vested right enforceable in law to get a particular symbol. The petitioner has no right or interest in a specific symbol reserved for recognised political party in the state whose recognition was withdrawn by the Election Commission *vide* its order dated 20.11.1992, particularly when the order of withdrawal of recognition has come into operation and remained operative for almost four months. Staying the operation of the order would be putting the clock back and granting to the petitioner indirectly what he could not claim directly.

The contention of the learned counsel for the petitioner that no body will suffer if the particular symbol demanded by the petitioner is allotted for the Jalandhar Parliamentary Constituency, is to be noted and rejected. I may observe if the contention is taken to be correct, then counter-contention that the petitioner would also not suffer in any manner if he contests the election on any other symbol. Consideration of merits and demerits, of consequences of allotment of symbol or declining it, is for the Election Commission. Ordinarily, courts would refrain from substituting its view on Election Commission, unless some patent perversity in the order is made out.

The judgements cited by the learned counsel for their respondent are mostly with respect to the effect of Article 324 to 329 of the Constitution, which will be taken note of at the time of final hearing of the writ petition. *Prima facie* interfering or giving any direction directly or indirectly for allotment of symbols would amount to interference in elections which had already commenced with effect from 19. 4. 1993.

I may venture to observe that the order of recognition or withdrawal of recognition of political parties cannot be looked upon in isolation. It is one of the steps in the conduct of election by the Election Commission. The fact that the by-election to 4 Jalandhar Parliamentary Constituency having been notified during the operation of order of de-recognition cannot be considered insignificant.

At the fag end of the arguments, the learned counsel for the petitioner vehemently contended relying upon, *Capt. Chanan Singh Sighu v Election Commission of India and Others 1992(2)*

P.L.R.12; Shri Kihoto Hollohan v Shri Zachillhu and Others J.T.1992 (1) S.C 600; and A.C. Jose v Sivan Pillai and Others AIR 1984 S.C.921, that symbol is an identity and since it already stands established, the petitioner should be granted the said symbols. The stay of the operation of the impugned order would neither affect nor would be prejudicial to any body. In my considered view, merely that a particular act would not act prejudicial to any body *per se*, in itself is not sufficient to grant an injunction or stay. In election law which is a statutory law, equity and prejudice have no place. When the Statute itself has not taken care of a particular situation, ordinarily Courts would not attempt to provide for the same. There is no gain saying that symbol is an identity, yet it was within the jurisdiction of the Election Commission to withdraw the recognition of the parties, if they do not conform to the prerequisites envisaged by para 6 of the Symbols Order. An order of competent jurisdiction is presumed to be just and in accordance with law unless shown to be otherwise. No patent error, either with respect to lack of jurisdiction or impropriety, has been pointed out except that the symbol order has not contemplated the situation of non-participation of registered and recognised political parties in any preceding election which may be an anomaly and it is for the competent authority to remove this anomaly and not for the Courts to legislate. It was observed by the Hon. Supreme Court in catena of authorities that election law is full of anomalies and it for the Legislature to remove them.

In view of the observations made above, I agree with the view taken by brother Amarjeet Chauhary J to the effect that the petitioner in pith and substance can contest the election as a political party by choosing any symbol notified by the Election Commission, with due deference, to the order of brother N. K. Sodhi J taking a contrary view, with which with respect, I do not agree, I may hasten to add that subscribing to the view would amount to interfering in the exercise of jurisdiction of the Election Commission in the conduct of the election, particularly when during the operation of the order of the withdrawal of recognition, the elections have been notified. It may be made clear that the orders dated 22.4.1992 and 26.4.1993 though having already been superseded by the order of Division Bench admitting the petition, shall stand modified in terms of order passed by Hon. Amarjeet Chaudhary J, i.e. petitioner parties in the two writ petitions may contest the election on any symbol other than symbol of 'Lion' or 'Bow and Arrow' which have been withdrawn in view of the impugned order and further not notified as symbols in the notification specifying the symbols.

I may hasten to add that the Election Commission will be at liberty to pass any appropriate order in the interest of the general public or for furtherance of the strengthening of the democratic system.

sd/-M.S.Liberhan
Judge

May 3, 1993

(Judgement of Full Bench consisting of Hon. Mr Justice G. C.Garg dated the 8th September, 1993)

JUDGEMENT**A. L. Bahri, J**

Two writ petitions filed by two political parties (i) Shiromani Akali Dal (Simranjit Singh Mann) (CWP No. 4991 of 1993) and (ii) Shiromani Akali Dal (Badal) (C.W.P. No. 4587 of 1993), were admitted to be heard by the Full Bench, as common substantial questions of law are involved therein.

With respect to grant of interim relief there was a difference of opinion that the matter was referred to another Judge. Now at the final hearing we are not concerned with the issues relating to the grant of interim relief of postponing the elections.

The broad facts are taken from C.W.P. No. 4091 of 1993 filed by Shiromani Akali Dal (Simranjit Singh Mann). The petitioner-party was de-recognised vide order dated 20 November, 1992, passed by Deputy Election Commissioner under the provisions of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter to be referred to as the 'Symbols Order') with the further direction that the aforesaid party shall not be entitled to the exclusive use of Symbol "Lion" earlier reserved for it in the State of Punjab. The said political party was to be treated as un-recognised till its poll performance is again reviewed at the next general election as and when held. The poll performance of this political party in the last general elections held in February 1992 was held to be nil. In the other writ petition filed by Shiromani Akali Dal (Badal) order to the same effect was passed by the Deputy Election Commissioner on 20 November, 1992. In this case, apart from validity of the aforesaid order being challenged on the common ground, another ground is also put forth that the order was passed in violation of the principles of natural justice as no notice of hearing was given to the petitioner. The petitioner as per allegations was not duly served in the proceedings.

In order to focus the controversial point raised in the petition, reference was made to the background which led the aforesaid political parties to boycott the election, the result of which was considered by the respondent-Election Commissioner as nil performance. These political parties, as per allegations, were participating in the assembly elections in the State of Punjab which were to be held in June, 1991. During the process of electioneering about 30 candidates were killed. At the last moment, when only polling was to take place and the electioneering had officially come to an end, the election was cancelled. The reason for cancellation imputed in the aforesaid petitions was that the Congress Party had come to power at the Centre and since that Party was not participating in the Punjab Elections, the same was postponed and to be held in February 1992. By February 1992 there was no change in the Punjab situation except that the Congress Party had decided to participate in the elections. Since no assurance was given that the elections would be eventually held if the petitioner-parties would participate, the petitioner-parties boycotted the elections hoping that such elections would not be held for their non-participation. In this manner the people of Punjab were treated like dirt in the elections which were to be held

in June, 1991 and which were cancelled by the Centre. Hence, there was no reason for the petitioner political parties to contest the elections scheduled for February 1992, and to be made fools of again. In the elections which were held in February 1992, eighty per cent of the voters abstained from voting. Thus, how could a mandate of 20 per cent outweigh decision of 80 per cent? The total election was rigged a farce and sham. The performance of the political parties, like the petitioners, on the basis of such election was not valid. The provisions of paragraphs 6 and 7 of the Symbol Order were pleaded to be bad and void, being insufficient, as it was not contemplated that such a situation would arise that the political party/parties would abstain from participating in the elections. By postponing the elections fixed in June 1991, the people of Punjab were taken for a ride. In that process several candidates were killed, crores of rupees were spent for nothing.

Written statements have been filed in the two writ petitions aforesaid on behalf of the election Commission of India. The respondent strongly contested the petitions. All the allegations levelled in the petitions have been denied. With respect to the order postponing the election in June, 1991, it was stated that the aforesaid order was challenged in the Apex Court unsuccessfully. The provisions of the Symbol Order of 1968 were held to be valid by the Apex Court. Such provisions were not bad on the ground of insufficiency. The election law, including the provisions of the Symbol Order, 1968, visualised the situation/situations where the political parties once recognised could be re-recognised if they had failed to secure a minimum number of seats or votes, in the general elections as prescribed.

The main question which has been debated on behalf of the petitioners is formulated as under:

"The provisions of the Symbol Order of 1968 did not visualise a situation where one or more recognised political parties would boycott the elections or in other words would not participate in the elections and on that ground alone such political parties could not be de-recognised. There should have been provision in the Symbol Order, 1968 by way of Exception or Proviso that if for certain valid reasons a Political Party or Parties did not participate in the elections, they would not be de-recognised."

Shri Ranjan Lakhanpal and Shri H.S. Mattewal, learned counsel, appearing on behalf of the petitioners, have vehemently argued that a peculiar situation existed when suddenly on the day the elections were to be held in June 1991 that the same were postponed, as a day earlier the Congress Party came into power in the Centre. Since the Congress Party was not participating in the elections in the State of Punjab, the elections were got postponed. In this manner the people of Punjab were cheated. Such were the valid reasons for the petitioners-political parties to boycott the elections subsequently announced. In order to appreciate the legal arguments arising from such submissions it is necessary to refer to the provisions of the Constitution, the Representation of the People Act, 1951, and the Symbol Order of 1968. The Election Commission is constitutional entity. Chapter XV of the Constitution specifically deals with the

subject of elections. Under Article 324, superintendence, direction and control of the preparation of the electoral rolls and the conduct of all elections to Parliament and to the Legislature of the states and also of the offices of President and Vice-President is to vest in an Election Commission. Such Commission is constituted under Article 324 (2). The Chief Election Commission is to act as Chairman of the Election Commission. After consultation with the Election Commission by the President, Regional Commissioners are also appointed to assist the Election Commission. Articles 325 and 326 refer to the preparation of electoral rolls. Under Article 327 the Parliament is empowered to make laws from time to time with respect to all matters relating to or in connection with the elections to either House of the Parliament or either House of Legislature of a State. Such matters on which law can be made include preparation of electoral rolls, the delimitations of constituencies or other matters necessary for securing due constitution of House of Houses. The State Government can also make such laws in connection with the elections to the House or House of the Legislature of the State, under Article 328. Article 329 bars jurisdiction of the Courts in election matters and it reads as under:

"329: Bar to interference by courts in electoral matters:- Notwithstanding anything in this Constitution:-

- (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;
- (b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

The aforesaid provisions of the Constitution clearly indicate the powers of the Election Commission in respect of superintendence direction and control over the conduct of elections to the Parliament as well as State Assemblies. In the exercise of such control, the Election Commission is competent to issue orders. Such orders cannot be in contravention of the other provisions of the Constitution or the laws made by the Parliament or the State Legislature. With the two exceptions as aforesaid, the Election Commission has complete control over the conduct of elections. The Representation of the People Act, 1951 is a complete Code with respect to the conduct of the elections to the Parliament as well as the State Assemblies. Section 29-A of this Act provides for registration with the Election Commission of Associations and Bodies as political parties. Such an Association is required to make an application to the Election Commission for its registration as a political party for the purposes of this Act under sub-section (1) thereof. Sub-section (2) contemplates such Associations or Bodies which were in existence at the commencement of Representation of the People (Amendment) Act, 1988 to make such application within 60 days from such commencement and for Associations or Bodies formed thereafter within 30 days next following the date of its formation. Other necessary details which are required to

be mentioned in such applications are given under sub-section (4) and (5) of Section 29-A or such particulars as are otherwise required to be furnished, and taking into consideration the necessary and relevant factors and after giving representatives of the Association a reasonable opportunity of being heard, the Commission is to decide either to register the Association as a political party or not so to register. The decision of the Commission is to be final as provided under sub-section (8) thereof. Part V of the Act deals with the procedure relating to the conduct of the election in detail. A notification is required to be issued by the Election Commission under section 30, fixing dates for nominations etc. which sets the election process in motion. Ultimately, with the notification of declaration of result the election process is completed as required under section 67 of the Act. An election can be challenged on the grounds given and in the manner prescribed under Chapter III of part VI of the Constitution and in no other way. When election is announced under the provisions of the Act as aforesaid that the process of allotment of symbols to the candidates eligible for participation in the election is started. The Election Symbol (Reservation & Allotment) Order, 1968 has been issued by the Election Commission to provide for specification, reservation, choice and allotment of symbol at the election in Parliament and Assembly Elections and also for the recognition of political party in relation thereto and for matters connected therewith. Paragraph 2 (h) of Order of 1968 defines political party to mean an Association or Body of individual citizens registered with the Commission as a political party under section 29-(A) of the Representation of the People Act, 1951. Paragraph 3 provides for additional particulars to be submitted with an application for registration as political party to the Commission. Paragraph 5 provides for the classification of symbols, i.e. either reserved or free. Sub-paragraph (2) of paragraph 5 provides for reserved symbols for recognised political party for exclusive allotment to contesting candidates set up by that party. A free symbol is a symbol other than a reserved symbol. Paragraph 6 provides for classification of political parties and paragraph 7 provides for two categories of recognised political parties. Since argument in the present case relates to paragraphs 6 and 7, they are reproduced below:

"6 Classification of political parties

(1) -----

(2) A political party shall be treated as a recognised political party in a State, *if and only if* either the conditions specified in clause (A) are, or the condition specified in clause (B) is, fulfilled by that party and *not otherwise*, that is to say:-

(A) that such party

(a) has been engaged in political activity for a continuous period of five years and

(b) has, at the general election in that State to the House of the People, or, as the case may be, to the Legislative Assembly, for the time being in existence and functioning returned:- either (i) at least one member to the House of the People for every twenty-five members of that House or any fraction of that number elected from that State; or (ii) at least one member to the Legislative

Assembly of that State for every thirty members of that Assembly or any fraction of that number;

(B) that the total number of valid votes by all the contesting candidates set up by such party at the general election in the State to the House of the People, or as the case may be, to the Legislative Assembly for the time being in existence and functioning (excluding the valid votes of each such contesting candidate in a constituency as has not been elected and has not polled at least one-twelfth of the total number of valid votes polled by all the contesting candidates in that constituency) is not less than four per cent of the total number of valid votes polled by all the contesting candidates at such general election in the State (including the valid votes of those contesting candidates who have forfeited their deposits).

(3) For the removal of doubts it is hereby declared that the condition in clause (A) of (B) of sub-paragraph (2) shall not be deemed to have been fulfilled by a political party if a member of the House of the People or the Legislative Assembly of the State becomes a member of that political party after his election to that house or, as the case may be, that Assembly.

"7. Two categories of recognised political parties:- 1) If a political party is treated as a recognised political party in accordance with paragraph 6 in four or more States, it shall be known as, and shall have and enjoy the status of, a "National party" throughout the whole of India; and if a political party is treated as a recognised political party in accordance with that paragraph in less than four States, it shall be known as, and shall in the State or States in which it is a recognised political party.

(2) Notwithstanding anything contained in sub-paragraph (1) every political party which immediately before the commencement of this Order is a multi-state party shall, on such commencement, be a National party and shall continue to be so until it ceases to be a National party on the result of any general election held after such commencement.

(3) Notwithstanding anything certain in sub-paragraph (1) every political party which immediately before the commencement of this Order is in a State a recognised political party, other than a multi-State party as aforesaid shall, on such commencement, be a State party in that State and shall continue to be so until it ceases to be a State party in that State on the result of any general election held after such commencement."

Paragraph 8 of the order provides for choice of symbols by candidates of National and State Parties and allotment thereof. Under sub-para (1) a National Party candidate is given the first choice for allotment of symbol reserved for that party and no other symbol. Likewise sub-para (2) gives choice of the candidate set up by the State party for allotment of symbol reserved for that party in the State and no other symbol. Para 12 refers to choice of symbols by other candidates and allotment thereof. Para 18 refers to the powers of the Commissioner to issue instructions and directions. It reads as under:

"18. Power of Commission to issue instructions and directions: The Commission may issue instructions and directions:-

- (a) for the clarification of any of the provisions of this Order:
- (b) for the removal of any difficulty which may arise in relation to the implementation of any such provisions; and
- (c) in relation to any matter with respect to the reservation and allotment of symbols and recognition of political parties, for which this Order makes no provision or makes insufficient provision, and provision is in the opinion of the Commission necessary for the smooth and orderly conduct of elections."

Paragraph 6 of the Order aforesaid authorises the Commission to specify as and when necessity arises that the political parties are recognised political parties or unrecognised political parties. A political party, as provided in sub-para (2) is to be treated as a recognised party in the State *if and only if* the fulfilled by that party *and not otherwise*. The necessary qualifications for a political party to get recognition under Clause (A) are three: (i) engagement continuously of such political party for a period of five years; (ii) in the general election in the State to the Legislative Assembly *for the time being in existence and functioning* returned either at least one member to the house of the people for every twenty-five members at that house or any fraction of that number elected from the State or at least one member to the Legislative Assembly of that State for every 30 members or any fraction of that number. The aforesaid conditions as laid down in clause (A) refers to the election of the members of such a political party to the house of the people clause (B) refers to the number of valid votes of all contesting candidates set up by such party at the general elections of Assembly *for the time being in existence and functioning* and is not less than 4 per cent of the total number of valid votes polled by all the candidates contesting the general election in the State. Thus this clause refers to the minimum number of votes required to be secured by candidates of a party securing recognition. Sub-paragraph (3) of para 7 provides that when a recognised political party shall cease to be such. This would show that after general elections are held the process of recognition and de-recognition of political parties has to be started. If such political parties already recognised fulfil the requisites as given in clauses (A) or (B) of para 6, above referred, they would continue to be so recognised and other political parties

fulfilling such requisites would be recognised and such of the recognised political parties who fail to show performance as required under Clause (A) or (B), would stand de-recognised.

The constitutional validity of the provisions of the Symbol Order of 1968 have already been upheld by the Supreme Court in *Kanhiya Lal Omar v R.K. Irivedi and others* AIR 1986 Supreme Court III. Relying upon the earlier decision of the Supreme Court in *Sadiq Ali v Election Commission of India*, AIR 1972 Supreme Court 187, it was held as under:

"The Election Commission is empowered to recognise political parties and to decide disputes arising amongst them or between splinter groups within a political party. It is also empowered to issue the Symbols Order. It could not be said that when the Commission issued the Symbols Order it was not doing so on its own behalf but as to be delegated of some other authority. The power to issue the Symbols Order is comprehended in the power of superintendence, direction and control of elections vested in the Commission."

It was observed that the provisions of the Symbols Order, 1968, are constitutionally valid as the Commission derived its power under Article 324(1) of the Constitution. The aforesaid Article operates in areas left unoccupied by Legislation and the word "superintendence", "direction" and "control" as well as "conduct of all action" are the broadest terms which would include power to make all such provisions. The earlier decisions of the Supreme Court in *Mohinder Singh Gill v Chief Election Commissioner, New Delhi*, AIR 1978 Supreme Court 851 and *A.C. Jose v Sivan Pillai* AIR 1984 Supreme Court 921 were relied upon. With respect to the passing of general orders and specific orders, the Supreme Court in *Kanhiya Lal's case* (supra) observed in para 17 as under:

"It may be a specific or a general order. One has also to remember that the source of power in this case is the Constitution, the highest law of the land, which is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be constructed liberally so that the object for which the power is granted is effectively achieved. Viewed from this angle it cannot be said that any of the provisions of the Symbols orders suffers from want of authority on the part of the Commission, which has issued it."

Faced with such a situation with respect to constitutional validity of Symbols Order of 1968 as already determined by the Supreme Court learned counsel for the petitioners with vehemence argued that the Symbols Order should be held to be bad in law on account of vagueness and insufficiency. To repeat the assertions that the situation of the kind as stated above was not contemplated that the political parties would boycott the elections or abstain from participating in the elections, the Court should supplement the provisions of the Symbols Order, 1968. To cover such-like situations where for valid reasons such political parties did not participate in the elections, they should not lose recognition. Though apparently attractive, the argument, is without

any substance. The Supreme Court in *A.K. Roy v Union of India and Another* AIR 1982 Supreme Court 710, observed that provisions of a statute could not be struck down on the ground of vagueness. In that case the provisions of National Security Act were under consideration. It was held as under:

"The concepts 'defence of India', 'security of India security of the State and relation of India with foreign powers, which are mentioned in Section 3 of the Act, and not of any great certainty or definiteness. But in the very nature of things they are difficult to define. Therefore provisions of Section 3 of the Act cannot be struck down on the ground of their vagueness and uncertainty."

With respect to the general principles of interpretation of statutes in *M/s Girdhari Lal & Sons v Balhir Nath Mathur and Others*, AIR 1986 Supreme Court 1499. The following principle was down in para 9 of the judgement:

"The primary and foremost task of a court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention, the Court must then strive to so interpret the statute as to promote and advance the object and purpose of the enactment. For this purpose, where necessary the court may even depart from the rule that plain words should be interpreted accordingly to their plain meaning. There need be no meek and mute a submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be well justified in departing from the so-called golden rule of construction so as to give effect to the object and purpose of the enactment by supplement, the written word if necessary."

From the ratio of the decisions aforesaid it cannot be laid down that the High Court in the exercise of jurisdiction under Article 226 of the Constitution can exercise function of the legislature by amending or by adding to the statute. Such a function is of the legislature and not of the Courts. The Court can merely supplement a word or two which are considered necessary to uphold the validity of the statute which would promote the object and purpose of an enactment. Apart from that, the Court has no power to travel into the realms of legislative jurisdiction to enact or amend the statute. In this contest, reference may be made to the decision of the Supreme Court in *Asif Hammed and others v State of Jammu and Kashmir and Others*, AIR 1989 Supreme Court 1899. In para 17 of the judgement it was observed:

"Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The

functioning of democracy depends upon the strength and independence of each of its organs."

In paragraph 19 of the judgement it was further observed as under:

"The Constitution does not permit the Court to direct or advise the executive in matters of policy to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."

In paragraph 21 of the judgement it was further observed as under:

"The Constitution has laid down elaborate procedure for the legislature to act thereunder. The legislature is supreme in its own sphere under the Constitution. It is solely for the legislature to consider as to when and in respect of what subject matter, the laws are to be enacted. No directions in this regard can be issued to the legislature by the courts."

The stand of the petitioners that this Court should make a provision in the form of "an exception" or a "proviso" to para 6 of the Symbols Order of 1968 to authorise the Election Commission not to de-recognise a political party who had failed to participate in the general elections for valid reasons. Such a course is not permitted by law. The provisions of paras 6 and 7 of the Symbols Order of 1968 are valid as already upheld by the Supreme Court. They are not bad on account of any insufficiency.

The right of a political party to be recognised as such is the creation of the statute as already referred to above. Such right is conferred on fulfilment of the requisites as provided in the statute itself, i.e. as provided under para 6(A) or (B) of the Symbols Order of 1968. In other words, recognition or de-recognition of a political party has to be within the four corners of limits as prescribed by the enactment. In this respect, reference may be made to the decision of the Supreme Court in *N.P. Ponnuswami v The Returning Officer, Namakhal Constituency* AIR 1952 Supreme Court 64. Commenting upon the right to vote or stand as a candidate for election, it was observed that it was not a civil right but a creature of statute or special law and must be subject to the limitations imposed by it. In para 18 of the judgement it was further observed as under:

"Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new an unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it."

The very fact that minimum standard of requisites was prescribed in para 6(A) or (B) of the Symbols Order of 1963 is indicative that if a recognised political party would not secure any vote or any seat in the elections, it would be de-recognised.

It is, neither for the Commission nor for the Court for that purpose, necessary to go into or determine the genuineness, reasonableness or sufficiency of the reasons of such a recognised political party in not getting any member elected or any vote secured or in other words the performance of such political party is not up to the requisite as provided under para 6(A) or (B) of the Symbols Order. The Commission was merely to take into consideration the result of the general elections of the assembly in existence and functioning to determine whether any political party was to be recognised or de-recognised. That was a matter of mathematical calculation. In such a situation the element of discretion was altogether absent. In the facts of the present case, there was no option for the Election Commission but to pass orders of de-recognition of the two petitioners-political parties on the ground that they were not fulfilling the requisites in the matter of performance shown in the general elections held.

Learned counsel for the petitioners further stressed that the provision in para 6 of the Symbols Order, 1968, that performance in the general elections only was to be seen for the purposes of recognition of political parties is arbitrary and unsound. According to them a democratic process continues throughout even before and after the elections. The performance of the petitioner-political parties in the elections held just before the general elections in dispute either for the State or in the Parliament, could be taken into consideration. This contention is devoid of merit and is not supported by law. Reading of para 6(A) and (B) reproduced above makes it abundantly clear that it is the performance of the general elections of the Assembly existing and functioning that is required to be taken into consideration for the purposes of recognition of political parties. The words "*if and only if*" and "*not otherwise*" in para 6 aforesaid leaves no manner of doubt that the intention of the Authority framing the Order was that performance of the political parties in the general elections only is to be seen. Even otherwise, this provision does not give the impression of arbitrariness or unsoundness. It would be otherwise unrealistic if after every election, general or by, such an exercise were done. The recognised parties would remain in a situation of turmoil and uncertainty if after every few months or years their status of recognised political party is to be subjected to revision. The provision as it exists allows a reasonable time between general elections for the political party to participate in the political activities of the State and to show or prove its worth in the next coming general elections.

No injustice, much less grave, is caused to the petitioners that it should call for interference by the High Court in the exercise of jurisdiction under Article 226 of the Constitution in such like matters. No judicial process is required to be taken by the Election Commission, as already stated above, to arrive at the conclusion with respect to matters mentioned in para 6(A) and (B) of the Symbols Order of 1968. No doubt the ground being pressed in these petitions is not one of such grounds that the election could be set aside and it cannot, strictly speaking, be said that an alternative remedy of election petition would be available to the defeated candidates or the

petitioner-political parties. The grounds on which an election can be set aside are given in Section 100 of the Representation of the People Act. Be that as it may, no case for interference is made out under Article 226 of the Constitution as the petitioners political parties are not debarred from indulging in political activities and participating in the elections, general or others, Parliament or Legislative Assemblies or other democratic institutions.

There is another angle of the case which needs to be noticed. Section 79(d) of the Representation of the People Act defines electoral right to mean the right of a person to stand or not to stand, or to withdraw or not to withdraw from being a candidate, or to vote or refrain from voting at any election. Thus nobody can be compelled to vote or not to vote. Likewise, nobody can be compelled to contest or not to contest any election. This is entirely the sweet will and discretion of the person concerned as to whether he is to contest any election or not. Likewise, it is entirely for the political party concerned to decide to participate or not to participate in any election. Such decisions cannot be subject matter of scrutiny by the Courts to either justify the action or inaction or otherwise. Validity of an election is not dependent upon such action or inactions. The Supreme Court in *The Election Commission of India v Shivaji and Others*, AIR 1983 Supreme Court 61, in para 6 of the judgement observed as under:

"In view of the non obstante clause contained in Art. 329 of the Constitution the power of the High Court to entertain a petition questioning an election on whatever grounds under Art 226 of the Constitution is taken away."

The decision in *N.P. Ponnuswami's case* (supra) was referred to therein.

Even on de-recognition of a political party, no fetters are placed on its rights to pursue political activities, including participation in the election. The only effect of de-recognition is that in the matter of choice of symbols in the future election, would be out of un-reserved symbols. In other words, symbols reserved for recognised political parties would not be available after its de-recognition. However, such political parties as unrecognised political parties could make a fresh choice of symbols and candidates of such political parties would be entitled to allotment of such symbols. The other candidates, of course, would have a choice from the remaining other symbols. The right of the candidate election is not thus taken away by de-recognition of a political party.

To conclude, the Symbols Order of 1968 is comprehensive to cover situations like the one projected in the present cast, i.e. of boycotting the elections as such cases would be of performance resulting in nil result and such political parties would be liable to be de-recognised under para 6 of the Symbols Order, 1968. No amendment of the aforesaid order is required and no direction can be given to the Election Commission to amend the same. The ground on which a political party decides to boycott or not to participate in the elections is not justifiable either before the Election Commission or before this Court, either in any election petition or in a petition under Articles 226 and 227 of the Constitution. It is entirely for the person concerned or the political party concerned to vote or participate in the election. No compulsion is attached thereto

and none can be attached. Non-participation by the political parties, for whatsoever reason maybe, would earn the disqualification of de-regulation. The impugned orders de-recognising the petitioners-political parties in the two cases referred to above are valid and in accordance with law.

In the petition filed by Shriomani Alkali Dal (Badal Group) another question has been debated that the impugned order passed by the Election Commission is void and is liable to be quashed on the ground of non-compliance of the principles of natural justice in as far as the petitioner was not duly served with the notice before the impugned order was passed. Learned counsel for the petitioner has stated that such an order passed without notice to the petitioner would be *void ab initio* and in support of this contention reference has been made to the observation of Full Bench of this Court in *Parkash Singh Badal and Others v Union of India and Others*, AIR 1987 Punjab & Haryana 263. This case related to the split of the Alkali Dal Legislature party. A breakaway Alkali Dal Legislature party was formed which was recognised by the Speaker. His successor took up the matter at the instance of the original Alkali Dal Party for disqualifying members of the splinter group of party. It is in this context that in para 40 of the judgement it was observed as under:

"As before passing the order, recognising the breakaway group as separate party, neither the political party nor any other person interested in the matter was heard, it would bind none and in that sense it can be said to be an order void *ab initio*."

During arguments it was suggested that two courses could be open, if it is found that the petitioner was not served or not properly served before the impugned order was passed; one was to relegate the petitioner to the remedy of getting the *ex parte* order set aside from the Authority concerned and the second to set aside the order on that ground by this Court on proof of the ground as stated above and to direct the Election Commission to proceed to pass an appropriate order on merits according to law. Both these courses are not considered appropriate in the facts and circumstances of the case. Since two cases were referred to the Full Bench for a decision on the disputed question as already referred to above, this court was expected to answer the same and having answered as above we are of the opinion that no useful purpose would be served either by sending the case back to the Election Commission with the direction to pass an appropriate order in accordance with law after hearing the petitioner or without setting aside the same to direct the petitioner to directly approach the Election Commission for getting set aside the *ex parte* order. After decision of the question of law by this Court, the Election Commission has to follow the same and after service of the parties to pass the order in accordance therewith. Thus, no further comment is made with respect to the disputed question of fact on service or proper service of the petitioner before the Election Commission.

For the reasons recorded above both the writ petitions are dismissed. No order as to costs.

sd/- A.L.Bahri
Judge

sd/- Ashok Bhan
Judge

sd/- G.C.Garg
Judge

September 8, 1993

Words:- 12350

Costs:- 31.00

Copies:- - 55

Ty.By: Harinder

Ex.By:

True Copy

Supervisor (Copy Branch)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CIVIL WRIT SIDE

C. P. NO. 4587 OF 1993

1. The Shiromani Alkali Dal (Badal), through its President, Sh. Parkash Singh Bada, resident of 156, Sector 9-A, Chandigarh
2. Sh. Sukhdev Sing Dhindsa, Secretary General, Shiromani Alkali Dal (Badal) r/o Kothi No. 504, Sector 11-B, Chandigarh

Petitioners

versus

Election Commission of India, through its Secretary, Nirwachan Sadan, New Delhi,

Respondent

Civil Writ Petition under Articles 226/227 of the Constitution of India praying that:

- (i) Need for advance notices may please be dispensed with;
- (ii) Operation of the impugned order whereby petitioner party has been de-recognised may please be stayed during the pendency of this petition;

OR

in the alternative for the present;

- (iii) It be entitled to the conclusive use of the Symbol "Bow & Arrow" earlier reserved for it in the State of Punjab;
- (iv) Need for certified copy of Annexure may also be dispensed with;
- v) Issue writ of certiorari or any other writ, order or direction as this Hon. Court may deem fit quashing the impugned order Annexure P/1 whereby the petitioner party has been de-recognised and paras 6 & 7 of the Election Symbols (Reservation and Allotment Order, 1968 as ultra vires of the Constitution of India.
- (vi) Issue any other order or direction as deemed fit in the circumstances of the case;
- (vii) Service of advance notices on the respondents be dispensed with;
- (viii) Costs of the writ petition be also awarded to the petitioners.

And for this, the petitioner as duty bound shall ever pray.

Dated the 8th September, 1993

PRESENT

THE HON. MR JUSTICE A. L. BAHRI

THE HON. MR JUSTICE ASHOK BHAN

THE HON. MR JUSTICE C. C. CARG

For the petitioners: Mr H.S. Mathewal, Sr. Advocate with Mr B.S.Virk, A Advocate

For the respondent: Mr. G.K.Chatrath, S.Adv.with Sarvshri vibrant Charma, Anu Chatrath, Alka Chatrath, Sushant Maini and Adarsh Malik, Advocates.

ORDER

For orders see C.W.P. No 4091 of 1993

September 8, 1993

Words: 500

Costs: 1-25

Copies: 12

Ty.By: D. S. Tiwana

Ex.By

Sd/-A.L. Bahri

Judge

Sd/-Ashok Bhan

Judge

Sd/- G.C. Carge

Judge

True Copy

Supervisor Copy Br.

THEME 8

ELECTION EXPENSES

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

DAVID SOMERVILLE

Plaintiff

and

ATTORNEY GENERAL FOR CANADA

Defendant

Elections – Spending limits within stipulated period prior to election – whether legislation violated relevant sections of the Charter of Rights and Freedoms.

Background facts

The applicant, David Somerville, sought a declaration that certain sections of the Canada Elections Act as amended were of no force or effect as they constituted an impermissible infringement of specific sections of the Charter of Rights and Freedoms. The sections of the Charter relied upon were those commonly referred to as freedom of expression, freedom of association, and the right to vote.

Held

That the sections of the Act complained against were in breach of the charter and therefore were of no force and effect.

Cases cited in the Judgements

National Citizens Coalition and Brown v A.G. of Canada (1994) 5 WWR 436

R v Registrar (1990) 3 S.C.R. 725

Osbourne v Canada, (1991) 2 SCR 69

R. v Oakes (1986) 1 S.C.R. 103

R v Zundel (1992) 2 S.C.R. 731

R v Butler (1992) 1 S.C.R. 452

REASONS FOR JUDGEMENT OF THE HONOURABLE MR JUSTICE MACLEOD

THE COURT

The applicant, David Somerville, seeks the following relief pursuant to the Constitution Act 1982 and the Canadian Charter of Rights and Freedoms.

A declaration that section 213(1), 259.1(1) and 259(2) of the Canada Election Act as amended by Statutes of Canada 1993, chapter 19 are of no force or effect as 259.1(1) and 213(1) constitute an impermissible infringement of section 2(b) and 3 of the Charter of Rights and Freedoms and 259.2(2) constitutes an impermissible infringement of Sections 2(b), 2(d) and 3 of the Charter of Rights and Freedoms.

The sections under attack provide as follows:

"213 (1) Any persons guilty of an offence who, for the purpose of promoting or opposing a particular registered party or the election of a particular candidate, directly or indirectly: (a) between the date of the issue of the writ and Sunday, the twenty-ninth day before polling day, the one day immediately preceding polling day or on polling day, advertises on the facilities of any broadcasting undertaking; or (b) procures for publication or acquiesces in the publication, during the period described in paragraph (a), on the one day preceding polling day or on polling day of and advertisement in a periodical publication.

"259.1(1) Every person who incurs advertising expenses in excess of one thousand dollars between the date of the issue of the writ and the day immediately following polling day is guilty of an offence.

259.2(2) For the purposes of section 259.1, no person shall incur advertising expenses in combination with one or more other persons if the aggregate amount of the advertising expenses incurred exceeds one thousand dollars."

"Advertising expenses" is defined as amounts paid and liabilities incurred with respect to advertising for the purpose of promoting or opposing, directly and during an election, a particular party or candidate. The penalty section provides for a fine up to \$5,000 and or imprisonment for five years.

The sections of the Charter relied upon are those commonly referred to as freedom of expression, freedom of association, and right to vote.

In 1984, this court had occasion in the National Citizens' Coalition and *Brown v Attorney General of Canada*, 1994 5 WWR 436, to consider a challenge to a predecessor section to section 259.1(1). That section provided that:

"Every one, other than

(a) a candidate, official agent or any other person acting on behalf of a candidate with the candidate's actual knowledge and consent, or

(b) a registered agent of a registered party acting within the scope of his authority as such or other person acting on behalf of a registered party with the actual knowledge and consent of an officer thereof, who, between the date of the issue of the writ for an election and the day immediately following polling day, incurs election expenses is guilty of an offence against the Act.

The Canada Elections Act defines "election expenses" as:

(a) amounts paid;

(b) liabilities incurred;

(c) the commercial value of goods and services donated or provided, other than volunteer labour, for the purpose of promoting or opposing, directly and during an election, a particular registered party, or the election of a particular candidate."

Mr Justice Medhurst in that case held, at page 453 as follows:

"Care must be taken to ensure that the freedom of expression, as guaranteed by s. 2 of the Charter, is not arbitrarily or unjustifiably limited. Fears or concerns of mischief that may occur are not adequate reasons for imposing a limitation. There should be actual demonstration of harm or a real likelihood of harm to a society value before limitation can be said to be justified.

In my view it has not been established to the degree required that the fundamental freedom of expression need be limited. The limitation has not been shown to be reasonable or demonstrably justified in a free and democratic society.

Accordingly, I hold that the laws under review, s. 70.1(1) and s. 72 of the Canada Elections Act, are inconsistent with s. 2 of the Charter and to the extent are of no force or effect."

The case was not appealed, and in the 1994 election that followed the chief electoral officer did not attempt to enforce the section in question in any part of the country. The same situation prevailed four years later in the 1988 election. Following that election however, a Royal Commission chaired by Pierre Lortie held hearings across the country on the questions of electoral reform, and issued a report containing some 275 recommendations. A special committee in the House of Commons was struck to consider these recommendations and issued a draft bill containing provisions relating to some of them. A bill was subsequently presented in the house, was eventually debated and passed in the House and Senate, emerging as Chapter 19, Statutes of Canada 1993, which was assented to on 6th of May, 1993.

Filed in these proceedings as exhibits, by agreement of counsel, were the four-volume report of the Lortie Commission, some 20 volume of research papers commissioned by the commission, a record of the proceedings of the special committee, portions of Hansard containing the debates in the House and the Senate, and the record of the two days the Standing Senate Committee on legal and constitutional affairs considered the bill on May 5th and 6th, 1993 which was approximately one month after this application was brought.

Also before me was this affidavit of the applicant and various documents exhibited during the testimony of several witnesses called by first the Attorney General and then, in rebuttal, by the applicant. The witness were, Dr. David Bercuson, a professor of history at the University of Calgary, Dr. Barry Cooper, professor of political science also at the University of Calgary, Dr. Janet Hiebert, assistant professor of political science at Queen's University, Kingston, and Jean Marc Hamal, for many years the chief electoral officer for Canada, all called by the Attorney General, and Dr. Neil Nevitta, professor of political science at the University of Calgary, called by the applicant.

Section 1 of the Charter contemplates a two-stage process for a review of impugned legislation. First, the question whether the legislation has the effect of limiting one of the guaranteed rights or freedoms and secondly, if it does, whether the limit is a reasonable one and can be demonstrably justified in a free and democratic society.

In the case of freedom of expression, Chief Justice Dixon put the matter as follows in *R v Keegstra*, 1990 3 SCR at page 725:

"Before looking to the specific facts of this appeal, however, I would like to comment upon the nature of the s. 2(b) guarantee. Obviously, one's conception of the freedom of expression provides a crucial backdrop to any s. 2(b) inquiry; the values promoted by the freedom help not only to define the ambit of s. 2(b) but also come to the forefront when discussing how competing interest might co-exist with the freedom under s. 1 of the Charter.

In the recent past, this Court has had the opportunity to hear and decide a number of freedom of expression cases, among them *RWDSU v Dolphin Delivery Ltd.*, [1935] 2 S.C.R. 573; *Ford v Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* (Man.) [1990] 1 S.C.R. 1123; and *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] S.C.R. 232. Together, the judgments in these cases provided guidance as to the values informing the freedom of expression, and additionally indicate the relationship between ss. 2(b) and 1 of the Charter."

That the freedom to express oneself openly and fully is of crucial importance in a free and democratic society was recognised by Canadian courts prior to the enactment of the Charter. The treatment of freedom of expression by the Court in both division of powers and other cases was examined in *Dolphin Delivery Ltd.*, *supra*, at pp 583–88, and it was noted that well before the advent of the Charter – before even the Canadian Bill of Rights was passed by Parliament in 1960, c.44 on freedom of expression was seen as an essential value of Canadian parliamentary democracy. This freedom was thus protected by the Canadian judiciary to the extent possible before its entrenchment in the Charter, and occasionally even appeared to take on the guise of a constitutional protected freedom (see e.g. *Reference re Alberta Statutes*, [1938] S.C.R. 100, per Duff C J, at pp 132–33; and *Switzman v Elbling*, [1957] S.C.R. 285, per Abbot J at p 326).

Without explicit protection under a written constitution, however, the freedom of expression was not always accorded careful consideration in pre-Charter cases (see Clare Beckton, "Freedom of Expression" in C-A. Beaudoin and E. Ratushny, *Canadian Charter of Rights and freedom* (2nd ed. 1989). Moreover, pre-Charter jurisprudence used freedom of expression primarily in relation to political expression, a context which restricted somewhat the content of the freedom and led this court to remark in *Ford*, *supra*, at p 764:

The pre-Charter jurisprudence emphasized the importance of political expression because it was a challenge to that form of expression that most often arose under the division of powers and the "implied bill of rights" where freedom of political expression could be related to the maintenance and operation of the institutions of democratic government. But political expression is only one form of the great range of expression that is deserving of constitutional protection because it serves individual and societal values in a free and democratic society.

While the pre-Charter era saw a role for the freedom of expression, then, with the Charter came not only its increased important, but also a more careful and generous study of the values informing the freedom.

As is evident from the quotation just given, the reach of s 2(b) is potentially very wide, expression being deserving of constitutional protection if "it serves individual societal values in a free and democratic society." In subsequent cases, the Court has not lost sight of this broad view of the values underlying the freedom of expression, though the majority decision in *Irwin Toy* perhaps goes further towards stressing as primary the "democratic commitment said to delineate the protected sphere of liberty (p 971). Moreover, the Court has attempted to articulate more precisely some of the convictions fuelling the freedom of expression, those being summarised in *Irwin Toy* (at p 976) as follows: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.

Although Ford commented upon the values generally seen to support the freedom of expression, the decision was also sensitive of the need to consider these values within the textual framework of the Charter. Consequently, the Court stated as pp 765–66 that:

While..... attempts to identify and define the values which justify the constitutional protection of freedom of expression are helpful in emphasizing the most important of them, they tend to be formulated in a philosophical context which fuses the separate questions of whether a particular form or act of expression is within the ambit of the interest protected by the value of freedom of expression and the question whether that form or act of expression, in the final analysis, deserves protection from interference under the structure of the Canadian Charter and the Quebec Charter. These are two distinct questions and call for two distinct analytical processes.

It is the presence of section 1 which makes necessary this bifurcated approach to Canadian freedom of expression cases. Indeed, the application of this approach in *Ford* in part permitted the Court to give a large and liberal interpretation to section 2(b) on the facts of the case leading to the inclusion of commercial expression within its ambit, and to state that the weighing of competing values would "in most instances" take place in section 1 (p 766)

Irwin Toy can be seen as at once clarifying the relationship between sections 2(b) and 1 in freedom of expression cases and reaffirming and strengthening the large and liberal interpretation given the freedom in section 2(b) by the Court in *Ford*. These aspects of the decision flow largely from a two-step analysis used in determining whether section 2(b) has been infringed, an approach affirmed by this Court in subsequent cases, for example *Reference sections 193 and 195.1(c) of the Criminal code (Man.)*, *supra*, and *Royal College of Dental Surgeons*, *supra*.

The first step in the *Irwin Toy* analysis involves asking whether the activity of the litigant who alleges and infringement of the freedom of expression falls within the protected section 2(b)

sphere. In outlining a broad, inclusive approach to answering this question, the following was said (at p 968):

"Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinion, beliefs, indeed all expression of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.

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

"The second step in the analysis outlined in *Irwin Toy* is to determine whether the purpose of the impugned government action is to restrict freedom of expression. The guarantee of freedom of expression will necessarily be infringed by government action having such a purpose. If, however, it is the effect of the action, rather than the purpose, that restricts an activity, s. 2(b) is not brought into play unless it can be demonstrated by the party alleging an infringement that the activity supports rather than undermine the principles and values upon which freedom of expression is based."

Mr. Shaw, counsel for the Attorney General, while not formally conceding that in this case there is a breach under sections 2(b) and 2(d), offered no argument that there was not. He did submit however, that it was appropriate that I make no finding with respect to section 2(d) and that there was no breach of section 3.

With respect to section 2(d), Mr. Shaw referred to the comments of Mr. Justice Sopinka in *Osbourne v Canada*, 1991 2 S.C.R. 69 at p 93, as follows:

"Having reached the conclusion that s. 33 of the Act is inconsistent with freedom of expression under s. 2(b) of the Charter, I do not consider it necessary or appropriate to determine whether there is also a violation of freedom of association under s. 2(d) of the Charter. The parties have devoted their arguments

almost entirely to the discussion of freedom of speech, and while it would appear that there is an infringement of s. 2(d) independently of the violation of s. 2 (b), the nature of the analysis to be undertaken, as well as the consideration to be taken into account, are not necessarily the same, and I would prefer to consider this question separately on another occasion having the benefit of the full submissions of the parties."

With respect to section 3, Mr. Shaw concedes that the right to vote is the right to an informed vote, as submitted by Mr. Hunter, counsel for the applicant, but Shaw argues that:

"The evidence in this case... cannot demonstrate, that the spending restrictions prevent voters from receiving sufficient information. This is a restriction not on information, but on availability on a delivery system for that information. We submit that if there is evidence that the regulation of third party spending has the potential effect of reducing the quality of the vote, there is no evidence of the extent to which the vote quality is reduced as applied to any standard.

Therefore, there is no evidence that Mr Somerville's vote is not a sufficient vote, and the Applicant has not led evidence that would establish that the limitation on direct advertising would have that effect."

In my view, it is clear on the face of the section involved, the absence of argument by the Attorney General, and on the evidence that there is a breach of sections 2(b) and 2(d), I acknowledge the remarks of Mr. Justice Sopinka quoted, but here while the point was not argued by the Attorney General, it certainly was at some length by Mr. Hunter and Mr. Groody, and I believe it is appropriate to make the finding on both sections.

With respect to section 3, accepting that it is a question of sufficient information to make an informed vote, considering the evidence of the applicant in his affidavit and the following remarks in the Lortie commentary, as follows:

"The effect of this limit would most likely be to restrict the amount of money spent on media advertising. Although this amount is insufficient for those who wish to mount national media campaigns to promote issues or to assess the positions of political parties, the centrality of fairness in the electoral process justifies this limit. If individuals or groups wished to conduct broader campaigns they could do so by supporting existing parties and candidates (including independent candidates) or by forming a political party and fielding candidates. Moreover, federal election campaigns are relatively short and would be shorter still under our recommendation (less than 50 days)."

I think it is apparent that voters are effectively precluded from receiving third party views from other parts of the country, and there is a breach of section 3, and I so find.

Having found breaches of the impugned sections, I must now turn to the second step in the process. Counsel agree that the basic test is still that found in *R v Oakes*, 1986 1 S.C.R.103, although Mr. Shaw suggests the test has been shown to be perhaps more flexible with respect to the "proportionality" aspect by subsequent cases decided in the Supreme Court namely, *Keogetra*, *Irwin Toy*, *Edwards Books*, and *McKinney*.

Reading from the judgement in *Oakes*, beginning at p 136:

"The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit.

The standard of proof under section 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of a probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in section 1 of the Charter supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case.

The case may be proved by a preponderance of probability, but there may be a degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

I wish, however, to emphasise that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved, it must be reasonably satisfied, and that whether or not it will be so satisfied, must depend on the totality of the circumstances on which its judgement is formed, including the gravity of the consequences.

Having regard to the fact that section 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a section 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit... a court will also need to know that alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the section 1 analysis are obvious or self-evident.

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R v Big M Drug Mart Ltd.* The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a protection. It is necessary, at a minimum, that an objective relates to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.

Second, once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test", *R v Big M Drug Mart*. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective and question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart*. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

The latest pronouncement of the Supreme Court of Canada on the question of freedom of expression is *R.V. Zundel* 1992 2 S.C.R. 731. Madam Justice McLachlin, writing for the majority, having found that the section in question violated section 2(b) of the Charter, continued at page 760:

"Section 1 requires us to weigh the intrusion of rights represented by the impugned legislation against the state's interest in maintaining the legislation. In this case that translates to weighing the state's interest in proscribing expression which it deems 'likely to cause injury or mischief to a [matter of] public interest'

on pain of criminal sanction against the individual's constitutional right to express his or her views."

On page 764 she continues:

"Can it be said in these circumstances that the Crown has discharged the burden upon it of establishing that the objective of the legislation is pressing and substantial, in short, of sufficient importance to justify overriding the constitutional guarantee of freedom of expression? I think not. It may be that s. 181 is capable of serving legitimate purposes. But no objective of pressing and substantial concern has been identified in support of its retention in our Criminal Code."

And on page 76:

"The fact that s. 181 has been so rarely used despite its long history supports the view that it is hardly essential to the maintenance of a free and democratic society."

Finally, on page 767:

"In the absence of an objective of sufficient importance to justify overriding the right of free expression, the state's interest in suppressing expression which may potentially affect a public interest cannot outweigh the individual's constitutional right of freedom of expression."

What the Attorney General, through Mr. Shaw, submits is the objective or purpose which is pressing and substantial was summarised by Mr. Shaw at the end of his argument on the first part of the Oakes test, as follows:

"Third party spending limits are an essential part of the comprehensive electoral financing regime which seeks to promote fairness in the electoral process by equalizing the opportunity of all to participate in democratic debate in a meaningful way regardless of financial resources. The specific objective of third party limits is to preserve the integrity and effectiveness of party and candidate spending limits. As noted by Lortie, without third party limits, the purpose of electoral finance laws would be destroyed, the reasonably equal opportunity legislation seeks to establish would vanish and the overall goal of restricting the role of money in unfairly influencing election outcomes would be defeated. The foregoing, we submit, demonstrates the objective of the third party spending limit. Bill C-114 relates to concerns that are pressing and substantial."

Having heard the very able arguments on this point of Mr. Shaw and Mr. Hunter and having considered all of the evidence before me, I am unable to conclude that the third party spending limits within this comprehensive electoral financing régime are sufficiently pressing and substantial so as to outweigh the Charter rights and freedoms in question here. I say that for the following reasons:

The first, the inclusion within the regime, apart from the impugned provisions, of additional, apparent Charter breaches, namely the limits on candidate and party spending.

Two, the apparent lack of any interest on the part of the Chief Electoral Officer, after two elections without third party limits, and having had at least one phone call from a disgruntled defeated candidate, to make any investigation to confirm the validity or non-validity of the notion that third party advertising influences election results.

Thirdly, the almost complete lack of attention paid by Mr Hamel or the three experts called by the Attorney General to the provincial jurisdictions where there are no spending limits. And indeed, the surprising admissions by Mr. Hamel, a long-time chief electoral officer, and Dr Bercuson, called as an expert on election spending, that they were unaware that Alberta was one of those jurisdictions.

Four, the lack of attention paid by the two experts, other than Dr. Hiebert, called by the Attorney General, to the only two quantitative studies referred to in the evidence put before the court as to the effect of interest group spending on public opinion and elections. And in the case of Dr. Hiebert the use by her without the qualification of a tentative conclusion by the authors of the study of the 1988 election when she knew, apparently before the publication of her paper, certainly before she gave evidence, that the authors had concluded their tentative conclusion was invalid. That study was co-authored by Dr. Roger Johnston of the University of British Columbia and was referred to in the evidence of Dr. Nevitt as follows:

"Q. Sir, are you aware of any study of the 1988 election, and in particular, of the impact of effect of third-party or independent advertising in that election?

A. Yeah. "Let the People Decide," which is the book that came from the 1988 election study, which was co-authored by Richard Johnston, Andre Blais, Henry Brady and John Crate, that addresses the issue.

Q. Sir, I'm going to hand you an extract from that text, and there's a copy for His Lordship. Looking at the face page of what you have in your hand, is that the book to which you're referring?

A. Yeah, this is the book."

There follows several pages of analysis of the extract of the book and then:

"Q. What does the table tell us about the impact of advertising on – opinion on the Free Trade Agreement through the total of the six periods?

A. Well, if you look at the "Total" column at the bottom, the right-most column you have a standard error of .028 which is higher than the – some of the estimates there, which would tell us that we can't have any there is no net effect at all on that, no reliable way of interpreting the cumulative impact of advertising on attitudes towards the Free Trade Agreement.

Q. Is that conclusion written in English in the text anywhere, sir?

A. Yeah. This is not easy material, not easy to boil it down.

Q. I appreciate that. I'm looking at the bottom of page 163?

A. Yeah, that's right. Third party advertising coefficients defy substantive interpretation. That means they look at the estimates and the standard errors, and they've made the right decision, I think, to not try to interpret those data."

Further along:

"Q. **Mr Groody:** Carrying on with the sentence that you alluded to it, reads, and I quote: 'Third party advertising coefficients defy substantive interpretation: some are large and significant, but the pattern is off setting, and the total coefficient effectively zero."

A. That's right.

Q. Now, what does that mean?

A. What that means is that when you work through the two columns I've identified on that table and you try to assess whether or not there's any coherent pattern to those findings, when you dismiss those particular results that are reliable because of the size of the standard error, what it shows is that the cumulative impact of advertising is nothing, there is none."

The other study which was conducted that I referred to was conducted under the auspices of the University of Chicago and was referred to by Dr. Nevitt in his evidence as follows:

"Q. **Mr Groody:** Dr. Nevitte, do you know of any other authoritative research that agrees or that substantiates or that would lend support to the conclusion that the advertising on the Free Trade Agreement in the 1988 election may not have had any effect on voter intentions, that counter-intuitive conclusion that you just referred to?

A. Yes. There is a, what I take to be the most systematic study conducted in the United States out of the National Opinion Research Centre, University of Chicago."

Further on:

"... in the 1970s, I believe they turned their attention to the issue of advertising, and, in fact, tried to assess the relative importance of third-party advertising, as it's been called, and, say, the impact of the news, be it T.V., newspaper, and to try and discover what was the – what was the most important factor that would affect public opinion, or – I think the title of the place was, in fact, "What Moves Public Opinion?" And that study determined that third-party advertising had no effect on people's vote intentions."

Fifth, some of the remarks before the select committee on these issues by Mr. Hawkes, who was the chairman of the special committee, and Mr. Andre, the minister responsible for Bill C-114 which became chapter 19, as follows. Mr. Hawkes in issue 8 of the committee minutes at page 21:

"If I may summarize for a minute, the situation in Quebec has controls on everybody. It is supported by the population and it works pretty well. The situation in Alberta has no controls on anybody. It is supported by the population and it works pretty well. The situation in Ontario has controls on parties and candidates and constituency associations but not on third parties, and that is getting to be a bigger problem. The trend line is that something will have to be done about that because the third-party effort is growing."

And at page 97, just before asking a couple of questions of a witness, Mr. Hawkes says:

"First, I want to indicate my bias. I am not sure that fairness can ever be achieved by any scheme that begins with the notion of limits. I have said that publicly and I have said it in the House of Commons. Intellectually, I find a lot of difficulty with that notion."

Then Mr. Andre found in issue 10 of the committee minutes at page 16. He is appearing as a witness and being questioned by Mr. Wilson and then by the committee:

"The question I want to ask you, Mr. Andre, is whether you feel that elections can be bought. Does victory always go to the biggest spender?"

M. Andre: That has certainly not been by experience. Indeed, I can think of several examples of where candidates prior to the law change – indeed, candidates who spent their money prior to the election period – have ended up paying a price by the accusation, you're trying to buy the election; how come you're spending so much money?

There's no question that you need a certain amount of money to run a campaign. There's no question about it. I know you're looking at limits and so on, and I

guess I would argue that in my constituency those limits are inhibiting. I don't have enough money under those limits to do normal kinds of things, which really means just getting the campaign literature in the hands of each of your electors and putting up an appropriate number of signs and so on. But there is no evidence that I see anywhere to suggest that the person who spends the most is likely to win. There isn't any such correlation that I am aware of.

I think when we arrived at these compromises in 1973, for putting on limits, there was certainly a perception about – it becomes part of the mythology. It's a myth that's stated and keeps getting repeated. It becomes a matter of fact simply because of repetition, that you can buy elections. Of course, that infers an electorate who is not as bright as we know them to be.

But on the other hand, when you do have limits, it's very helpful to the political parties. It's helpful in budgeting, it's helpful in raising money, and it means that you can concentrate more on the election itself and discussion of the issues, getting your message out and so on and so forth. When you don't have limits, there's incredible pressure to raise and spend more – incredible wastage.

With regard to the American system. I've never heard anybody say that somebody has bought the election because they have money. What I hear criticized about their system is that they spend all their time raising money. In this raising of money, sometimes they have to make commitments in terms of support to lobbyist groups, and so on and so forth, which causes the public to be a little bit apprehensive. But it's funny, it's on the raising side, not the spending side.

So on balance, I guess if I were the czar, I probably would go for a no-limit system as being purer, in a philosophical sense. But I certainly recognize that there are real benefits to me and to everybody else in the system in having limits. You're right, they only work if third parties can't come in. You can't have limits on the candidates and parties without limiting third parties."

And at page 26:

"Those who were disappointed in the last election are building a myth that third-party ads affected the outcome. Our political campaigners will argue to the nth degree that the money spent by these industry groups to promote free trade was basically severed in terms of its impact."

Finally at page 35:

"For goodness sake, I can't think of an election anywhere that was altered by somebody spending too much and so on."

My finding on the first part of the Oakes test makes it unnecessary to conduct a full analysis under the second part, proportionality. However, in view of the likelihood a federal election will be called soon and that this matter may well proceed through the appellate courts, it may be useful for me to indicate my views on some aspects of the second part of the test, at least insofar as they relate to the evidence before me.

The second part of the test is set out in the passage quoted earlier of Chief Justice Dixon. Counsel have abbreviated the three aspects as one: rational connection; two: minimum impairment; and three: harshness versus importance of the objective.

With respect to the rational connection requirement, accepting Mr. Shaw's submission that what is required is a reasoned apprehension of harm, as described by Mr. Justice Laforest in *R v Butler*, 1992 1 S.C.R. 452 at pages 486–511, and referred to in other cases, I would conclude, for the same reasons set out with respect to the question of a pressing and substantial concern, that this case is distinguishable from *Butler* and those other cases, and that from the evidence before me a reasoned apprehension has not been made out.

With respect to the latter two aspects of the second part, in view of the apparent thrust of Dr. Hiebart's criticism of the spending in the 1988 election of very large amounts, that is greater than \$50,000, and the evidence of the applicant that the \$1,000 limit precludes any national expression, and Mr Lortia's concession to that effect in the commentary of the commission, together with the comments at various stages of the select committee as to alternate methods such as disclosure and registration schemes as a possible remedy, I would hold that the \$1,000 limit fails the latter two aspects as well.

In the result I find that sections 259.1(1) and 213(1) are in breach of section 2(b) and 3 of the Charter, and that section 259.2(2) is in breach of sections 2(b), 2(d) and 3, none are justified under section 1, and therefore all are of no force and effect.

Costs may be spoken to at this time or at some later time convenient to counsel. Are there any submissions as to costs or otherwise?

Mr. Hunter: My Lord, I would propose that we appear before you to make submissions with respect to costs.

The Court: Very well.

Mr. Hunter: If that's agreeable. And I can be available on short notice, whatever suits Your Lordship on that.

The Court: I will be away from July 1st on.

Mr. Hunter: Would Tuesday be possible, My Lord, for the purpose.

The Court: Yes, what time.

Mr. Shaw: Any time on Tuesday would be fine.

The Court: Could we make it 1.30?

Mr. Hunter: That's fine, My Lord.

PROCEEDINGS CONCLUDED

Delivered orally at the Court House, Calgary, Alberta on 25th day of June, A.D. 1993.

A. Hunter, Esq.

E. Groody, Esq.

For the Plaintiff

J. Shaw, Esq.

K. Coughlan, Ms.

For the Defendant

Lynna Rafferty, Ms., CSR(A)

Official Court Reporter

CAT – 25th June, 1993

COURT OF APPEAL

PROVINCE OF QUEBEC
MONTREAL REGISTRY

NO: 500-09-001593-920
(760-05-000252-898)

CORAM: THE HONOURABLE McCARTHY
MAILHOT, J.J.A.
MOISAN, J.A. ad hoc

ATTORNEY GENERAL OF CANADA

APPELLANT – Respondent

v.

MONIQUE BARRETTTER,
DANIEL PAYETTE,

RESPONDENTS – Petitioners

and

JEAN-MARC HAMEL

MIS EN CAUSE – Mis en cause

Elections – Reimbursements of expenses – Limited of 15% of valid votes cast for non-elected candidates – Whether limitation was in breach of Charter of Rights and Freedoms.

Background facts

The Attorney-General of Canada appealed against a judgement which declared that certain sections of the Canada Elections Act were inconsistent with the Canadian Charter of Rights and Freedoms and of no force or effect. The impugned section of the Act contained words which, with the exception of elected candidates, limited to those candidates who have obtained at least 15% of the valid votes cast the right granted by the Act to reimbursements of one-half of allowable election expenses.

Held

That he was granted and the respondents' motion for a declaratory judgment was dismissed.

Cases cited in Judgement

Andrew v Law Society of British Columbia, (1989) 1 SCR 143

R. v Turpin (1989) 1 S.C.R. 1296

OPINION OF McCARTHY, J A

This is an appeal by the Attorney General of Canada from a judgement which declared "inconsistent with sections 3 and 2(b) of the *Canadian Charter of Rights and Freedoms* and of no force or effect" certain words in sections 241(1)(a) and 242 of the *Canada Elections Act* R.S.C. Chap. E-2 ("the Act"). The words are those which, with the exception of elected candidates, limit to those candidates who have obtained at least 15% of the valid votes cast the right granted by the Act to the reimbursement of one-half of allowable election expenses. The judge also held that the infringement of sections 3 and 2(b) had not been shown to be justified under section 1 of the Charter.

Section 3 of the Charter reads as follows:

"3. Every 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 judge in the first instance pointed out that the right to vote necessarily means the right to vote "in an informed and rational manner, after the citizen has had an opportunity to know the political options and programmes supported by the candidates". Similarly, the right to stand for election necessarily means with the electorate....". Legislation which, either in its purpose or in its effect, interferes with such rights is unconstitutional. The *purpose* of the 15% threshold for reimbursement is "to discourage the proliferation of parties and candidates unable to attract an important following", parties and candidates that are "ephemeral, marginal, frivolous or insignificant". No one suggests that that purpose as such interferes with the rights guaranteed by section 3. However, the judge concluded, the *effect* of the 15% threshold renders it unconstitutional:

"The evidence shows that effective communication of information to the citizenry by a candidate for election involves expenses. In theory, each candidate should be afforded an equal opportunity to communicate his views to the electorate; otherwise there is the danger that the latter will be given a distorted or incomplete view of the issues. Of course, perfect equality is impossible. Much will depend upon the capacity of each candidate to use effectively and persuasively the opportunities afforded to him, but the law should not contribute to or aggravate inequalities.

A candidate who is not independently wealthy and who anticipates receiving electoral support near to or below the 15% threshold will be naturally apprehensive about his budget for election expenses. Since it is an all or nothing proposition, the 15% threshold produces the curious anomaly that the truly marginal candidate who has no real hope of attracting more than, say, 5% of the

vote may be less inhibited than the candidate who is at or near the 15% level; the latter does not know how much can be safely spent, whereas the former understands that he or she will not receive the government subsidy, and budgets accordingly.

In the Court's opinion, the effect of the limitation in sections 241 and 242 tends to discourage some serious candidates for election from conducting an effective campaign, for fear of incurring costs that may or may not be subsidized by the government. The uncertainty of their situation serves to distract them from what should be their primary concerns during an election campaign. If all candidates were equally distracted or inhibited, the likelihood of a violation of section 3 is diminished, but equality of opportunity is essential to fairness in elections, and an unfair election is an infringement of the citizen's right to vote.

The Court concludes that the limitation of the reimbursement of election expenses to those candidates receiving 15% of the vote is inconsistent with section 3 of the Charter."

Section 2(b) of the Charter reads as follows:

"2. Everyone has the following fundamental freedoms:

.....

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

....."

The judge concluded that the *effect* of the 15% threshold also inhibits "public debate on the part of some candidates for election" and thus violates the freedom of expression guaranteed by section 2.

Respondents also argued that the 15% threshold constitutes discrimination prohibited by Article 15 of the Charter, which reads as follows:

"15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

However, the judge rejected this argument, saying that the alleged discriminatory *effect* in favour of the Progressive-Conservative and Liberal parties at the expense of the New Democratic Party was far from being proved. Furthermore, said the judge, unsuccessful NDP candidates (the respondent Payette was one, his official agent being the respondent Barrette) do not form a group members of which can be subject to discriminating within the meaning of section 15 as interpreted in *Andrews v Law Society of British Columbia* 1989 1 S.C.R. 143.

With deference, I have difficulty in following to its conclusion the reasoning in first instance. Quite properly the judge emphasises the right of the voter to know, and of the candidate to make known, the candidate's views. Quite properly the judge, on the other hand, avoids saying the section 3 (or section 2(b)) of the Charter obliges the legislator to supply candidates with the means necessary to make known their views. Nor do the respondents argue that the legislator has such an obligation. What the respondents do argue, and the judge appears to accept the argument, is that *if* the legislator does supply such means, in whole or in part, he must supply them without discrimination in purpose or in effect (subject to the possible application of section 1 of the Charter). Discriminating in this sense is supposedly something different from discrimination under section 15, which the judge, at least, concludes is not present here. However, I see nothing in the Charter to support the supposition that there are two kinds of prohibited discrimination, one explicitly prohibited and one implicitly prohibited. In other words, if the portions of the Act here in question are unconstitutional it must be because they infringe not section 3 or section 2(b) but section 15. They do not impede the right to vote or to stand for election or to express oneself freely; the question is whether they encourage with discriminatory purpose or effect the exercise of any of those rights.

In *Andrews*, although a minority concluded that it was nonetheless justified under section 1, the Supreme Court of Canada held unanimously that a provincial legal provision making Canadian citizenship a requirement for admission to the bar involved discrimination within the meaning of section 15 of the Charter. McIntyre J (all his colleagues concurring on this point) described such discrimination as follows (page 174):

"I would say then that discriminating may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society."

Referring to various approaches adopted with regard to section 15, he said (pages 179–180):

"A third approach, sometimes described as an 'enumerated or analogous grounds' approach, adopts the concept that discrimination is generally expressed by the

enumerated grounds. Section 15(1) is designed to prevent discrimination based on these and analogous grounds."

and (page 182):

"The third or 'enumerated and [sic] analogous grounds' approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above...."

McIntyre J concluded, page 183, that non-citizens lawfully permanent residents of Canada constitute "a good example of a 'discrete and insular minority' who come within the protection of s. 15".

In *R v Turpin* 1989 1 S.C.R. 1296 the Supreme Court quoted the above passages from *Andrews* and added (pp. 1331–1332):

"In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. McIntyre J emphasised in *Andrews* (at p.167):

'For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.'

Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrary wise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from the independent of the particular legal distinction being challenged."

In *Turpin* the Court also referred to the opinion of Wilson J in *Andrews* to the following effect (p 1332):

".....the determination of whether a group falls into an analogous category to those specifically enumerated in s. 15 is 'not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society'."

The Court held unanimously that a section of the Criminal Code requiring, except in Alberta, that an accused charged with certain offences be tried by judge and jury did not involve discrimination within the meaning of section 15. "Persons resident outside Alberta and charged with section 427 offences outside Alberta" said the Court at p 1333, "do not constitute a disadvantaged group in Canadian society within the contemplation of section 15". At the same time, the Court suggested that *in some circumstances* a person's province of residence or place of trial *could* be "a personal characteristic of the individual or group capable of constituting a ground of discrimination". It should perhaps also be noted that in *Andrews*, although he approved the "enumerated and analogous grounds" approach, McIntyre J at a previous point (p 175) had suggested that there might possibly be *no* limits on the grounds for discrimination.

Applying to the present case as best I can, the comments of the Supreme Court in *Andrews* and *Turpin* I am unable to see in the 15% threshold for partial reimbursement of elections expenses any discriminatory purpose or effect within the meaning of section 15 of the Charter. Unsuccessful candidates who do not obtain at least 15% of the valid votes cast are not, in my view, a "discrete and insular minority". Nor are they a "disadvantaged group in Canadian society". If the 15% threshold discriminates against them, such discrimination is not based on any of the grounds enumerated in section 15 or on any analogous ground. For the same reasons, the 15% threshold involves no prohibited discrimination against voters who, if they are more fully informed, might vote differently. As for persons who, if they are more assured of being supplied with the means necessary to make their conduct a different kind of campaign, the same considerations apply. Turning to the argument that the 15% threshold has in practice the *effect* of discriminating against the NDP or, more correctly, against members of that party, I agree with the judge that that argument is not proved. Nor do the results of the federal election held while the present case was under advisement in this Court, to the extent that we may take judicial notice of such results, support the argument that the 15% threshold has the effect of discriminating against members of new political formations or against voters who might vote for candidates representing such formations or against persons who might become such candidates. True, the judge expressed the view that the 15% threshold "tends to discourage some serious candidates for election from conducting an effective campaign" (see page 3 above) but that view was not expressed in the context of section 15, in the context of discrimination. In the context of discrimination this is what the judge said:

"Petitioners [respondents] suggest that the effect of the legislation under attack is to favour the Progressive Conservative and Liberal parties, at the expense of the New Democratic Party. The Court is satisfied that this was not intended by the legislation, and it is not convinced that the Act has produced an effect unfavourable to the NDP. Prof. Boily in this report proposes the contrary and shows in a persuasive way that at the national level at least, the NDP has benefited financially more than any other party from the electoral reform effected in 1974."

As I have indicated, I agree.

In the light of all the foregoing, it is not necessary to deal here with possible justification of the 15% threshold under section 1 of the Charter.

I would grant the appeal and dismiss respondents' motion for a declaratory judgement. I would order the parties to pay their own costs in both courts, the appellant having advised us that such an order would be acceptable.

Gerald McCarthy J A

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO 640 OF 1993
(With Cross Objections)

Gajanan Krishnaji Bapat & Another Appellants

v

Dattaji Raghobaji Meghe & Others Respondents

Before

A. S. Anand, J and M. K. Mukherjee J

Elections – Election expenses – expenses met by party and others – whether candidate's expenses.

Background facts

The appellants filed an election petition challenging the election of the respondent No.1, Dattaji Raghobaji Meghe, the returned candidate from 23 Nagpur Parliamentary constituency in elections held for the Xth Lok Sabha and sought a declaration to the effect that respondent No.2, Shri Banwarilal Bhagwandes Purahit, be declared as the duly elected candidate from the said constituency after setting aside the election of the returned candidate.

The main case of the appellants was that the expenditure incurred or authorised by respondent No. 1 or his election agent was much more than what had been disclosed by him in the return lodged under the election law with the District Election Officer and that huge expenditure incurred by him in connection with his election had been suppressed.

Held

That the election petitioners had miserably failed to discharge the onus of proving various charges levelled by them against the returned candidate regarding the commission of corrupt practice. The election appeal consequently failed and was dismissed.

Cases cited in Judgement

Jyoti Basu v Debi Chosal (1982) (3) SCR 318
Nihal Singh v Rao Birendra Singh & Another (1970) (3) SCC 239
Prabha Jain v Charan Das & Another (1975) (Supp) SCR 107
Danlat Ram Chamhan v Anand Sharma (1984) (2) SCR 419
Quanmarul Isham v S.K. Kanta and Others (1940) Supp (3) SCC 5
Surendra Singh v Hardaval Singh (1985) AIR SC 89
Rai Naraim v Indira Gandhi (1976) (2) SCR 347
Ch Razik Ram v Ch Jaswant Singh Chouhan & Others (1975) (4) SCC 769
Samant N. Balakrishna v George Fernandez & Others (1969) AIR SC 1201
Sheodan Singh v Moham Lal Gantam (1969) AIR SC 1024
Nagh Raj Patodia v R. K. Birla (1971) AIR SC 1295
O. Nalla Thamby v Union of India (1958) AIR SC 1133
Jagannath v Jaswant Singh (1954) SCR; 892

DR. ANAND J

This appeal under Section 116-A of the Representation of People Act 1951 (hereinafter referred to as the Act), by two electors is directed against the judgement and order of a learned single Judge of the Nagpur Bench of the High Court of Judicature at Bombay dismissing the election petition. The returned candidate has also filed cross-objections challenging those findings which have gone against him. Both shall be disposed of by this common judgement.

The appellants filed an election petition under section 80 of the Act challenging the election of respondent No. 1, Dattaji Raghobaji Meghe, the returned candidate from 23 Nagpur Parliamentary constituency in the elections held for the Xth Lok Sabha and also sought a declaration to the effect that respondent No. 2 Shri Banwaqrilal Bhagwandas Purohit be declared as the duly elected candidate from the said constituency after setting aside the election of the returned candidate. The challenge to the election of respondent No. 1 was mainly based on the allegations of commission of various corrupt practices by him and/or his election agent detailed in the petition.

Appellant No. 1 was at the relevant time the Vice-President of Bhartiya Janta Party (Nagpur City) Nagpur, while appellant No. 2 was a worker of the Bhartiya Janta Party. Respondent No. 2, Shri Banwarilal Bhagwandas Purohit, the defeated candidate had been sponsored as a candidate by the Bhartiya Janta Party, while respondent No. 1. Datta Raghobaji Meghe, the returned candidate, had been sponsored by Congress (1). Besides respondents 1 and 2, the other candidates, who had contested the election and had not withdrawn their candidatures from the contest, numbering more than forty-two, were also joined as respondents to the election petition.

The main case of the appellants projected before the High Court and canvassed before us against the returned candidate was that the expenditure incurred or authorised by respondent No. 1 or his election agent was much more than had been disclosed by him in the return of expenditure lodged under Section 78 of the Act with the District Election Officer and that huge expenditure incurred by him in connection with his election had been suppressed. It was further alleged that, though the expenditure incurred in connection with the election of respondent No. 1 was shown to have been incurred by the political party, some other sympathetic associations, organisations, individuals, friends and well-wishers, the said expenditure, in fact, had been incurred and/or authorised by respondent No. 1 and/or his election agent and the amount spent by those organisations had been provided out of the funds made available by respondent No. 1 to those parties for making the payment and their names were given only to conceal the truth of the transactions so as to escape from the mischief of section 123 (6) of the Act. It was pleaded that some of the organisations under whose names the advertisements had appeared, were in fact non-existent and that the individuals who were shown ostensibly to have incurred some expenditure for furtherance of the prospects of the election of respondent No. 1, had actually no funds of their own to spend and respondent No. 1 had placed his own funds in their hands to meet the expenditure. According to the appellants, the expenditure incurred by respondent No. 1 was far in excess of the limit prescribed by Section 77 of the Act, read with Rule 90 of the conduct of

Election Rules 1961 (hereinafter the 'Rules'), and the return of election expenditure did not reflect the correct state of affairs. Since respondent No. 1 had exceeded the prescribed limit of expense, he was guilty of committing the corrupt practice under section 123 (6) of the Act and his election was, therefore, liable to be declared void and respondent No.1 also disqualified for committing the corrupt practice.

Respondent No. 1, before filing his written statement, raised a preliminary objection, through Ex.16 and Ex. 17, to the effect that the allegations made in the petition were vague and that material facts and particulars had not been supplied and as such the vague pleadings were reliable to be struck off the election petition rejected under section 81(3) read with section 86 of the Act. On 29.10.1991, however, Ex. 16 was rejected while application Ex. 17 was allowed to the extent that the allegations made in the petition regarding the commission of corrupt practice under Section 123 (2) and (3A) were found to be vague and non-specific and the pleadings in that connection were directed to be struck off. Against the order of rejection of the preliminary objection raised in Ex. 16, respondent No. 1 preferred a special leave petition being SLP (C) No. 1911165-66/91 in this Court which was dismissed on 20th December 1991 by the following order:

"The special leave petition is dismissed. However, this order will not prevent him from raising objections, which are available to him according to law, when the evidence is made on the relevant allegations."

Subsequently, an application, Ex. 27, filed by the appellants for leave to amend the election petition for correcting certain inadvertent "errors, omissions and slips" was allowed on 28.11.1991 and the necessary corrections were carried out in the election petition. Again an application Ex. 47/A filed by the appellants seeking further amendment of the verification clause of the petition was allowed by the Court on 18.1.1992, after an earlier application, Ex. 44, filed by the appellants seeking amendment of the election petition had been allowed on 18.12.1991.

A detailed written statement was thereafter filed by respondent No. 1 in which the charges levelled against him in the election petition were vehemently denied. Respondent No. 1, in respect of certain items of expenditure, took a specific stand that the expenditure on those items as detailed by the appellants in the election petition, were incurred by Nagpur City District Congress Committee and Nagpur Gramin Congress Committee and not by him. Similarly, in respect of some other items of expenditure in respect of those items was incurred by certain organisations, associations, individuals, friends and well-wishes, without any authority or consent of respondent No. 1 or his election agent and completely on their own volitions. In the written statement, the names of some of the organisations and individuals as well as the associations of persons and the political party who had incurred the expenditure were furnished by respondent No. 1. It was maintained by respondent No. 1 that he had not incurred any expenditure besides the one reflected in the return of election expense and had not committed any corrupt practice. After the amendments were carried out by the appellants, the returned candidate, respondent no. 1 filed yet another 'vague and non-specific' pleadings but the same was rejected, though the

prayer of respondent No. 1 to amend the written statement made through application Ex. 49 was allowed on 9.1.1992.

From the pleadings of the parties, the following issues were framed on 21.1.1992:

- (1) Do the petitioners prove that they were electors in the election held for the Tenth Lok Sabha from 23, Nagpur Parliamentary Constituency?
- (2) (a) Do the petitioners prove that a meeting was held in the office of the Maharashtra State Handloom Corporation on 17.5.1991 during the Tenth Lok Sabha Election from 23, Nagpur Parliamentary Constituency?

(b) Do the petitioners further prove that the said meeting was addressed by the respondent No. 1?

(c) Do the petitioners prove that in the said meeting, respondent, No.1 had declared that labour charges for handloom weavers would be increased by 0.35 paise per sq. metre from June 1991?

(d) Do the petitioners prove that the said declaration of increase in the labour charges was made by respondent No. 1 to hold out promise of gratification for inducing the weavers numbering 150,000 to vote for the respondent No.1?

(e) Do the petitioners prove that the said declaration made by the respondent No.1 amounts to commission of corrupt practice within the meaning of Section 123 (1) (a) i.e. bribery?

(f) Do the petitioners further prove that the said declaration made by respondent No. 1 also amounts to undue influence constituting commission of corrupt practice under section 123(2) and further amounts to direct or indirect interference or attempt to interfere with the free exercise of electoral rights of the handloom weavers who were electors in the said election?
- (3) Do the petitioners prove that the respondent No. 1 has not maintained correct and proper accounts as is required to be maintained under section 77 and has incurred expenses in excess of the limit prescribed thereunder and thereby committed corrupt practice under Section 123 (6) of the Act ?
- (4) Do the petitioners prove that the respondent No. 1 incurred by him in the return of expenditure annexed as Annexure 7 to the petition, on the following items as alleged in paras 2.4 to 2.10 of the petition, on account of the –

- (i) payments made to Shri Devi Sharda Mangal Karyalaya, Nagpur, by way of office rent;
 - (ii) payments made to M/S Vishwa Bharti Typing Institute, Nagpur;
 - (iii) payments made to M/S Prince Travels, Nagpur, for hiring autorickshaws and taxis;
 - (iv) payments made to M/S Pramod Automobiles, Nagpur;
 - (v) payments made to M/S Raj Automobiles, Nagpur.
- (5) (a) Do the petitioners prove that the respondent No. 1 has authorised and/or incurred expenditure on the undermentioned items which has not been disclosed in the return of expenditure annexed as Annexure 7 to the petition as alleged in paras mentioned in the petition described against each item hereunder?
- (b) (i) Do the petitioners prove that printing cards at Annexure 9 indicate that the same have been published by Nagpur City District Congress Committee, Nagpur, but the expenditure incurred on printing and distribution of about 15 lacs voter-cards has been made by respondent No.1 to the extent of Rs.2,25,000/-. Do the petitioners further prove that the respondent No.1 got printed those cards at Shakti Offset Works, Nagpur and the said firm received a total amount of Rs.2,25,000/- from respondent No. 1?
- (ii) Do the petitioners prove that respondent No. 1 got printed 325,000 posters of different sizes though those posters show that they were issued by President, Nagpur District Congress Committee and the entire expenditure of these posters to the tune of Rs. 3, 40, 250/- was made by respondent No. 1?
- (iii) Do the petitioners prove that the respondent No. 1 published his candidature by large size cut-outs at places mentioned in Annexure 11 alleged to be prepared by persons whose names are given in Annexure 10? Do the petitioners further prove that cost of these cut-outs comes out to Rs.283,000/- as given in Annexure 11 and was incurred by respondent No. 1 by paying the same to persons mentioned in Annexure 10?
- (iv) Do the petitioners prove that the respondent No. 1 advertised his candidature by wall paintings at different locations at Annexure 12 costing about Rs. 88500/-? Do the petitioners further prove that this wall paintings work was not executed by respondent No. 1 through painters and incurred expenditure of it by payment of charges of painters?

(v) Do the petitioners prove that about 1,240,830 letters such as those at Annexure 13 & 14 were prepared by the respondent No.1 and were sent to voters and almost all the voters received these letters? Do the petitioners further prove that although on this letter it appears that the same is being sent at the instance of Sarva Dharma Sambhav Samajik Sanghna, the expenditure required in fact was incurred by respondent No. 1 to the extent of Rs.1,240,830/-?

(vi) Do the petitioners prove that advertisements in newspapers at Annexure A at S1. Nos. A2, A5, A7, A8, A10, A14 to A19, A22 to A27, A28(b), A30(a) (first part) A30 (b) (second part); Annexure B at S1. Nos. B4 to B9, B11 to B14, B17 and B18, Annexure C at S1. Nos. C1, C2, C4, C5, C10, C12, C14 to C18, C23 & C24. Annexure D: at S1. Nos. D1, D2, D3, D5, D7, D8, D11, D13, and D15; Annexure E, At S1. Nos. E1, E2, E3, E9, and E10; Annexure F, At S1. Nos. F1, F3, F6, F10, F14 and F16; Annexure G at S1. Nos. G1, G2 and G3; Annexure H at S1. Nos. H11 to H14, H17, H8, H11 and H17, were published by the respondent No.1 himself in connection with the election and he himself incurred the expenditure?

(vii) Do the petitioners prove that the advertisements appearing in newspapers at –

Annexure A: at S. Nos A6, A9, A11 to A13, A20, A21, A27(a), A28, A30(b) (first part) and A31(b);

Annexure B: at S. Nos. B1, B2, B3, B10, B15, B16 and B19

Annexure C: at S. Nos. C3, C6 to C9, C11, C13, C19 to C22.

Annexure D: at S1. Nos. D6, D9, D10, D12, and D14

Annexure E: at S1. Nos E3 to E8;

Annexure F: at S. Nos. F3, F5, F7 to F9, F11 to F13 & F15;

Annexure G: at S. Nos. G4 to G8;

are published in connection with the election by the respondent No.1 and the expenditure of which is incurred by the respondent No.1 himself though in the said advertisement the names of publishers are shown as persons other than the respondent No. 1 given in Annexures.

- (6) (a) Do the petitioners prove that the respondent No. 1 had employed M/S Yugdharma Consultant and Commercial Services, Nagpur to publicise his candidature and incurred expenditure as per the details shown in Annexures 17 and 18 and alleged in para 2.13 of the petition.
- (b) Do the petitioners prove that besides the above agency, the respondent No. 1 had employed two other agencies, namely, Orange City Advertising and Prasad Publicity, for publishing his candidature by advertisements issued in the newspaper and thereby authorised and incurred expenditure as per details shown in Annexure 18A, 18B and 18C and alleged in paras 2.23D of the petition?
- (c) Do the petitioners prove that election agent of respondent No. 1 incurred total expenditure to the tune of Rs.39,500/- on 14.6.91 and 17.6.91 for publication of advertisement in connection with the election?
- (7) Do the petitioners prove that the respondent No. 47 did not properly scrutinise the nomination of the respondent No. 3 and he was allowed to represent himself as such, although a wireless message dated 26.4.91 to the contrary was received by the Returning Officer prior to the acceptance of the nomination papers from the Chief Electoral Officer of the Maharashtra?
- (8) Do the petitioners prove that by allowing the respondent No. 3 to represent himself as the official candidate of R.P.I.(k), the result of the election of the respondent No. 1 has been materially affected?
- (9) Are the petitioners entitled to have an inspection of the ballot papers on the basis of the allegations made in paras 3.1 to 3.11 of the petition and the allegations made in paras 1 to 13 of Ex. 28?
- (10) Do the petitioners prove that the election of the respondent No.1 to the Tenth Lok Sabha from 23, Nagpur Parliamentary Constituency is void on account of the commission of corrupt practices under Section 123(1A) & Section 123(2) and Section 123(6) of the Act?
- (11) Do the petitioners prove that the respondent No. 2 has secured majority of valid votes to entitle him to be declared as duly elected from 23, Nagpur Parliamentary Constituency to the Tenth Lok Sabha?
- (12) Do the petitioners prove that but for the votes obtained by respondent No.1 by alleged corrupt practices, the respondent No. 2 would have obtained a majority of valid votes to entitle him to be declared duly elected?

- (13) Whether respondent No. 2 can be declared as duly elected to the Tenth Lok Sabha from 23, Nagpur Parliamentary Constituency, Nagpur?
- (14) What order?

After the evidence of some of the witnesses was recorded on behalf of the appellants, Election Petitioner No. 1 filed an application, Ex. 701 on 27.5.1992, once again for amending the election petition in the light of the evidence recorded. Respondent No. 1 filed his objections to the said application through Ex. 834 on 15.6.1992. The learned Single Judge, allowed the application permitting the election petitioner to amend the election petition once again and being of the view that no new issue was required to be framed on the basis of the proposed amendments directed that the respondent No. 1 could apply for recalling any of the petitioners' witnesses for further cross-examination on 17.6.1992, respondent No. 1 filed an application Ex. 835 for leave to amend the written statement which was also allowed. We shall advert to the proceedings concerning various amendments in the latter part of this judgement.

The learned Single Judge, after conclusion of the evidence and after hearing learned counsel for the parties, held that the appellants (election petitioners) had proved that respondent No. 1 had not maintained a correct and proper account of the election expenditure as is required to be maintained under Section 77 of the Act. It was also found that respondent No. 1 had not shown in his return an expenditure to the extent of Rs.58220/- apart from the expenditure shown by him in the return of election expenditure but since the addition of the said amount, to the amount of expenditure shown by respondent No.1 in his return of election expenses, did not exceed the permissible limit of Rs.1,50,000/-, the returned candidate, respondent No. 1, did not commit any corrupt practice as envisaged by section 123(6) and dismissed the election petition but without any order as to costs in favour of respondent No. 1.

Since, in this appeal, learned counsel for the appellants Dr. Ghatate, has confined his case to issues 3, 4(v), 5(b) (i) (ii) (v) (vii); issued No.6 (a) (b) (c); and partly Issue No.10, we are, as such, relieved of the necessity of dealing with the other issues. We confirm the findings of the High Court in respect of those issues of which correctness has not been disputed before us.

The right to elect and the right to be elected are statutory rights. These rights do not inhere in a citizen as such and, in order to exercise the right, certain formalities as provided by the Act and the Rules made thereunder are required to be strictly complied with. The statutory requirements of election law are to be strictly observed because the election contest is not an action as law or a suit in equity but it is a purely statutory proceeding unknown to the common law. The Act is a complete code in itself for challenging an election and an election must be challenged only in the manner provided for by the Act. In *Jyoti Basu v Debi Ghosal* (1982 (3) SCR 318), this Court observed:

"A right to election, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a Statutory right. So is the right to be elected. So it is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An Election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket."

Though the election of a successful candidate is not to be interfered with lightly and the verdict of the electorate upset, this Court has emphasised in more than one case that one of the essentials of the election law is to safeguard the purity of the election process and to see that people do not get elected by flagrant breaches of the law or by committing corrupt practices. It must be remembered that an election petition is not a matter in which the only persons interested are the candidates who fought the election against each other. The public is also substantially interested in it and it is so because election is an essential part of a democratic process. It is equally well settled by this Court and necessary to bear in mind that a charge of corrupt practice is in the nature of a quasi-criminal charge, as its consequence is not only to render the election of the returned candidate void but in some cases even to impose upon him a disqualification for contesting even the next election. The evidence led in support of the corrupt practice must therefore not only be cogent and definite but if the election petitioner has to succeed, he must establish definitely and to the satisfaction of the court the charge of corrupt practice which he levels against the returned candidate. The onus lies heavily on the election petitioner to establish the charge of corrupt practice and, in case of doubt, the benefit goes to the returned candidate. In the case of an election petition, based on allegations of the commission of corrupt practice, the standard of proof is generally speaking that of criminal trials, which requires strict proof of the charge beyond a reasonable doubt and the burden of proof is on the petitioner and that burden does not shift. (See with advantage: *Nihal Singh v Rao Birendra Singh & Another* (1970 (3) SCC, 239); *Om Prabha Jain v Charan Das & Another.*, (1975 (Supp) SCR, 107); *Daulat Ram Chauhan v Anand Sharma* (1984 (2) SCR, 419) and *Quamarul Islam v S. K. Kanta and Others* (1994 Supp (3) SCC, 5).

By this proposition, however, we should not be understood to mean or imply that the returned candidate is absolved from his liability to bring forth evidence on the record to rebutt the case of the petitioner and to particularly prove such facts which are within his special knowledge (section

106 Evidence Act). Though, the nature of allegations in cases alleging corrupt practices are quasi-criminal and the burden is heavy on him who assails election but unlike in a criminal trial, where an accused has the liberty to keep silent, during the trial of an election petition the returned candidate has to place before the Court his version and to satisfy the Court that he had not committed the corrupt practice as alleged in the petition and wherever necessary by adducing evidence besides giving his sworn testimony denying the allegations. However, this stage is reached if and when the election petitioner leads cogent and reliable evidence to prove the charges levelled against the returned candidate as only then can it be said that the former has discharged his burden. That necessarily means, that if the election petitioner fails to adduce such evidence which may persuade the court to draw a presumption in his favour the returned candidate will not be required to discharge his burden by adducing evidence in rebuttal. While on this point, it will also be pertinent to mention that the election petitioner has to establish the charge by proof beyond reasonable doubt and not merely by preponderance of probabilities as in civil action. In *Surendra Singh v Hardaval Singh* [AIR 1985 SC 89], this Court held it as:

"Very well settled and uniformly accepted that charges of corrupt practices are to be equated with criminal charges and proof thereof would be not preponderance of probabilities, as in civil action, but proof beyond reasonable doubt and if after balancing the evidence adduced there still remains little doubt in proving the charge its benefit must go to the returned candidate.' Various tests have been laid down by the High Courts and by this Court to determine the extent of proof required to establish a corrupt practice. The most well accepted test however is that the charge must be established fully to the satisfaction of the Court. While insisting upon the standard of strict proof beyond a reasonable doubt, the courts are not required to extend or stretch the doctrine to such an extreme extent as to make it well nigh impossible to prove any allegation of corrupt practice and as was said in *Harcharan Singh v Sajjan Singh* [AIR 1985 SC 236] "such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electoral process."

We are in respectful agreement with the above view. Sometimes direct evidence about the commission of corrupt practice may not be forthcoming or available and in that case, the charge may be proved by producing circumstantial evidence but the courts, in such cases insist, that each of the circumstances must be proved individually and all the circumstances put together must point unerringly only to the hypothesis of the commission of the corrupt practice by the returned candidate and must not be capable of any other hypothesis consistent with the innocence of the returned candidate. (see: *Quamarul Islam v S.K. Kanta And Others* (supra); *Raj Narain v Indira Gandhi* (1976 (2) SCR, 347); *Ch. Razik Ram v Ch. Jaswant Singh Chouhan and Others* (1975 (4) SCC, 769).

The election law insists that to unseat a returned candidate, the corrupt practice must be specifically alleged and strictly proved to have been committed by the returned candidate himself

or by his election agent or by any other person with the consent of the returned candidate or by his election agent. Suspicion, howsoever, strong cannot take the place of proof, whether the allegations are sought to be established by direct evidence or by circumstantial evidence. Since, pleadings play an important role in an election petition, the legislature has provided that the allegations of corrupt practice must be properly alleged and both the material facts and particulars provided in the petition itself so as to disclose a complete cause of action.

Section 83 of the Act provides that the election petition must contain a concise statement of the material facts on which the petitioner relies and further that he must set forth full particulars of the corrupt practice that he alleges, including as full a statement as possible of the name of the parties alleged to have committed such corrupt practices and the date and place of the commission of each of such corrupt practice. This section has been held to be mandatory and requires first a concise statement of material facts and then the full particulars of the alleged corrupt practice, so as to present a full picture of the cause of action.

A petition levelling a charge of corrupt practice is required, by law, to be supported by an affidavit and the election petitioner is also obliged *to disclose his source of information* in respect of the commission of the corrupt practice. This becomes necessary to bind the election petitioner to the charge levelled by him and to prevent any fishing or roving enquiry and to prevent the returned candidates from being taken by a surprise (see: *Samant N. Balakrishna v George Fernandez and Others* (AIR 1969 SC, 1201)).

The jurisdiction to try an election petition has been vested in the High Courts. Election petitioners are, generally speaking, tried by experienced judges of the High Courts. Those learned judges have the benefit of observing the witnesses when they give evidence.

Therefore, the appreciation of evidence by the High Court is entitled to great weight. Generally speaking, this Court accepts the findings of fact arrived at by the High Court after appreciation of evidence (see *Sheodan Singh v Mohan Lal Gautam* (AIR 1969 SC 1024)). Being the Court of First Appeal, however, this Court has no inhibition in reversing such a finding, or fact or law, which has been recorded on a misreading or wrong appreciation of the evidence or the law, but ordinarily and generally speaking, this Court does not, as it ought not to, interfere with the findings of fact as recorded by the learned trial Judge of the High Court, unless there are compelling reasons to do so. It is in the light of the above settled principles, that we shall consider the materials on the record and the findings of the High Court in respect of which challenge has been made before us.

As already noticed the appellants confined their challenge to the findings in respect of some of the issues only which relate to the commission of corrupt practice of incurring or authorising expenditure in excess of the prescribed limits within the meaning of Section 123 (6) of the Act. It would, therefore, be appropriate to consider the parameters of the alleged corrupt practice before we examine the findings and the arguments in respect of the relevant issues.

Section 77 of the Act provides that ‘every candidate at an election shall either by himself or by this election agent keep a separate and correct account of all expenditure in connection with the election *incurred or authorised* by him or by his election agent between the date of publication of the notification calling the election and the date of declaration of the result thereof, both days inclusive, Explanation (1) which was introduced by the Amendment Act of 1974 declares that any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual, (other than the candidate or his election agent) *shall not be deemed to be and shall not ever be deemed to have been*, expenditure in connection with the election incurred or authorised by the candidate or by his election agent for the purposes of sub-section (1) of section 77. Sub-section (2) of section 77 provides that the account of election expenses shall contain such particulars as may be prescribed and sub-section (3) lays down that the total of the said expenditure shall not exceed such amount as may be prescribed. Vide section 78 of the Act the account of election expenses is required to be lodged with District Election Officer by every candidate at an election within thirty days from the date of election of the returned candidate. The maximum amount of election expenditure which may be incurred by the candidates for the Parliamentary and Assembly Constituencies has been prescribed in Rule 90 of the Conduct of Election Rules 1961. In so far as the Parliamentary Elections are concerned, the said limit is Rs.1,50,000/-. Under section 123 (6) of the Act, the incurring or authorising of expenditure in contravention of section 77, of the Act amounts to commission of a corrupt practice. However, every contravention of section 77 of the Act does not fall within the mischief of section 123(6) of the Act. Neither the violation of sub-section (1) of section 77 nor the violation of sub-section (2) of section 77 amounts to the commission of the corrupt practice under section 123 (6) of the Act. However, section 77(3) mandates that the total of the expenditure in connection with the election shall *not* exceed the prescribed limit and therefore the provisions of section 123 (6) of the Act are related *only* to section 77 (3) of the Act. If a candidate incurs or authorises expenditure in excess of the prescribed limits, he commits the corrupt practice under section 123 (6) of the Act and his election is liable to be set aside and he also incurs the disqualification of being debarred from contesting the next election. From a plain reading of section 123(6) and 77, including Explanation 1 to the section 77 of the Act, it is therefore clear that in order to be a corrupt practice, the excessive expenditure must be *incurred or authorised* by the candidate or his election agent. An expenditure incurred by a third person, which is not authorised by the candidate or his election agent is not a corrupt practice. In *Magh Raj Patodia v R.K. Birla*, [AIR 1971 SC 1295], after referring to a catena of authorities even before the inclusion of Explanation 1 of section 77 of the Act by the Amendment Act 58 of 1974, it was emphasised that to prove the corrupt practice of incurring or authorising expenditure beyond the prescribed limit, it is not sufficient for the petitioner to merely prove that the expenditure beyond the prescribed limit *had been incurred in connection with the election of the returned candidate, but he must go further and prove that the excess expenditure was authorised or incurred with the consent of the returned candidate or his election agent*. In *Raj Narain v Indira Gandhi* (1976 (2) SCR 347) this Court reaffirmed the above view and taking note of the Amendment Act 58 of 1974, opined that voluntary expenditure incurred by friends, relations, or sympathisers of the candidate or the candidates’ political party are not required to be included in

the candidate's return of expenses, *unless* the expenses were incurred in the circumstances from which it could be positively inferred that the successful candidate had undertaken that he would *reimburse* the party or the person who incurred the expense. It is not enough to prove that some advantage accrued to the returned candidate or even that the expenditure was incurred for the benefit of the returned candidate or that it was within the knowledge of the returned candidate and he did not prevent it, to clothe the returned candidate with the liability of committing the alleged corrupt practice. Noticing that during an election, the sponsoring or supporting political parties as well as friends, sympathisers and well-wishers do sometimes incur expenditure not only without the consent of the concerned candidate but even without his knowledge this court opined that the successful candidate cannot be clothed with all such expenses to suffer the disqualification.

In *P. Nalla Thampy v Union of India* (AIR 1958 SC 1133], a constitution Bench of this Court examined the validity of Explanation (1) to section 77 (1) of the Act (introduced in 1974) and Chandrachud C J (as he then was) while upholding its constitutionality, observed:

"In any democratic system of Government, political parties occupy a distinct and unique place. They are looked upon as guardian angels by their members, though, occasionally, they fail to discharge the benign role of guardian, leave alone the angelic part of it. It is through them that the generality of the people attempt to voice or ventilate their grievances. Considering, also the power which they wield in the administration of Government affairs, a special conferment of benefits on them in the matter of mobilities governing the election process cannot be regarded as unreasonable or arbitrary."

The Constitution Bench thus emphatically laid down that unless the expenditure is in fact incurred or authorised by the candidate or his election agent, he cannot be saddled with that expenditure. Of course a candidate cannot be permitted to place his own funds in the power or possession of a political party, an association, or some other persons or individuals for being spent on his behalf and then plead for the protection under Explanation 1 Section 77 of the Act. Where the election petitioner successfully establishes that the funds were provided by the returned candidate, it would be immaterial as to who actually made the payments, which ought to have been included in the return of election expense. It is not "whose hand it is that spends the money." The essence of the matter is "whose money it is" that has been spent. In order that explanation (1) to section 77 of the Act may apply, therefore, it must be proved that the source of the expenditure incurred was not out of the money of the candidate or his election agent.

Respondent No. 1 lodged the account of his election expenses with the District Election Officer on 12th July, 1991, supported by 45 vouchers disclosing the total expenditure of Rs. 72,421.85. The appellants in the election petition pleaded that Respondent No.1 had not kept a true and correct account of the expenditure incurred and/or authorised by him or by his election agent in relation to the elections held on 12th June, 1991 and had exceeded the prescribed limit and thereby committed the corrupt practice under section 123 (6) of the Act. The appellants alleged

that a huge amount of expenditure incurred in connection with the election of Respondent No. 1 was falsely shown to have been incurred by the political party and other associations, persons or individuals, though in fact the expenditure had been incurred and/or authorised by Respondent No. 1 himself or by his election agent. It was asserted that Respondent No. 1 had placed his own funds in the power and possession of the political party, organisations and individuals for being spent in connection with his election in order to circumvent the law and escape from the consequence of incurring and authorising expenditure beyond the prescribed limits. It was alleged that Respondent No. 1 had incurred an expenditure for the purpose of his election during the period 25.4.1991 to 16.6.1991 to the tune of Rs. 38,30,375.50, as against the permissible limit of Rs. 1,50,000.00. The statement showing the expenditure allegedly incurred and authorised by Respondent No.1 was given in para 2.24 of the election petition. At the trial, however, items No.2, 8, 9, and 14 out of that statement were not pressed. The High Court, however, in para 200 of the judgement found that besides the expenditure disclosed in the return of expenses filed by Respondent No. 1, he had also incurred the following expenses, which had been suppressed:

Rs.	17,900.00	for the amount paid to Raj Automobiles
Rs.	1,320.00	for the advertisement in the Tarun Bharat dated 28.4.1991
Rs.	7,000.00	for the advertisement in Tarun Bharat-Election Special
Rs.	9,100.00	for the advertisement of Likmat Dt.12.5.1991 Sharad Pawar Mitra Mandal)
Rs.	22,900.00	in view of the findings recorded on issue No.5(b) (vi) & (vii).

Total:Rs.	58,220.00	

and adding the amount of expenditure suppressed, i.e. Rs 58,220.00 to the declared expenses, the high court found that the return of expenditure filed by Respondent No.1 should have been for a sum of Rs. 1,30,641.85. However, since even that amount fell short of the permissible expenditure of Rs. 1,50,000.00, it was found that Respondent No.1 had not committed the corrupt practice within the meaning of Section 123 (6) of the Act. Whereas the appellants have challenged the findings of the High Court on some of the issues, as already noticed, the returned candidate, Respondent No. 1, has also filed cross objections challenging the findings of the High Court in respect of the addition of Rs. 58,220.00.

Issue No. 4 (v):

Though issue No. 4 concerns five items it is only Item No. (v) which has been pressed before us by the learned counsel for appellants. The findings of the High Court on items (i) to (iv) of Issue

No.4, which have been decided against the appellants have not been challenged before us and therefore, we confirm the findings of the High Court regarding those items. So far as Item No.(v) is concerned, it relates to the payments made by Respondent No.1 to M/S Raj Automobiles for purchase of fuel etc.

According to the appellants, Respondent No.1 in his return of expenditure submitted to the District Election Officer had, under Items 31 to 34, shown the expenditure incurred by him on account of purchases of petrol etc. from M/s Raj Automobiles, Civil Lines, Nagpur under bills No. 401 to 404 for the period 1.5.1991 to 12.6.1991 but had failed to include the cost of *1180 litres of petrol* also allegedly purchased by the returned candidate from Raj Automobiles over and above the quantity of petrol shown to have been purchased by Respondent No. 1 under bill Nos. 401, 402, 403, as disclosed in the return of expenses filed by him for the period 1.5.1991 to 12.6.1991. The appellants specifically pleaded that petrol which had been shown to have been purchased by Respondent No. 1 was for three vehicles: (i) MH-G-1722; (ii) MH-02-2200; and (iii) 7069 but the cost of purchase of *1180 litres of petrol* had been suppressed. In his written statement, Respondent No. 1, admitted that under items 31 to 34 in his return of expenditure, he had shown the expenditure incurred by him on account of the purchase of petrol from M/s Raj Automobiles during 1.5.1991 to 12.6.1991 but denied that Raj Automobiles, Civil Lines, Nagpur had sold 1180 litres of petrol over and above the quantity of petrol shown to have been purchased by him under bill Nos. 401, 402, 403 filed along with the statement of account. It was pleaded that the allegation was vague and based on speculation and that no particulars had been given of the basis on which it was alleged that he had purchased 1180 litres of petrol at the cost of Rs.17,900/- in addition to what had been disclosed by him.

The appellants examined PW 36, Shankar Rao Gadge, who was working as an Accountant with Raj Automobiles at the relevant time. He deposed that a credit account had been started for Respondent No. 1 at the instance of Mrs Shalini Bai Meghe (wife of respondent No.1 and proprietor of Raj Automobiles) and credit slip books had been issued to Respondent No.1. That whenever petrol or oil was purchased by or for Respondent No.1, a copy of the credit slip used to be given to M/S Raj Automobiles and its counterfoil was retained by the customer. The original credit slips were later on returned to the first respondent along with the bill. The witness after referring to the record deposed that fuel had been supplied to Respondent No.1 for car Nos. MH-31-1722, MH-02-2200, MK-1/1022 besides vehicle No. 1422 and 7069 during 1.5.91 to 16.6.91. He also proved a cash memo dated 16.6.1991 for bill No. 2503 (Ex.681) for sale of 10 litres of petrol sold to Respondent No.1. The witness admitted that receipt No. 843 dated 12.7.1991 (Ex.680) was in respect of bill No. 401 to 405 for the consolidated amount of Rs. 12,152.40 and went to say that the payments had been made by a cheque by Respondent No.1. According to the witness, except the petrol which was sold under the cash memo Ex.680 all other petrol and oil sold to Datta Meghe was worth Rs. 12,152.40. All these transactions are carried over and entered in their accounts. "*We did not sell either oil or petrol besides these to Datta Meghe*" was the categorical statement made by PW 36 Gadge.

The appellants also examined Shri Prakash Baidya PW 53. This witness earlier used to be a partner in M/S Raj Automobiles till 1991, whereafter he ceased to have any concern with Raj Automobiles. During the parliamentary elections, he was the General Secretary of the East Nagpur Assembly Constituency for BJP, the party to which both the appellants as well as Respondent No. 2 belonged and was in charge of that area. He deposed that it is necessary to put one litre of oil if the consumption of petrol is 100 to 125 litres and that in one litre of oil, the run of the vehicle would be about 1,000km on an average consumption at the rate of 10km per litre of petrol. During the cross-examination, he admitted that he had deposed about the ratio of consumption of petrol and oil from his experience and not from any book and also conceded that if an engine is old it would consume more oil as well as more petrol and that the oil-petrol ratio varies according to the horse power of the engine and its model and that if the changer of the vehicle leaks, the consumption of oil would be more because of leakage and not no account of the consumption. He admitted that he is not an automobile engineer.

Respondent No.1, the returned candidate in his statement admitted that his wife owns Raj Automobiles and that petrol and oil were bought by him on credit from Raj Automobiles, except for one cash transaction on 16.6.1992 for Rs. 147.40 (Ex.681). He went on to add that he did not buy petrol from any other petrol station except Raj Automobiles during the election period and that the credit slips which used to be issued to Raj Automobiles were received back by him with the bill from Raj Automobiles and after the bills were paid, the credit slips were destroyed. During his cross-examination, he stated that he had three diesel and four petrol cars with him for his election and that he had hired some motor cars and auto-rickshaws on 19, 20 and 21 May and 8, 9, 10 June, 1991 through Prince Travels. He disclosed the names of the parties from whom he had procured those vehicles and asserted that, besides car no. 7069 which he had procured from Nagar Yuvak Sanstha, he used the cars of the workers who used to come and see him. According to him, vehicle no. 7069 is NE and the model was three to four years' old.

In coming to the conclusion that the candidate had purchased more fuel than the one shown by him in his return of expenditure, the High Court relied upon the petrol-oil ratio as deposed to by P. W. Baidya. It was found that the amount of *oil* admittedly purchased by the returned candidate as per bill No. 404 when considered in the light of the total fuel purchased would show that, much more fuel would have been purchased to consume the quantity of oil purchased as per bill No. 404. It was found by the High Court on the basis of the calculations made that the returned candidate had suppressed an expenditure to the tune of Rs.18,277.60, but since the appellants had asserted that there had been suppression of the use of 1,180 litres of petrol worth Rs. 17900/- only, therefore only that much expenditure could be added to the disclosed expenses of the returned candidate. The High Court, while entering into the calculations, did not base itself on the oil-petrol ratio but multiplied the consumption of petrol for one of the cars (MH-31G-1727), which was admittedly used by Respondent No. 1 by three and drew an inference that for the other three cars also, the same amount of petrol would have been consumed and thus found that the returned candidate would have purchased more petrol worth at least Rs. 18277.60.

In the election petition a specific allegation had been made to the effect that the returned candidate had purchased 1180 litres of petrol in addition to what had been disclosed by him from Raj Automobiles. In the verification of the election petition, the appellants had disclosed the source of information with regard to the contents of para 2.10 as based on the information received from Shri Baidya PW. In the affidavit filed in support of the allegations of the said corrupt practice, the source of information was also disclosed to be Shri Baidya PW. However, PW 53, Shri Prakash Baidya in his deposition in court, did not state that he had conveyed any information to the election petitioners about the alleged excess purchase of 1,180 litres of petrol by Respondent No.1 from M/S Raj Automobiles, apart from the quantity of fuel purchased by him as disclosed in the return of election expenditure. In his statement, he only *speculated* about the excess purchase of petrol on the basis of oil-petrol ratio, based on his experience even though admittedly he is not an expert, not even an automobile engineer. In the election petition nothing was said about the petrol-oil ratio as the basis from which the appellants had inferred that 1,180 litres of petrol had been purchased by the returned candidate in addition to the quantity of fuel shown to have been purchased by him from Raj Automobiles. Except for giving same figure of '1,180' litres of petrol alleged to have been purchased by Respondent No. 1, the appellants did not give any other facts or particulars in the election petition for alleging purchase of 1,180 litres of excess petrol and left the matter totally vague. Even in his own statement, appellant No. 1, did not disclose the basis for arriving at the figure of '1,180'. An attempt was apparently made to get sustenance from the testimony of Baidya PW 53, admittedly a party man of the appellants and respondent No.2, to support the allegations made in the petition on the basis of oil-petrol ratio. Even in that behalf, we find that no evidence was led by the appellants to show as to what were the models of the vehicles used by the returned candidate and the extent to which all those vehicles had been used during the elections. The returned candidate, R1W1, was not even asked a single question regarding the extent of the use of the different vehicles to determine the mileage run in respect of each one of those vehicles. No explanation was even sought from him regarding the oil-petrol ratio or as to why so much of oil had been purchased for so little fuel. In this connection, it is also relevant to note that PW 33 Shri Vijay Rathi, the Accountant of Raj Automobiles, had been summoned by the appellants along with the record presumably to prove the excess sale of 1,180 litres of petrol, apart from the fuel shown in bill nos. 401, 402, 403 and 404 but the record was never exhibited and there is, thus, force in the submission of Mr. Manohar, learned counsel for the returned candidate that a presumption should be drawn against the appellants to the effect that the summoned record being inconvenient was not got exhibited by the appellants. The observation of the High Court, under the circumstances, to the effect that Raj Automobiles had suppressed the record does not appear to be well founded as the summoned record had been brought by PW 33 to the Court but the party chose not to get the same exhibited and no fault can be found with Raj Automobiles.

The High Court, as already noticed, found the suppression of Rs. 18,277.60 on the calculation based on the quantity of petrol purchased for vehicle No. MH-31-G-1722. The total petrol purchased for that vehicle was shown as 470 litres and the amount of oil purchased for that vehicle was shown to be 22 litres. Obviously, the ratio of oil-petrol as deposed to by Shri Baidya

PW 53, does not appear to have any relation to be petrol-oil ratio for the said vehicle. On the basis of the ratio as deposed to by PW 53, more than 50 litres of oil should have been consumed for this vehicle. The High Court, as already observed, calculated the cost of 470 litres of petrol as Rs. 6927.80 and then multiplied it by three and arrived at the figure of Rs. 20,783.40 and deducting an amount of Rs. 2505.80, which had been shown to be cost of the petrol used for the two other vehicles used by the returned candidate, determined the suppression at Rs. 18,277.60, but since the election petitioners had alleged suppression of the use of 1,180 litres of petrol worth Rs. 17,900/- only, the High Court fastened the liability on the first respondent not for the amount of Rs.18277.60 but Rs. 17,900/- only.

In our opinion, the approach of the High Court was wrong and it fell into a complete error in making these calculations which are not even based on guesswork but are totally conjectural in nature. The type of exercise done by the High Court had neither any factual foundation in the election petition nor even in the evidence. The High Court made out a new case – neither the one pleaded by the election petitioners nor the one pleaded by the returned candidate. It was not a permissible course for the High Court to adopt while dealing with the allegation of commission of a corrupt practice in an election petition. Since no evidence was led by the election petitioner about the alleged purchase of excess of 1,180 litres of petrol, the High Court ought to have found the issue against the appellants. The finding of the High Court is, not only conjectural but is based on surmises and not on any evidence. Except PW 1, who made a vague statement to the effect that he had seen the vehicles pleaded in the election petition, on the roads throughout during the elections, without indicating when, where and which vehicle, no other evidence was produced to show the extent to which the other vehicles in question had been used during the election by Respondent No. 1 or his election agent or by any other person with the consent of Respondent No.1 or his election agent. The election petitioner could have examined witnesses from different segments of the constituency to depose, if they had seen the returned candidate or his election agent in that area in any particular vehicle and the number of occasions when the returned candidate had been so seen in different localities in the same or different vehicles to show the extent of the running of those vehicles by bringing out the total distance likely to have been covered. No such evidence was led, though the production of such evidence was not an utter impossibility. That vehicle No. 1722 (which was made the basis for calculation of total run by the High Court) was more extensively used than the other vehicles is a reasonable possibility which cannot be ignored. It was incumbent upon the appellants to prove the sale of 1,180 litres of petrol in favour of Respondent No.1 by Raj Automobiles as alleged by them in the election petition, by leading cogent and satisfactory evidence and they miserably failed to prove the said charge, let alone beyond a reasonable doubt. Even the mathematical calculation made by the High Court also appears to be incorrect but we need not detain ourselves to point out the same because of the infirmities pointed out by us in the approach of the High Court. The finding of the High Court on Issue No. 4 (v), therefore, cannot be sustained and we set aside that finding and hold that the appellants have failed to prove Issue No.4 (v) and, consequently, the addition of Rs.17,900,00 in the return of expenditure of Respondent No. 1 was not justified and the said amount shall have to be excluded. The cross-objection to that extent succeeds and is allowed.

Issue No. 5 (b) (i) & (ii)

The allegations of the election petitioners which led to the framing of Issue No.5 (b) (i) and (ii) are contained in paragraphs 2.11 to 2.14 of the election petition and concern the issuance of voter cards to 1,243,382 voters in the constituency by the returned candidate after getting the same printed at a cost of Rs.2,25,000/- from Shakti Offset Works, appealing to the electorate to vote for the returned candidate. Besides, Respondent No. 1 is also alleged to have got printed posters of different sizes, namely, one lakh posters of 20" x 30"; one lakh fifty-thousand posters of 18" x 23"; and seventy-five thousand posters of 15" x 20", propagating his candidature and these posters of different sizes, on an average of about 300 posters were exhibited at each of the 1,250 polling booths in the constituency. It was alleged that in all 3,25,000 posters were printed by the returned candidate between 25.4.91 and 21.5.91 after incurring an expense of Rs. 3,40,250.00 for the printing of the said posters, and the first respondent did not include in the return of his election expenses either the amount of Rs.2,25,000, being the cost of the voters cards, or Rs.3,40,250, being the cost of the posters. In the written statement, while admitting that the appeal made in the voter cards was to cast votes in favour of the first respondent and that the posters were also published for the furtherance of the prospects of the election of the first respondent, the returned candidate denied to have incurred any expenditure at all on printing and distribution of either the voter cards or the posters. According to the first respondent, he learnt about the printing of about four lakh voter cards by the Nagpur City District Congress Committee *at its own expense* and also came to know that some posters had been printed and published by Nagpur City District Congress Committee while some more posters had been supplied by Congress, (I) through its sub-organisations, at various levels, as per the past practice and as per the practice being followed by the other parties also for distribution, and that he had neither authorised nor incurred any expense for the said cards and posters, and that the same had been distributed without his knowledge let alone his consent.

The appellant Bapat PW 1 in his statement deposed that voter cards had been issued about eight days prior to the poll *to very voter* as mentioned in the voters' list Ex.74 and according to his estimation the cost of printing of the voter cards would be Rs.2,25,000/-. In the course of his statement however, he admitted that in the case of respondent No.2, Shri B.L. Purohit voter cards had also been issued to the voters but went on to say that the same had been got printed by the BJP at its own expense and were distributed by the workers of the B.J.P. without any expense being incurred or borne by Respondent No. 2 himself. With regard to the publication of the posters, he deposed that the posters had been used by the returned candidate extensively. Specimens of some of the posters were produced as Ex. 75 to Ex. 78. PW 1 asserted that the expenditure for the printing of voter cards and the posters, in the case of the returned candidate, was borne by the first respondent himself and not by anyone else.

The appellants, in support of their case, examined PW 41 Suresh Deotale President of Nagpur Gramin Congress, PW 42 Baliram Dakhne Cashier, PW 43 Baburao Zade, Secretary of the Gramin Congress and PW 46 Moratrao Kumbhalkar, Treasurer of the Nagpur District Congress

Committee. The evidence of all these witnesses however reveals that the Congress Committee had incurred the expenditure for publication of advertisements, voters cards, posters etc. in connection with the election of the returned candidate. These witnesses, however, admitted that the Congress party did not maintain any account in respect of election expenses either for the local bodies, Legislative Assemblies, or Parliament. That the work regarding the election propaganda and incurring of election expenses used to be entrusted to one or the other of the office bearers by the Party. In the case of the election of Datta Meghe, the witnesses deposed that the job had been entrusted to PW 43, Baburao Zade. These witnesses further deposed that money for undertaking election expenses was collected by the Congress Party in the form of collection coupons. That a part of the election coupons were supplied by the All India Congress Committee in the denomination of Rs.2/- and Rs.5/-, while the rest were printed at the local levels. No account, however, was maintained of those coupons. The posters were also supplied by the All India Congress Committee and the Provincial Congress Committee. PW 43, Baburao Zade stated that Shakti Offset was one of the printers who had undertaken the printing job and that orders for printing work had been placed by him on Shakti Offset through Shri Parshonikar. He admitted that he was a sitting MLA at the time of the election. He, however, was not aware if Parshonikar was the Secretary of Nagpur Shahr Zila Congress Committee. From the testimony of PW 41 President of Nagpur Gramin Congress, it emerges that the manner of collection of funds for election purposes was through sale of coupons. The witness denied that not maintaining any accounts of those coupons was a practice devised only for the present election, but asserted that it was a practice which used to be followed in all earlier elections also. He went on to add that when Shri Purohit, Respondent No. 2 was a Congress Candidate in the Parliamentary elections of 1984 and 1989, the expense for his election propaganda had been incurred by the Congress Committee also by raising funds through sale of coupons and that no account had been kept either of the coupons or even of the total expense incurred during those elections. He was emphatic that the Congress Committee did not maintain any account in respect of the expenditure incurred by the Party in connection with the elections to the local bodies, Legislative Assembly or Parliamentary elections. The evidence of PW 42 is almost of the same lines as that of PW 41 and PW 43 in all material particulars. This witness further deposed that he had learnt from PW 43 Baburao Zade that an amount of Rs.40000/- had been paid to Parshionikar towards the election expenses and that some posters had been issued by the All India Congress Committee also. The pass book of the Gramin Congress which was produced by the witness, revealed that after the withdrawal of an amount of Rs.250/- on 26.9.90, the next withdrawal was only on 10.4.92 of Rs.3500/- and that no other amount had either been deposited or withdrawn by the party from the Bank. The evidence of the witnesses to the effect that funds for election expenses were collected by sale of coupons and donations and no account was maintained of the receipt and expenses, thus, receives corroboration from the Bank Pass Book of the Gramin Congress. The testimony of PW 43, which supports the testimony of PW 41 which supports the testimony of PW 41, reveals that about 30,000 to 40,000 voters cards besides some handbills worth Rs.2000/- to 3000/- had been got printed by the Party through Shakti Offset Works. Explaining the reason for not maintaining any account of receipt and expense, the witnesses stated that since persons who bought the coupons or gave donations were mostly businessmen, who generally paid the amount

by cash, and did not want any record of the payment made by them to be kept, the accounts were not maintained. PW 44, Vishnu Dutt Misra, Vice-President of the Nagpur Nagar Zila Congress and PW 45 Awari, President of Nagpur Nagar Congress Committee, deposed on the same lines as PW 41 to PW 43. PW 46, Marotrao Kumbhalkar, the Treasurer of the Party, further stated that the responsibility for the election propaganda of the returned candidate in the present case had been placed on Shri Parshonikar, who was made the Secretary in charge of the elections of Respondent No.1 by the Party. According to PW 46, an amount of about Rs.14 lakhs had been collected through donations and sale of coupons, out of which Nagar Congress Committee had also got coupons worth about Rs.7 lakhs printed and the remaining coupons worth Rs.7 lakhs had been received from the All India Congress Committee. The job of giving advertisements to the newspapers etc. on behalf of various Congress Committees and organisations had been entrusted to Shri Parshionikar. He admitted that, even in 1989 when Respondent No. 2, Banwarilal Purohit, had contested the election as a Congress candidate, an amount of about Rs.12 lakhs to Rs.14 lakhs had been collected through sale of coupons and donations and the same had been sent by the Party for the furtherance of the election of Respondent No. 2, Banwarilal Purohit, without maintaining any account of receipt and expenses.

Ashok Thakre PW 54, the Manager of Shakti Offset Works deposed that *none of the candidates had approached him personally for placing orders for printing work*. He disclosed the names of the persons who had approached him on behalf of different candidates to place orders in connection with the printing of posters of different sizes, as reflected in Ex.75 to Ex.78 and asserted that orders had been placed for the same by Shri Parshonikar and the posters had been got printed by Gramin Congress for which purpose PW 43 had also approached him. He went on to state that Shri Parshionikar had approached him on behalf of Nagar Zila Shehar Congress and that the printing work was done by Shri Pande on behalf of the Yuvak Congress. PW 54 gave details of the various posters printed by him and by reference to ledger Ex.738/9, stated that an amount of Rs.50,000/- has been shown to have been credited to the account by the President Nagar Shehr Congress Committee on 13.5.91 under five different receipts, Ex.744 to 748, for Rs.10,000/- each, totally Rs.50,000/-. He then deposed that a further sum of Rs. 50,000/- had been received by the Press from Nagpur Zila Congress Committee, Gramin-Vibhag and that a sum of Rs.5,000/- had also been received from Zila Congress Committee (Yuvak) on 6.6.91 and 23.10.91. An amount of Rs.10,000/- was received from Nagpur Zila Congress Committee (1) Gramin also. That all these amounts were spent for the printing work entrusted by various Congress Committees for the organisation of propaganda material for the election of the returned candidate. The returned candidate in his deposition denied to have authorised or incurred any expense as alleged by the election petitioners in connection either with the printing of voter cards or the posters etc. and maintained that he had not even taken the responsibility to reimburse the expenditure on behalf of any one and that no expenditure in that behalf had been incurred by any one with his consent either.

After considering the evidence in its totality in the light of the pleadings in the election petition, we find that the election petitioner has not adduced any cogent, satisfactory or reliable evidence

to establish that the expenditure of Rs. 22,500/- and Rs. 340,250/- as alleged in the petition had been incurred and/or authorised by Respondent No. 1 for the printing of voter cards and the posters. On the other hand, it emerges that the entire expenditure on that behalf was undertaken and borne by the Congress Party and others and that it was so done as per the past practice also.

The argument of Dr. Ghatate however is that Thakre PW 54, the Manager of Shakti Offset Works who denied the receipt of any amount from the returned candidate could not be relied upon because there had been some tampering with the record, including the ledger, and therefore it should be inferred that he was helping the returned candidate. It was submitted by the learned counsel that even though PW 54 was produced and examined by the election petitioner, they were not bound by his entire evidence and that once it was established that the record had been tampered with, the onus would shift to the returned candidate to show that he was not responsible for the tampering or that the tampering had not been done at this instance. This argument is fallacious and does not impress us at all. There is no material brought on the record to even suggest, let alone establish, that the tampering had been done in the record at the instance of the returned candidate. No sound foundation had been laid either in the petition or in the evidence which may justify this court to raise the inference which the learned counsel invites us to draw. A similar argument had been raised on behalf of the appellants in the trial court also and the learned trial Judge found that the allegation of the tampering of the record by Shakti Offset Works at the instance of the returned candidate had not at all been proved, much less satisfactorily. The trial court rightly found that the practice followed by all political parties for the printing of voter cards and posters had always been much similar and the amounts for the said purpose used to be spent by the political parties by the sale of coupons and by receiving donations, and even when Respondent No. 2 had contested the election as a Congress candidate, the same practice had been followed. The election petitioners have failed to establish any link between the alleged expenses and the returned candidate for printing and distribution of voter's cards and posters and have not brought any circumstance on the record to show that the returned candidate had any hand in the tampering of the record, or even that the tampering of the record was done for the benefit of the returned candidate only.

We wish, however, to point out that though the practice followed by political parties in not maintaining accounts of receipts of the sale of coupons and donations as well as the expenditure incurred in connection with the election of its candidate appears to be reality, but it certainly is not good practice.

It leaves a lot of scope for soiling the purity of election by money influence. Even if the traders and businessmen do not desire their names to be publicised in view of the explanation of the witnesses, nothing prevents the political party, and particularly a national party, from maintaining its own accounts to show total receipts and expenditure incurred, so that there could be some accountability. The practice being followed as per the evidence introduces the possibility of receipts of money from the candidate himself or his election agent for being spent for furtherance of his election, without getting directly exposed, thereby defeating the real intention behind

Explanation 1 to Section 77 of the Act. It is, therefore, appropriate for the Legislature or the Election Commission to intervene and prescribe by Rules the requirements of maintaining true and correct account of the receipts and expenditure by political parties by disclosing the source of receipts as well. Unless, this is done, the possibility of purity of elections being soiled by money influence cannot really be ruled out. The political parties must disclose as to how much amount was collected by it and from whom and the manner in which it was spent so that the court is in a position to determine "whose money was actually spent" through the hands of the party. It is equally necessary for an election petitioner to produce a better type of evidence to satisfy the court as to "whose money it was" that was being spent through the party. Vague allegations and discrepant evidence may only create a doubt but then the charge of corrupt practice cannot be held to be proved on mere lurking suspicion or doubts.

However undesirable and objectionable the practice might be, the fact remains that the evidence led by the election petitioners in this case does not establish the charge levelled by them at all. In the absence of any cogent, reliable, satisfactory and trustworthy evidence to show that Respondent No. 1 or his election agent had incurred or authorised the expenditure as alleged in the petition, the trial court rightly found the issue against the election petitioner and we find no reason to take a different view. We therefore, confirm the findings of the High Court on the said issue.

Issue No. 5 (b) (v)

In paragraph 2.20 of the election petition it has been pleaded that Respondent No. 1 had sent personal inland letters to all the voters residing within the constituency and the appellants had calculated the price of each such letter as Rupee One, inclusive of printing and postage. Two such letters, Annexures 13 and 14, containing the residential address of Respondent No. 1 allegedly received by Vijay Shinde and Vinayak Gode PW 49 were annexed with the election petition. It was alleged that Respondent No. 1 had made an appeal through the inland letters to the voters to cast their vote in his favour on 12.6.91. It was further stated that, though the letters were shown to have been sent by *Sarva Dharma Samajik Sangathan*, the expenditure for the same was in fact authorised and incurred by Respondent No. 1 himself. It was pleaded that there were 1,240,830 voters in the constituency and, therefore, Respondent No. 1 was alleged to have incurred an expenditure of Rs.1,240,830/- on the inland letters and he had not shown the expenditure incurred by him in that behalf in the return of expenditure filed by him, and if the said amount is included, it would show that the returned candidate had incurred and authorised expenditure beyond the prescribed limits and thus committed the corrupt practice under section 123 (b) of the Act. In the written statement, the returned candidate denied the allegations and styled the same as imaginary and baseless. He denied to have sent any letter to Vijay Shinde and Vinayak Gode, Annexures 13 and 14 respectively, or to anyone else in the constituency. The allegation that he had incurred an expenditure of Rs. 1,240,830/- was vehemently denied. Respondent No. 1 stated that according to the information received by him after the election, the

Sarva Dharma Samajik Sangathan had got printed about two thousand letters similar to Annexures 13 and 14 and issued the same without his approval or consent and the entire expenditure must have been borne by the Sangathan itself since it was neither authorised nor incurred by him or by his election agent. It was stated that the allegations in the paragraph were vague and general in nature and lacked essential ingredients and particulars and the assertion that all the voters in the constituency had received the letters from Respondent No. 1 was based on speculation and conjectures and not on facts.

In the original written statement filed by the returned candidate in reply to paragraph 2.20, it appears that while he denied the "sending" of the inland letters identical to Annexures 13 and 14, there was no specific denial made by him regarding *his signatures* allegedly appearing on those letters. In the amended written statement, a specific denial was also incorporated stating that *the Respondent No. 1 had not signed those letters* and that inadvertently it had been omitted to be mentioned in the earlier written statement, while denying the sending of the inland letters. Thus, in the amended written statement there was denial, both about the signatures as well as the sending of the letters by the first respondent to the voters. Respondent No. 1 also denied having incurred or authorised any expenditure in connection with the printing and postage of those inland letters.

Appellant No.1 Bapat, appearing as PW 1, in his statement asserted that each one of the voters in the constituency had received such an inland letter from Respondent No. 1 but admitted during his cross-examination that he had no idea whether the letters had actually been signed by the first respondent or by someone else. The petitioner also examined Shri J. D. Kotwal PW 56 as the hand-writing expert to identify the signatures of Respondent No.1 on Annexures 13 and 14 (Ex.79 and 80), and to compare the same with the admitted signatures of the first respondent. The handwriting expert PW 56, however, did not support the case of the election petitioner and deposed that no opinion could be expressed regarding the authorship or otherwise of the disputed signatures on Ex.79 and 80 (Annexures 13 and 14). With the denial by Respondent No. 1 that he had neither signed those letters nor sent any such letters to the electorate and the evidence of the hand-writing expert PW 56, the appellants must be held to have failed to prove that the letters like Annexures 13 and 14 were signed by Respondent No. 1 or that he was responsible for sending those letters to the electorate. The argument of Dr. Ghatate that even if the letters had not been signed by Respondent No. 1, but since this same had been sent as an appeal to vote for him, it should be *presumed* that he was the author and sender of the letters, does not appeal to us. The court can only decide the case on the basis of the evidence led and not on what ought to have been led. In the instant case, the election petitioners have failed to examine any witness to show that the letters (like Annexures 13 and 14) had in fact been *sent* by Respondent No. 1 to the electorate. The letters were, on the face of it, sent by the *Sangathan*. No evidence has been led to show that the money spent by the *Sangathan* had been provided by Respondent No. 1 either or that the *Sangathan* was a non-existent body. The allegation has remained totally unsubstantiated. It was certainly not obligatory for the returned candidate under the circumstances, to have produced any witness from the *Sangathan* to prove that *Sangathan* had

been the letters on its own or that it had also incurred the expenditure itself. Since, the case of the returned candidate categorically had been that those letters were neither signed by him nor sent by him nor did he incur any expenditure in respect thereof, it was for the election petitioners to establish the charge by leading reliable and satisfactory evidence. The evidence of appellant Bapt PW 1, to the effect that he had enquired from the Charity Commissioner and learnt that there was *no such Sangathan* registered with the Charity Commissioner, to urge that the *Sangathan* was a 'fake' organisation and was not a genuine society, ignores the fact that the registration of such a *Sangathan* is not necessarily to be done only with the Charity Commissioners. The petitioner admittedly made no inquiry from any other quarter to find out whether or not *the Sangathan* was in fact in existence or not. The intrinsic evidence of the documents shows that the letters were sent by the *Sangathan* and, keeping in view the evidence of the handwriting expert, it appears that the letters bore the *name* of "Datta Meghe" and *not his signatures*. The petitioner could have produced some witness from *the Sangathan* to show that no such letters had been sent by the *Sangathan*. The petitioners did not *even summon a witness* from the *Sangathan* along with the record. Had it been done and if the summons could not be served because of the alleged non-existence of such a *Sangathan*, it may have been possible for the petitioner to argue that the *Sangathan* was a fake organisation and that an inference may be drawn that the letters had been sent by Respondent No. 1 at his expense but no such inference can be drawn in favour of the appellants in view of the facts and circumstances existing on the record. Respondent No. 1 had disclosed the name of Shri Bhasme as one of the officers of the *Sangathan* in his testimony and the appellants should have sought permission of the Court to summon Shri Bhasme at that stage at least, but they did not do so for reasons best known to them. We are unable to agree with Dr. Ghatate that the evidence should have been led by the returned candidate to *prove* that actually the letters had been sent by the *Sangathan* after incurring the expenses itself and the petitioners should not be expected to lead such evidence. The onus to *prove* the charge was on the election petitioners and in the absence of any satisfactory evidence adduced to discharge that onus, the returned candidate was under no obligation to *prove* that he was not responsible for committing the corrupt practice. Again, it is not the case of the appellants that the expenditure had been incurred by the *Sangathan*, with the consent of the returned candidate or his election agent nor is it the case that the returned candidate had undertaken to reimburse the expenditures incurred by the *Sangathan*. The trial court, in our opinion, after properly considering and appreciating the evidence rightly found that there was no evidence on the record to support the plea that the first respondent had spent the amount as alleged on the postage and printing of the inland letters of the type, Annexures 13 and 14 (Ex.79 and 80) or that he had sent those letters to every voter in the constituency. From the material on the record, there is no scope even to raise a strong suspicion against the first respondent in that behalf. The appellants appear to be labouring under the wrong impression that once they make an allegation against the returned candidate, their responsibility is over and it is for the returned candidate to *prove* his innocence. It is against the essential principles of election law. At the risk of repetition it may be stated that where allegations of corrupt practice are alleged, it is for the election petitioners to prove the charge against the returned candidate beyond a reasonable doubt to the satisfaction of the court. The obligation of the returned candidate to rebut the allegations by leading evidence arises only after

the election petitioners have led dependable evidence in support of the charge of corrupt practice and not till then. The appellants have in the present case filed to do so in respect of the charge relating to issue No.5(b) (v) and, accordingly, we agree with the High Court that the returned candidate was not required to refute the charge by leading evidence on this behalf. The issue is accordingly decided against the appellants and we confirm the finding of the High Court.

Issue No. 5(b) (vi) & (vii)

These two issues relate to the publication of certain advertisements in various newspapers such as Nagpur Times, Nagpur Patrika, Nav Bharat Times, Tarun Bharat among others. There is some connection between these issues and issues 6(a), (b) and (c), which we shall deal with separately. According to the election petitioners, the returned candidate had opened an account with Nav Bharat Times, Nagpur Times and Nagpur Patrika and had incurred an expense of Rs. 489,424.00 for the publication of various advertisements in connection with his election in those newspapers but the said amount was not included in the return of expenditure and that had the same been included, the returned candidate would be shown to have incurred expenses beyond the permissible limits. The break up of the amount (Rs. 489,424.00) allegedly incurred or authorised by the returned candidate as given by the appellants is as follows:

(1)	Nav Bharat Times	=	Rs. 261,274.00
(2)	Nagpur Times & Nagpur Patrika	=	Rs. 228,150.00

It was alleged in the election petition that the returned candidate had an account, Code No. M-0042 (Ex.441), with the newspaper Nav Bharat Times and though it was shown that the expenses for the advertisements published in the newspapers were borne by Nagpur District Congress Committee, Gramin Congress Committee and some other organisations and individuals, but in fact the payments had been made out of the amounts provided for by Respondent No. 1 to the said Committees, organisations and individuals. In the written statement, Respondent No. 1 denied that he had incurred or authorised any expenditure himself or through his election agent in respect of the various advertisements appearing in Nav Bharat Times, Nagpur Times and Nagpur Patrika as alleged in the election petition. It was also denied that the advertisements had been published at the instance of or with the knowledge of Respondent No. 1 or that he had placed his funds at the disposal of the party and others to discharge the liability arising out of the publication of the advertisements.

We shall first take up the publication of the advertisements in Nav Bharat Times for which it is alleged that an expenditure of Rs. 2,61,274.00 was incurred or authorised by Respondent No. 1.

PW 6, Narayan Gawalani, the Manager of Nav Bharat Times, while appearing as a witness for the election petitioner deposed that the newspaper receives advertisements through advertising agencies, organisations and individuals. The agencies which had released advertisements during

the elections were Prasad Publicity Yugdharma Consultants and Commercial Services (Y.C.C.S). For Prasad Publicity and Y.C.C.S. they had a running account while Congress had no running account with Nav Bharat. He then explained how various advertisements appearing in the paper came to be published and disclosed the sources from which the same had come and also identified the person or party who had made payments in respect of those advertisements. He went on to depose that whenever the advertisements were received, they were entered in a register called the "RO Input Register" but the same had not been preserved and had since been destroyed. That there was no other proof pertaining to the receipt and publication of advertisements. He produced the ledger and proved various advertisements, release orders, bills etc. During his cross-examination, he was confronted with various receipts and he went on to say:

"None of the advertisements of which the total works out to Rs. 26,690/- as stated above were given by Datta Meghe. The payment also was not made by Datta Meghe for those advertisements, nor did he take responsibility for making these payments."

While explaining the document Ex. 407 and the existence of words "(Datta Meghe Election advertisements)" written in ink in the copy of Ex.407, he expressed ignorance as to when or by whom those words were inserted in the office copy. He admitted that in respect of Ex. 409A, the words "Datta Meghe Account" did not appear in the original of the receipt but could not say as to who had written those words in the copy. The witness, in response to the question regarding the association of Respondent No. 2, with the partners of the firm stated:

"I know Ramgopal Maheshwari, Prakash Maheshwari. They are the partners of the firm which owns Nav Bharat. It is true that on many common social forums they and Respondent No.2 Banwarilal Purohit are together. I do not know if they belong to the same community. It is not true that our management has forged the duplicates of receipt books at the instance of Banwarilal Purohit in order to bolster his false claim in the petition."

The witness categorically asserted that "M 00042 is the code number of "Datta Meghe Election Advertisement Account" and that all payments against the said code number and account had been received from Nagpur Shahar District Congress – 1 Committee and that no payment was received from Datta Meghe or from anyone else on behalf of Datta Meghe.

PW 7, Shri Sapre, Manager, Accounts of Nav Bharat Times, deposed that Manmohan Maheshwari is the Editor of Nav Bharat Times. That receipt Ex.406 was issued first in the name of Datta Meghe, but later on was corrected to show the name of the party as Congress Committee, and it was done under his instructions because it had been brought to his notice that payment had not been made by Datta Meghe but by Nagpur Shahar Indira Congress Committee. He went on to state that the original receipt Ex.406-A was signed by Kulkarni. Explaining the difference in scoring of certain words in the carbon copy Ex.406-A and its original Ex.405-A, the witness

stated that he had scratched the original name and substituted it with the name of Shahar Congress Committee. He, however, could not state as to who did the scoring in the original receipt Ex.406-A, because the same had not been done by him. When his attention was drawn to a number of other receipts and their carbon copies and particularly the entries thereon, with a view to pointing out the difference between the entries in the originals and the copies, the witness stated that since receipts had been issued by different persons like Kulkarni, Prabhakar and others, he could not explain the reason as to why the corrections had been made but asserted that the corrections had not been made only in the case of the receipts concerning Respondent No. 1 but such corrections had been made also in respect of the receipts issued in favour of *some other candidates* and all such corrections were made in routine. The witness then categorically admitted:

"We do not have any personal account of the Respondent No. 1 Datta Meghe in the account books. Except for the 'Datta Meghe Election Advertisement Account' there is no other account in Datta Meghe's name. The receipt Ex.406 was fully written by Kulkarni when it came to me, and it bore the two bill numbers, and that was also the case with original Ex.406-A. I did not check up in whose names the two bills mentioned therein, stood. They had been checked by the Advertisement Department."

PW8 Pannalal Poddar was working as an Assistant in the advertisement department of Nav Bharat Times at the relevant time. He deposed that a subsidiary ledger was being maintained in the advertisement department and that the bills which were prepared by the advertisement department were entered in the said ledger against the accounts of the concerned parties and that he used to maintain that register. He stated that at page 496 of the ledger, there exists an account in the name of "Datta Meghe Election Advertisement Account" and that the said account had been written up to page 498 under the same title. He stated that out of the writing "Datta Meghe Election Advertising Account" Nagpur, the words "Datta Meghe, Nagpur" were in his handwriting but the remaining words "Election Advertisement Account" were not in his handwriting and he could not even identity the author of the words "Election Advertisement Account" in the above entry. He stated that the entry regarding bill no. 9101007 of May, 1991 for Rs.10,000/- stood originally in the name of Datta Meghe but that name was scored out later on but he could not say as to who had scored out the name and substituted the same by "Nagpur Congress." That the scoring in the entries had been done in bill nos. 9101007, 9101343, 91901439 and 9101940 also by substituting the name of Datta Meghe with Nagpur Congress and Nagpur Shahar Zila Congress-1. He, however, did not know who had made the corrections or even the time when the same had been made or the reason why they had been made. During his cross-examination, he admitted that there were neither any erasers nor corrections in the subsidiary register in regard to the four bills (above noted) and that the entries in that register had been made within 5 to 7 days of the issuing of the receipts. The witness specifically admitted that it "is not possible to say by referring to the account whether payment was received in this account through any other organisation except the Congress Committees."

Respondent No. 1, appearing as R1W1, deposed that Parshionikar had been entrusted with the work of issuing advertisements on behalf of the Congress Committee. That Parshionikar was a man of his confidence. He denied that he had himself entrusted any job of publication of the advertisements in the newspapers to Parshionikar. He went on to add that he had not asked Nav Bharat Times to open a separate account for his election advertisements and denied any knowledge whether Nav Bharat Times had opened any account as "Datta Meghe Account." He denied the suggestion that Account No. M-0042 had been opened by him initially in the name of "Data Meghe Account" but was later on converted, at his instance, to the name of "Datta Meghe Election Advertisements Account" to escape the rigours of law. He went to assert that he had not given any advertisement to Nav Bharat Times nor had he paid any amount to the said paper.

Dr. Ghatate, learned counsel appearing for the appellants, argued that since there was an account in the name of Datta Meghe, being Account No. M-0042, and admittedly the District Congress Committee had no account with Nav Bharat Times, the inference was obvious that the assertion of the returned candidate that he had neither issued any advertisements in Nav Bharat Times nor made any payment for the same or even agreed to reimburse the expenses incurred for the publication of the advertisements in the said paper, was not correct. He submitted that the interpolations made in the copy of the receipt Ex.406 and its original Ex.406-A was a tell-tale example of the tampering of the record by Nav Bharat Times with a view to help Respondent No. 1 to conceal the incurring of expenditure by him and that an adverse inference should be drawn by him that all the scoring etc. must have been done in various bills and receipts etc. by the employees of Nav Bharat Times, only with a view to favour Respondent No. 1. In support of the argument, learned counsel pointed out that receipt Ex.406 dated 17.5.1991 was initially issued in the name of Datta Meghe and subsequently in the original receipt Ex.406A, where the name of the party had been initially left blank, the name of Congress Committee was written even though in the carbon copy, the name of the party continued to be shown as Datta Meghe, which was also later interpolated and substituted to read "Datta Meghe Election Advertisement Account". Learned counsel submitted that from the fact that the original receipt Ex.406A was produced during the cross-examination of the witness by the counsel for Respondent No. 1, the only explanation for the original receipt Ex.406-A being found in possession of Respondent No. 1, could be that he had made the payment and kept the receipt, as otherwise there was no occasion for the original receipt to be found with the counsel for the returned candidate.

Thus, wherever it was found that the involvement of Datta Meghe could be proved, his name was scored off and replaced by Congress Committee etc. by Nav Bharat Times. According to Dr. Ghatate, even if Datta Meghe himself had not placed any order for issuance of any of advertisements or directly made payment for the same to the newspaper, it was out of the funds provided by him that the payments had been made and therefore the returned candidate would be deemed to have incurred the said expenditure. Though the arguments of Dr. Ghatate appear on the first blush to be attractive, they do not bear close scrutiny. Had receipt Ex.406-A, which is the original of receipt Ex.406, been with Respondent No. 1, contained a blank entry which was later on filled up as District Congress Committee showing it as the party making the payment,

there was no reason why the same entry could not appear in the carbon copy Ex.406, if the employees from Nav Bharat Times were out to oblige Respondent No. 1. The explanation given by the witnesses from Nav Bharat Times regarding the appearance of different names in the original and the carbon copy, cannot be said to be wholly unacceptable, particularly in view of the attendant circumstances. The possibility that interpolation was made in the copy of the receipt Ex.406 to create evidence against the returned candidate also cannot be ruled out, particularly in view of the association of Respondent No. 2 with the management of Nav Bharat Times. If the original Ex.406A had contained the name of Congress Committee and the entry in the carbon copy had been left blank, it could have been filled up by adding the name of Datta Meghe. That apart, the receipts Ex.406-A and its carbon copy Ex.406 relate to payments made in respect of *two bills* based on *two distinct release* orders. Neither the correctness of the release orders, admittedly not issued by Datta Meghe, nor the authenticity of the relevant bills, which bills again had not been drawn in the name of the returned candidate, has been doubted by the appellants. Therefore, much capital cannot be made out of the difference of the entries in the original and the carbon copy of receipts Ex.406-A and Ex.406, when it is not disputed that Ex.406 was actually issued in the name of Nagpur Shahar Indira Congress Committee. It is also pertinent to notice here that the appellants have led no evidence whatsoever to show that any order for advertisement had been placed by Respondent No. 1 himself or by his election agent with Nav Bharat Times in respect of either of the two release orders or bills. Not a single bill, out of the massive record produced by the appellants, is in the name of the returned candidate. There is not a single receipt of payment issued in the name of the returned candidate either. The witnesses appearing on behalf of the petitioners have categorically asserted with reference to the record that *no amount had been paid by Respondent No. 1 for any of the advertisements published by them in their newspapers*. The learned Trial Judge has elaborately considered various documents to which his attention was drawn and the arguments raised on the basis of the so-called interpolations etc. on some of the documents and concluded that there had been some errors in the mentioning of Code numbers in some receipts etc., but rightly found that the first respondent could not be held responsible for any of those interpolations. No evidence, direct or circumstantial, has been led by the petitioners to support the charges levelled against the returned candidate to the effect that the returned candidate had provided funds to the party and it was his money which was paid through the hands of the party. The allegation has remained absolutely unsubstantiated. As a matter of fact, the evidence led by the election petitioners instead of supporting their case, has to a large extent, demolished the same, in as much as none of the witnesses have contradicted the assertion of the returned candidate that he incurred no expense, other than that which he had disclosed in the return of his election expense. The Trial Court therefore, rightly held that the expenses in respect of all the advertisements (subject matter of the issues) which were published in Nav Bharat Times could not be said to have been incurred or authorised by the first respondent. We find that the conclusion arrived at by the Trial Court is based on correct and proper appreciation of the evidence and learned counsel for the appellants has been unable to point out any flaw or error in the reasoning of the learned Single Judge of the High Court. We accordingly uphold the finding of the High Court.

We shall now consider the allegations regarding the expenditure allegedly incurred in connection with the advertisements which appeared in different issues of Nagpur Times and Nagpur Patrika for the election of the returned candidate. It is not disputed that none of the advertisements were issued by the returned candidate himself nor any bill was drawn against him nor any payment was received from him. These advertisements appeared under different names. For example, the advertisements, Ex. 84/13 and 84/15 appeared in the name of a "well-wisher". The bill for those advertisements Ex.474, was drawn by the Nagpur Times/Nagpur Patrika combined in the name of "Nitin Furnitures" and the receipt of payment, Ex. 475 was also drawn in the name of "Nitin Furnitures", Nagpur. Similarly, two advertisements, dated 8.6.1991, published in Nagpur Times being Ex.84/14 and 85/15, were published by "Punjab Woodcrafts". The bills in respect of the same were drawn in the name of "Punjab Woodcrafts" for Rs. 15,000/- and the receipt, Ex. 477 dated 14.9.1991, also shows the name of M/s Punjab Woodcrafts as the party who had made the payment. The advertisement issued in the Nagpur Times, Ex. 84/15 and in Nagpur Patrika, Ex. 85/16 were again published by a "well-wisher" and the bill Ex.4478, dated 30th June, 1991 for the said advertisement was issued in the name of "Ranji Engineering Works" and the receipt, Ex.479, for the same was also issued in the name of Ranjit Engineering Works (by mentioning its code No. ICR-0436). Again, for the advertisements published in Nagpur Times and Nagpur Patrika, dated 10.6.1991, by a "well-wisher", the bill was prepared in the name of "Talmale Baandhu" on 30th June, 1991 and the receipt in respect of the said bill dated 14.9.1991 was also issued in favour of "Talmale Bandhu".

The appellants examined Shri Mahendra Bangarde PW 40 who had been working as the Finance Manager with Nagpur Times since 1983. He stated that Ms Neelima used to work as the Data Operator. She, however, was not examined by the appellant. He proved various entries in the ledgers, bills and receipts concerning the publication of advertisements in the Nagpur Times. He did not state that any of those advertisements had been published either by Respondent No. 1 or by his election agent or that any payments in respect thereof had been made by Respondent No. 1 or his election agent nor even that Respondent No. 1 or his election agent had taken the responsibility for making the payment for the concerned advertisements.

Santosh PW 9 was working as the Manager General (Co-ordination) with the Nagpur Times at the relevant time and deposed that he knew about the advertisements which were published in the Nagpur Times and Nagpur Patrika during the last Lik Sabha elections. He deposed that various advertisements which had appeared in the Nagpur Times in support of the election of the returned candidate had been published at the instance of Shri Parshoinkar, who had taken the responsibility for settling the bills in respect of those advertisements. He went on to say that it was at the asking of Shri Parshoinkar that bill Ex. 474 for Rs. 15,000/- dated 30.6.1991 was drawn in the name of 'Nitin Furnitures'. The payment for the said bill was received on 14.9.1991 from Nitin Furnitures. He admitted that the Punjab Woodcrafts had an account with the newspaper and that it was their representative who had requested them for the publication of an advertisement for which also Shri *Parshoinkar* had taken the responsibility for making payment and that later on Shri Parshoinkar had brought the amount and paid the same on behalf of Punjab Woodcrafts. The

witness stated that according to his knowledge, Shri Parshoinkar was an office bearer of the Congress Committee and admitted that payments for some other bills were also made by Shri Parshoinkar on behalf of various parties, as well as on behalf of the Congress Committee. Referring to the corrections made in the Code numbers appearing in certain bills, the witness stated that he had no knowledge as to who had made those corrections or overwriting and when the same were made, but categorically asserted that all the payments had been made only by Shri Parshoinkar. The witness admitted that there was an account styled as "Datta Meghe Election Advertisement Account" with his newspaper and that the Nagpur Shahar District Congress Committee also had a separate account with his paper. Explaining the corrections made in respect of receipts No.779, 825, 1026, 1356 which had been first shown credited in the account of "Datta Meghe Election Advertisement Account", the witness stated that it was the Nagpur Shahar District Congress Committee, who had asked the newspaper to publish the advertisements and had also undertaken the responsibility to make the payment for the same and since the said Congress Committee had also an account with them directly, they had transferred the "amounts" from "Datta Meghe Election Advertisement Account" to the account of Nagpur Shahar District Congress Committee, as the advertisements had actually emanated from the Congress Committee and payments had also been made by the Congress Committee. The witness explained that initially in their records *all* the amounts which were being received from Nagpur Shahar District Congress Committee as well as from Nagpur Gramin Committee were being credited in the account of "Datta Meghe Election Advertisement Account", but later on the same were corrected to accord with the actualities and credited in the appropriate account of the party responsible for the advertisement and payments. The witness stated that since Shri Parshoinkar had brought the payments for the advertisements from the Nagpur Shahar District Congress Committee, Nagpur Gramin Congress Committee, Nitin Furnitures, Punjab Woodcrafts, Ranjit Engineering Works and Talmals Bandhu there had been some confusion about the mentioning of the code numbers in various receipts. During his cross-examination, the witness categorically asserted that no payments were made by Datta Meghe for the advertisements which were released by Prasad Publicity nor had Datta Meghe taken the responsibility for making payments in respect of those advertisements. Thus we find that, according to the witnesses examined by the petitioners, neither Datta Meghe had issued any advertisement for publication nor had he made any payments in respect of the advertisements issued at the instance of different parties in the newspapers.

Respondent No.1 during the course of his examination asserted:

"I had not asked any of the newspapers to open an account in my name in respect of the advertisements, during the election period. Neither did I ask my election agent or anyone else to open such an account on my behalf. I have no account in my name as Datta Meghe with any of the newspapers, because I never asked such account to be opened. I learnt yesterday that an account had been opened in my name by Janvad, only yesterday. I do not know whether that account had been opened during the election period. It is not true that I had opened personal accounts in my name with Nav Bharat, Nagpur Times and Nagpur Patrika in

relation to the advertisements during the election. It is not true that I had asked the entries which stood in my name to be transferred in the name of the Congress Committees. It is not true that I supplied the funds for publishing these advertisements to the Congress Committees, or the institutions or individuals who made the payments."

The assertion of the returned candidate finds support from the witnesses produced by the petitioners concerning the advertisements published in Nagpur Times and Nagpur Patrika.

The argument raised by Dr. Ghatate in respect of the advertisements published in Nagpur Times and Nagpur Patrika was only a repetition of the arguments raised on behalf of the election petitioners in the Trial Court. The learned Single Judge, after examining minutely various bills, receipts, advertisements and entries in the ledgers etc. and also analysing the oral evidence, came to the conclusion that the election petitioners had failed to establish the charge levelled against Respondent No. 1 to the effect that he was responsible for the publication of any of the advertisements or that he had incurred or authorised any expenditure himself or through his election agent or even that the funds allegedly provided by him had been utilised to discharge the liabilities. The High Court found that the returned candidate could not be connected with any of the interpolations or tampering with the record of the newspaper either and observed:

"The question, however, is whatever may be the reasons for the manipulation, can the liability for manipulation be fastened on the first respondent. Merely because there was a change in the names in the bills and there was every good reason for the name of the first respondent, if it had appeared in the original document being suppressed and there was a Datta Meghe Advertising Account 0056 in the book of Nav Samaj Ltd., it cannot be said that the first respondent's name had appeared in the original bill and that that was removed and new names were substituted. *The matter cannot rest merely on surmises. The persons, who had actually accepted the advertisements, were not examined. Though Sarode's version, when it comes to be against the interest of the respondent No.1 would have to be considered with more care and caution for disbelieving the version that the first respondent was not concerned with the advertisements some positive evidence was necessary. On the other hand, the positive evidence is that the first respondent had not given these advertisements and had not accepted the responsibility for these advertisements. None from Ialamale Bandhu, Punjab Woodcraft. Ranjit Engineering Works and Nitin Furniture was called as a witness [sic] to show that they had not given the advertisements. If such evidence were led, then an inference could have legitimately been raised that since they had not given these advertisements, they must have been given by the first respondent, because he would be the person who would be really interested in advancing his own cause. Since, in the elections, several persons on their own may come forward for giving the advertisements, without any apparent motive, in the circumstances, though*

there is no reason to doubt the evidence that the names in the bills and the receipts issued by Nav Samaj Ltd., had been changed in order to conceal the real advertiser. I find that that evidence by itself is not sufficient to clothe the first respondent with the responsibility of giving the advertisements."

(Emphasis added.)

We find ourselves in complete agreement with the above opinion of the High Court. Relevant witnesses were not examined by the election petitioners for reasons best known to them. The appellants have offered no explanation, much less a satisfactory one, as to why those witnesses who were relevant and were likely to shed some light were withheld. The evidence led by the appellants is not only insufficient but also confusing, contradictory and often destructive of the case set up by the petitioners. We are hesitant, in the face of the evidence on the record, to make a view different to that of the High Court. On the basis of the above discussion, Issue 5(b) (vi) and (vii), except to the extent we shall refer to certain items later on, are held not to have been established by the election petitioners and the same as decided them.

Issue No. 6 (a), (b) & (c)

In paragraph 2.23A of the amended election petition, the case projected by the election petitioners was that the returned candidate, Respondent No. 1, had got released various advertisements through Yagdharm Consultants and Commercial Services for publication in the newspaper 'Tarun Bharat'. A Statement, Annexure 18-A, indicating the bills in respect of the advertisements allegedly released by respondent No.1 in the said newspaper was filed and it was alleged that an amount of Rs. 2,090.00 had been received by Tarun Bharat towards the advertisement expenses. It was pleaded that though some of the bills had been drawn in the name of the Respondent No. 1 himself and he had been shown to have settled those bills by making payments thereof, some of the other bills were fictitiously shown under the names of certain dummy organisations or individuals, though the payment in respect of each one of those items of advertisements was also made by Respondent No. 1 himself and/or by his election agent, Shri Sudhakar Deshmukh, during the period 25.4.1991 to 16.6.1991 and all that expense was suppressed from the return of election expenses. In para 2.23/B of the amended petition, it was pleaded that the advertisement details whereof were contained in Annexures 18-B and 18-C, had also been released for publication by Respondent No. 1 himself and/or by his election agent or by the individuals/organisations and others under the authority of Respondent No. 1 and or his election agent, to the daily newspaper Hitvada, through Orange City Advertising, Nagpur and Prasad Publicity, Nagpur respectively and an amount of Rs.40,000/- and 23,520/- had been paid to Hitvada towards the charges of those advertisements through orange City Advertising and Prasad Publicity respectively. That even though the bills for the amount were drawn in the name of certain organisations and individuals, actually the payments in respect of each one of the bills had been made by Respondent No. 1 himself and/or his election agent, Shri Sudhakar Deshmukh, but the returned candidate had failed to include the said expenditure in the return of his election expenses.

In paragraph 2.23 C of the amended election petition, by reference to the statement contained in Annexure 18-D, detailing the advertisements released through Prasad Publicity to Tarun Bharat, it was pleaded that those advertisements had been issued by Respondent No. 1 for publication in Tarun Bharat and an amount of Rs.71,440/- had been paid to Tarun Bharat towards the publication of said advertisements and even though some of the bills were drawn in the name of Respondent No. 1 himself and he made the payments thereof, the other bills had been fictitiously drawn in the name of certain organisations or individuals, though in fact the payment in respect of the same were made either by Respondent No. 1 himself or by his election agent, Shri Sudhakar Deshmukh, and that an expenditure of Rs.71,440/- in that behalf was not included by him in the return of election expenses.

The returned candidate in his written statement, while admitting the publication of some of the advertisements in Tarun Bharat, the expenditure whereof he had shown in the return of election expenses, denied that he had made the payments of Rs.2,090.00 to Tarun Bharat as alleged in paragraph 2.23 A (Annexure 18 A) or had even asked them to publish the concerned advertisement. He also denied that he had authorised or incurred an expenditure to the tune of Rs.40,000.00 and 23,520.00 as alleged in para 2.23 B of the amended election petition in respect of the items detailed in Annexure 18 B and 18 C. In reply to para 2.23 C, the returned candidate denied to have incurred any expenditure himself or through his election agent or with his consent through any other organisation, association or individual for the advertisements, association or individual for the advertisements, as itemised in Annexure 18-D, to the election petition. He asserted that no expenditure with regard to the publication of the alleged advertisements had been incurred or authorised by him and he categorically denied to have suppressed any amount from the return of his election expense.

We shall first take up for consideration Issue No. 6(c) which concerns the publication of seven advertisements, which according to the election petitioners were issued by the election agent of Respondent No. 1, Shri Sudhakar Deshmukh and published on 18.6.1991 in Lok Mat, Lok Mat Samachar, Hitavad, Nagpur Times, Nagpur Patrika, Nav Bharat and Tarun Bharat. The said advertisements were "thanksgiving" advertisements. The total expenditure incurred in respect of the same as alleged in the amended election petition was Rs.39,500/-. Some of the advertisements were alleged to have been directly released to the newspaper by the election agent of Respondent No. 1 while others were alleged to have been released through Prasad Publicity.

According to Mr. Manohar, the learned senior counsel for the returned candidate the expenses involved in the publication of all these advertisements, even if accepted as true and assumed for the sake of argument to have been incurred or authorised by the election agent of Respondent No. 1, were *not* required to be included in the election expenses, as the said advertisements had been published *after* the declaration of the result and were not published during the crucial dates mentioned in Section 77 of the Act. According to Dr. Ghatate, on the other hand, since the advertisements had appeared in various newspapers on 18.6.1991, it would be reasonable to presume that the advertisements had been *issued* prior to midnight between 17th June, 1991 and

18th June, 1991 and therefore the expenditure involved in the publication of these advertisements would be deemed to be an expenditure incurred in connection with the election and was required to be included in the return of election expenditure.

As already noticed, Section 77 (1) of the Act mandates that a separate and correct account of all the expenditure *in connection with the election, incurred or authorised by the returned candidate or by his election agent between the dates on which he had been nominated and the date of declaration of the results thereof, both dates inclusive*, shall be maintained. The High Court, after a detailed discussion of the submissions made by learned counsel for the parties, which have been reiterated before us also, come to the conclusion that all the seven advertisements for which the total expenditure of Rs. 39,500/- was alleged to have been incurred or authorised by the election agent of the returned candidate were "thanksgiving" advertisements and were published after the declaration of result and therefore they did not fall within the prohibitory limits of the time schedule prescribed in sub-section (1) of Section 77 of the Act and were as such not required to be taken into account while computing the expenses incurred by the first respondent.

We are in agreement with the view of the High Court that the advertisements in question could not be said to have been issued in *connection* with the election, even if that expression is to be given a wide amplitude. What is it that the Legislature intended to achieve by prescribing the inner and the outer limits in Section 77 of the Act? Obviously, it was the elimination of money influence during the elections and maintaining of purity of elections. The expenditure incurred *after* the declaration of the result of the election can possibly have no nexus with the purity of the electoral process. The very fact that the advertisements *thanked* the electorate for electing Datta Meghe would show that the same could only have been *issued for publication after the declaration* of Datta Meghe as the returned candidate. The expenditure incurred in that connection therefore cannot be said to be an expenditure 'authorised' or 'incurred' during the prohibited dates. Indeed, there may be cases where some expenditure can be incurred or authorised by a returned candidate in connection with his election, even after the declaration of the result, but unless that expenditure can be related to the *process of election*, authorised or incurred during the prohibitory limits set out in Section 77 (1) of the Act, it is not required to be included in the return of expenses. The mere fact that the advertisements appeared in the newspapers on the very next day cannot lead to any presumption that the expenditure in connection therewith had been incurred or authorised by the returned candidate during the prescribed prohibitory dates in anticipation of his being declared elected. We agree and uphold the finding of the High Court that there was no nexus between the amount spent on thanksgiving advertisements with the election after the declaration of the result of election and decide issue No. 6(c) against the election petitioners.

Issue No. 6(a) arises out of the allegations made in Para 2.13 of the election petition and the items contained in Annexures 17 and 18 to the petition. It deals with the advertisements allegedly issued by Respondent No. 1 through M/s Yugdharma consultants and Commercial Services, Nagpur (for short 'YCCS') to publicise his candidature. A chart containing 27 items of

expenditure incurred in respect of various advertisements published on different dates in different newspapers in connection with the election of the first respondent were relied upon to urge that the advertisements had been released through two advertising agencies namely Yogdharma Consultants & Commercial Services (YCCS) and Prasad Publicity. According to the election petitioners Respondent No. 1 incurred an expenditure of Rs. 2,74,224/- on the advertisements released through YCCS but the said expenditure has been suppressed by the returned candidate and if included in the returned of election expense, would show that the returned candidate had committed the corrupt practice as envisaged by Section 123 (b) of the Act.

That some of the advertisements had been published in various newspapers and had been released through YCCS or Prasad Publicity has not been disputed by learned counsel for Respondent No. 1 before us. His argument, however, is that neither Respondent No. 1 had authorised the publication of those advertisements through YCCS or Prasad Publicity nor had Respondent No. 1 or his election agent authorised or incurred the alleged expenditure of Rs. 2,74,224/- in respect of those advertisements. The main thrust of the argument of Dr.Ghatate, appearing for the appellants, on the other hand was that in the release orders which had been issued by YCCS the name of "Datta Meghe" had been shown as the client and, therefore, it was futile to urge that Respondent No. 1 or his election agent had not incurred or authorised the expenditure in connection with those advertisements. Reliance was placed on the advertisements which appeared in the issues of Lok Mat and Lok Mat Samachar dated 1.5.1991; 2.5.1991; 3.5.91; 5.5.91; 6.5.91; and 21.5.91 being Ex.83/2 to 83/6, 83/34, 83/91 to argue the expenditure by Respondent No. 1. We, however, find that the bills in respect of each of the aforesaid advertisements were admittedly issued in the names of persons, other than the first respondent. Those had been issued in the names of Sushila Bai Jadav; Nagpur Nagar Congress Committee; Yuvak Congress Committee, and Supersteel Furniture etc. Even in respect of the advertisements which appeared in the issues of Yugdharma dated 1.5.91; 3.5.91; 8.5.91; and 11.5.91, the bills had admittedly been issued in the names of Nagpur Nagar Zila Congress Committee. The election petitioners sought to connect Respondent No. 1 with the advertisements issued through YCCS by pointing out that the name of Shri Datta Meghe had been shown as the client in those bills and, therefore, he alone must be presumed to have discharged the liability arising out of those bills either directly or by placing his funds in the hands of the parties in whose names the bills had been drawn. Reliance has been placed on the statement of Shri Mudhukar Kishti, PW 55 by learned counsel for the appellants in support of his submissions.

Shri Madhukar Kishti, PW 55 was, at the relevant time, the Managing Director of Yugdharma Co-operative Society, the parent company which publishes the daily Yugharama run by Yugdharma Industrial Co-operative Society. Yugdharma Workers Newspapers Pvt. Ltd. who had constituted YCCS in March 1990 as the sister concern for routing advertisements to different newspapers. PW 55 deposed that he used to do whatever work was required to be done by the YCCS. He went on to state that YCCS released advertisements for publication for Datta Meghe's candidature for the Parliamentary Elections of 1991 to various newspapers and asserted that those advertisements were received by them from Yuvak Congress Committee etc. Explaining as to

how the name of Datta Meghe had appeared in certain release orders against the name of the client even though Datta had not released any of the advertisements, the witness stated that since the space had to be booked in relation to the election of Datta Meghe in various newspaper, the witness had, on his own mentioned the name of Datta Meghe against the name of the client for the sake of convenience, though Datta Meghe had not entrusted any advertisement to YCCS for publication. The witness added that he had not received any orders personally on behalf of YCCS from any of the clients of YCCS and that the orders used to be received by Shri Takre Shri Prakash Deshpande. In his cross-examination, the witness, however, conceded that the name of Datta Meghe had been mentioned in certain release orders only because the name of the client had not been disclosed by the party and the space was required to be booked in the newspapers in advance owing to the rush of advertisements. Since, the advertisements were required to be published in connection with the election of Datta Meghe, he had shown his name against the name of the client on his own accord. PW55 further admitted that neither any bill nor any receipt had been issued by the YCCS in the name of Datta Meghe. Thus, we find that PW55 does not advance the case of the election petitioners at all in so far as the allegations concerning issue No.6(a) are concerned. Besides, this witness had no personal knowledge of the nature of the transactions on the basis of which the release orders came to be issued. The elections petitioners had summoned various release orders and other record from this witness to connect the name of Datta Meghe but curiously enough they were neither exhibited nor got proved. The other witnesses who could throw some light on the nature of the transaction, like Shri Thakre and Shri Prakash Deshpande, though summoned, were not examined on this aspect for reasons best known to them. The submission of learned counsel for the appellants that the explanation given by PW55 regarding the reason for the name of Datta Meghe appearing in some of the release orders is not satisfactory cannot help the appellants because there is no other evidence or explanation offered by the election petitioner. Even otherwise the explanation appears to be quite plausible. It was for the election petitioners to adduce better and cogent evidence, direct or circumstantial, to show that the returned candidate had incurred or authorised either himself or through his election agent the expenditure in respect of the advertisements issued by YCCS, as alleged in the petition, but no such evidence was produced and the allegation has remained unsubstantiated.

Shri Prakash Deshpande, PW11, the Deputy General Manager of Hitvada did prove the signatures of PW55 on release order Ex.586 dated 7.5.1991 but was silent about any transaction between YCCS and the first respondent. Same position exists in respect of other advertisements also. We need not, therefore, detain ourselves to refer to all other advertisements, their release orders, bills or receipts because from the evidence of PW55 it stands established that no payment for any of the advertisements issued by YCCS came from the returned candidate, Respondent No. 1 deposed that the advertisements had been issued by different parties, associations and individuals and those parties had made the necessary payments. The petitioners have led on evidence to show that the advertisements which were issued under the names of different parties, organisations and individuals like Nagpur Nagar Congress Committee, Indira Brigade, Youth Congress, Phartiva Sher Sangathana, Vidharbha Professors Club etc. were in fact not issued by those parties, organisations, institutions of individuals, by examining any witness from such bodies and,

therefore, the argument that the advertisements, though shown to have been issued by different parties and organisation etc., were in fact issued at the instance of the first respondent or that it was his money which they had paid to discharge the liabilities in respect of these advertisements, has no basis let alone any foundation. The election petitioners have totally failed to bring any material on the record to connect Respondent No. 1 either with the publication of or expenditure incurred in respect of the various advertisements as alleged in the petition. Even though the names of the parties, organisations, associations, institutions, and individuals etc. had been mentioned in the advertisements as the sponsors of the advertisements, the election petitioners did not examine any one of them to elicit from them that they had not issued or caused to be issued those advertisements or that they had not incurred any expense in connection therewith. We are not impressed with the submission of the learned counsel for the petitioners that since identical advertisements came to be issued simultaneously in different newspapers on the same date or on different dates, an inference should be raised that it was done only at the instance of the first respondent, because he alone was the beneficiary irrespective of different names of sponsors. The argument has neither logic nor any basis. The election petitioners led no evidence to even create a doubt about the identity of the sponsors and merely because identical advertisements appeared on the same date, it is not possible to hold that the sponsors were fictitious persons or that the actual sponsor was the returned candidate himself. It is not unknown that during the elections, many sympathisers as well as 'others' come forward to support the candidature of a particular candidate and sponsor and pay for the advertisements which they get published to further the prospects of that candidate's election. Moreover, apart from the returned candidate, the party which sponsors him as its candidate is equally interested in the furtherance of the prospects of his election and may approach different organisations, associations or individuals to sponsor and publish the advertisements at their expenses in favour of the candidate and even to suggest to them that the same could be done by availing of the services of YCCS which was engaged in the propaganda cannot be ruled out. The burden of proving the issue was heavy on the election petitioners but they have miserably failed to discharge the burden. No evidence, direct or circumstantial has been led even to show that it was the money of the returned candidate which had been used by the party, other associations, institutions or persons, for the publication of the advertisements in various newspapers. The evidence on the record does not lead to any inference that it was the first respondent's money which was used for publication of advertisements and in the absence of such an evidence, no responsibility can be fastened on the first respondent in respect of the expenditure incurred in connection with those advertisements. The learned trial Judge, after a detailed discussion of various exhibits and taking into consideration the law on the subject concluded that:

.....
 "Datta Meghe's connection with the advertisements released by YCCS has not been established, and there is no other evidence to show that Datta Meghe either incurred or authorised the expenses for the advertisements released through YCCS, and all the advertisements, which have been issued through the agency of YCCS

will have to be left out, while considering the expenses incurred or authorised by the first respondent Datta Meghe."

We are in complete agreement with the above conclusions and nothing has been pointed out before us to persuade us to take a different view. Issue No.6(a) is, therefore, decided against the election petitioners.

Issue No. 6(b)

According to the allegations contained in paragraph 2.23-A of the amended election petition, the returned candidate had, besides releasing advertisements through YCCS in various newspapers, also utilised the services of Orange City Advertising, Nagpur and Prasad Publicity, Nagpur for the publication of advertisements in connection with the furtherance of his elections in various newspaper. The details of the advertisements allegedly released by the returned candidate to the newspaper daily Hitvada through Orange City Advertising, Nagpur and Prasad Publicity, Nagpur were provided in Annexure 18B and 18C attached to the election petition. The total amount alleged to have been spent by the returned candidate in that behalf was stated to be Rs. 40,000/- and Rs. 23,520/-. In paragraph 2.23-B the election petitioners averred that although, it appears from the statements at Annexure 18B and 18C that the bills were issued in the names of certain organisations, the payments in respect of each one of the bills had in fact been made by Respondent No. 1 himself and/or his election agent, Shri Sudhakar Deshmukh, during the period from 25.4.91 to 16.6.91. *It was alleged that the orders for each of the items of advertisements appearing in the statements at Annexure 18B and 18C were also placed by Respondent No. 1 himself and/or by his election agent, Shri Sudhakar Deshmukh, or by the organisations and individuals as indicated in the statements at the instance and under the authority of Respondent No. 1 or his election agent.* Besides the election petitioners alleged in para 2.23-C that some more advertisements had been released by Respondent No. 1 during 25.4.91 to 16.6.91 through Prasad Publicity in *Tarun Bharat* and an expenditure of Rs. 71,440/- had been incurred therefore which was also not disclosed by the returned candidate in the return of his expense.

In the written statement, Respondent No. 1 categorically denied that the advertisements detailed in Annexures 18B and 18C had been published or issued by him and asserted that no expenditure in that behalf had been incurred or authorised by him or by his election agent. It was denied that he had authorised and/or incurred an expenditure of Rs. 40,000/- and Rs. 23,520/- as itemised in Annexures 18B and 18C. Similarly, it was asserted by the returned candidate that he had not placed orders for any of the advertisements detailed in Annexure 18D either himself or through his election agent nor had he authorised any of the organisations or individuals mentioned in Annexure 18D to get published the advertisements. It was maintained that no expenditure whatsoever with regard to the advertisements itemised in Annexure 18D were incurred or authorised by the returned candidate or by his election agent and therefore there was no question of disclosing the same in the return of election expenses. With regard to the advertisements allegedly released through Orange City Advertising, the learned trial Judge has noticed:

"With regard to Issue No.6(b), the learned counsel for the petitioners stated that he would not be in a position to urge that the expenditure on the advertisements introduced by Orange City Advertising should be included in the expenditure incurred by the first respondent. I have already found that no other item of expenditure incurred through Prasad Publicity, except what has been included in issue No. 5(b) (vi) & (vii) can be included, and issue No. 6(b) is answered accordingly."

Learned counsel for the appellants has not disputed the above finding before us and as such we have no reason to take a view different than the one taken by the High Court.

We have dealt with, in the earlier part of the judgement, the allegations relating to the expenditure incurred by the returned candidate through Prasad Publicity, while dealing with issues 5(b) (vi) and (vii). We shall now advert to the findings with regard to certain amounts which have been found to have been suppressed by the returned candidate from the return of election expenses.

The election petitioners relied upon the testimony of Shri Anant Shastri PW50, who used to carry on the work of advertising agency in the name of Prasad Publicity. The witness deposed that he knew Respondent No. 1 and that he had received advertisements for publication in the newspapers from several institutions with which Respondent No. 1 was connected. Those institutions included Radhika Bai Meghe Memorial Trust; Nagar Yuvak Shikshan Sanstha; Polytechnic; Engineering College; Dental College; Pharmacy and Medical College, being run by those institutions. That he had been releasing the advertisements on behalf of those institutions since 1984. He went on to add that payments had been received for the publication of the advertisements from various organisations as also from Nagpur Shahr Zila Congress Committee and entered in a ledger, which, however, had been destroyed by him in the last week of March 1992. He stated that the account ledger had been destroyed by him before he had received the summons to appear in the court as a witness in the election petition. According to PW 50 he did not himself write the account books and that the same were written by his accountant Shri Dhale. After referring to the counterfoil book, PW50 deposed that ledger folio No.226 pertained to the account of Yashwantrao Chauhan Social Forum and that counterfoil No.003363 from the same counterfoil book also bore ledger folio No.226 and was issued in the name of Datta Meghe Mitra Mandal. The word "staff" which had been written below "Datta Meghe Mitra Mandal" in the copy had, however, been scored out later on. The witness went on to say that counterfoil No.003364 also bore ledger folio No.226 and was issued in the name of Nagpur Zila Congress Committee. Counterfoil No.003365 which also bore ledger folio No.226 was issued in the name of Narayan Ahuja while counterfoil No.003366 with the same ledger folio number was issued in the name of Rajiv Sena. The witness explained as to how the same ledger folio number (226) appeared against various counterfoils and stated that various organisations which had come forward to support the candidature of Datta Meghe and were releasing advertisements in his favour had been clubbed together under one and the same ledger folio No.226. He denied the suggestion that the account against ledger folio No.226 was of Datta Meghe and not of the organisations clubbed together.

The High Court after considering the evidence of Anant Shastri PW50 in great details opined that the witness was enjoying the patronage of the returned candidate and of various institutions with which the returned candidate was connected and that the witness had destroyed the ledger, a material document, "probably because those documents, if retained, would not have been favourable to the first respondent". The High Court did not accept the explanation offered by Anant Shastri PW50 regarding the time and reason for the destruction of the ledger. The High Court repelled the argument of learned counsel for the returned candidate that the release counsel for the returned candidate that the release order of Prasad Publicity Ex. 225 relating to advertisement Ex. 88/1 was suspicious because the date 28.4.91 did not appear on the carbon copy Ex. 712, which had been produced by Anant Shastri PW50 presumably because the High Court felt that the witness was favouring the returned candidate. Similarly, the High court did not accept the criticism made by learned counsel for the respondent in respect of release order No.5031 dated 28.4.91 in which the name of Datta Meghe had appeared in the carbon copy, as the client, though there was no mention of the date 28.4.91 on it. The High Court noticed that though below the name of Datta Meghe, the word "Karyalaya" had been initially mentioned in Ex.711, the manner in which that word had been written would show that the word "Karyalaya" *might not have been written on 28.4.91 but on some other date*. According to Shri Anant Shastri PW50 the advertisement dated 28.4.91 had been given to him by Shri Vasant Parshonikar on behalf of Nagpur Nagar Zila Congress and it was for publication of the programmes arranged by Nagar Zila Congress Committee. That he had given identical advertisements to four newspapers including Nagpur Patrika and Lokmat. According to the witness, the word "Karyalaya" had been omitted from Ex. 325 inadvertently as he forgot to mention it. The witness, however, stated that Datta Meghe was not his client for the said advertisement and the words 'Datta Meghe' were used only as a caption and the actual bill was issued in the name of the real client, Nagpur Nagar Zila Congress Committee.

According to Shri Padmakar Paunikar PW3, bill Ex. 156 was issued to the party on 29. 4. 91 itself. It was signed by Bhojraj PW12 and the receipt of Ex.157 was also signed by Bhojraj PW12. He admitted that both the bills Ex.156 and Ex.227 were prepared on two different type-writers and both bore the signatures of PW12. He conceded that the three bills dated 29. 4. 91 were issued on three different formats. Ex. 156 was issued on the format of Nar Kesari Prakashan and disclosed Datta Meghe as the client and that advertisement had been released by Prasad Publicity; Ex.227 was on the format of Tarun Bharat and showed Yashwantrao Chauhan Forum as the party concerned; and Ex. 603 was against on the format of Tarun Bharat and showed Datta Meghe as the name of the client. According to PW12, the name of Yaswantrao Chauhan Forum was shown as client in Ex.227 because *they* had asked for the bill in the name of Yashwantrao Forum when bill Ex.227 was issued. The witness admitted that all the three bills were identical. The witness admitted that all the three bills were identical. The High Court dealt with this issue relating to the advertisement Ex.88/1 which had appeared in Tarun Bharat for a sum of Rs.1320/- and observed:

"If one were to go only by the different formats on which the bills were issued and different names which appeared on the bills, it would appear that there was a good deal of confusion and on the basis of the bills themselves, no inference could be raised as to who was the real client. If regard is to be had to the fact that the original release orders mentioned the name of Datta Meghe as client, there was no reason for Tarun Bharat to depart from normal practice of issuing the bills in the name of Prasad Publicity by showing Datta Meghe as the client, and that seems to have been done with the bill (Ex.156) issued purportedly on 29.4.91 on the format of Narkesari Prakashan. By that time, the forms of Narkesari Prakashan were being used. It would be only when a bill with a different name would be required that the change in the name would appear, and the only person, who was interested in having a bill in the name different from the one used in the release order, would be Prasad Publicity which was represented by Anant Shastri. To the extent that Datta Meghe's name appeared in the original release order, there is no demur even by Anant Shastri who was a party to the transaction. If his version that the name of Datta Meghe was mentioned merely as a caption was true, there was no difficulty for him to allow the name of Datta Meghe to continue in the original bills which were issued. Coupled with the position that all the original documents issued by Tarun Bharat are said to have been handed over by Anant Shastri to a person about whose identity he was not clear, it is difficult to accept the position that the name of Datta Meghe in the release orders issued to Tarun Bharat appeared merely as a caption."

The High Court then opined:

"In view of the above factum, there can be no doubt, though there was a deliberate attempt to disguise the transaction, that the amount of Rs.1320/- under the bill Ex.156 for the advertisement published in Tarun Bharat dated 21. 4. 91 (Ex. 88/1) on the basis of which the release order (Ex.225), was paid by the first respondent under receipt Ex. 157, on 29. 4. 91."

After hearing learned counsel for the returned candidate at length and going through the record, in our opinion the finding recorded by the High Court is quite sound. The explanation for appearance of the name of Datta Meghe in the release orders does not appeal to common sense. Anant Shastri did not hand over the documents to a 'stranger' whose identity he could not recollect and admittedly he did not hand over the same to Shri Parshoinikar. Thus, in the facts and circumstances on the record, the High Court was right in concluding that the expense for bill No. 156 in respect of advertisement Ex.88/1 had been authorised or incurred by the returned candidate. Even the challenge to the said finding by learned counsel for the returned candidate before us was only half-hearted. We thus agree with the finding of the High Court and hold that the returned candidate did incur an expenditure of Rs.1320/- for Bill Ex.156 in respect of the advertisement published in Tarun Bharat Ex. 88/1 but failed to include the same in the return of his election

expenses. The High Court rightly included that amount to the amount disclosed in the return of election expenditure.

Coming now to the advertisement which appeared in the *Election Special Issue* of *Tarun Bharat* dated 21. 5. 91 and for which an expenditure of Rs.7,000/- was alleged to have been incurred by the returned candidate, we find that the plea with regard to this advertisement was not raised by the appellants in the original election petition and was not even included in the first amended election petition but was introduced for the first time by an amendment dated 18. 12. 91. In the verification to the election petition, the contents of the relevant paragraphs were verified as 'partly based on personal knowledge and partly on information received from Tarun Bharat.....'. In the affidavit filed in support of the allegations of corrupt practice, again the contents of para 2.23 were verified as based partly on personal knowledge and partly on information received from the official record of *Tarun Bharat*. The election petitioner, however, did not in his deposition disclose the basis of his 'personal knowledge' for making the allegation. In the pleadings a wide latitude was left by the election petitioners to lead evidence on any of the various 'possibilities' detailed in the election petition. The 'vagueness' of the pleadings even after amendment shows that the election petitioners were out on a wild goose chase and trying to fish for evidence so as to be able to fasten some liability on the returned candidate or his election agent. PW39 Laxman Trimbakrao Joshi, the Chief Editor of *Tarun Bharat* was, examined by the election petitioners in support of the allegations made in the petition regarding publication of the advertisement in *Election Special Issue* of *Tarun Bharat*. He deposed that *Tarun Bharat* had decided to issue an *Election Special Issue* after the elections were announced and that he had personally contacted Datta Meghe about 8 to 10 days before the publication of the issue on telephone and had a talk with Datta Meghe personally and had requested him for the issuance of an advertisement, as he was a contesting candidate. *Datta Meghe*, according to the witness, had *told him that he would think about the matter* and admittedly, thereafter, did not get in touch with him. The witness went on to state that an advertisement in support of Respondent No. 1 was published in *Tarun Bharat* dated 21. 5. 91. It had been received through Prasad Advertising Agency (Prasad Publicity) who had also supplied the material for publication. The witness, however, did not know whether the bill for the advertisement had been prepared in the name of Prasad Publicity or someone else nor did he know as to who had paid the bill. He did not even know as to who had instructed Prasad Publicity to give the advertisement or who made the payment for the same to the Prasad Publicity. This advertisement Ex. 221 is the subject matter of three bills Ex. 192 bearing No. 4167 (shown as Duplicate); Ex. 234 No. 4178 and Ex.605, No. 4167 (written after scoring out 4178). All the bills are dated 21.5.91. Whereas in Ex. 192, which was on the format of Narkeshari Prakashan, the bill was addressed to Prasad Publicity, showing Datta Meghe's name as the party releasing the advertisement, Ex. 234 was on the format of *Tarun Bharat* and again addressed to Prasad Publicity but showing NSUI as the client, while Ex. 605 was issued on the format of *Tarun Bharat* and was addressed to Prasad Publicity and showed Datta Meghe as the client. The High Court after considering the evidence of PW3, Paunikar (who had deposed that Prasad Publicity had *not* placed the order); PW39 Laxman Joshi, (who had deposed that the advertisement was received from the Prasad Publicity that the bill had been settled by

Prasad Publicity); PW50 Anant Shastri and PW12 Bhojraj, held that the advertisement had been issued by Respondent No. 1 and that Anant Shastri PW50 had manipulated the bills and the record to help the returned candidate.

We have carefully perused paragraphs 154 to 157 of the judgement of the learned trial Judge dealing with the question of the expenditure of Rs.7000/- in connection with the advertisement Ex. 221 in the Election Special Issue and the evidence on record. Keeping in view the difference in the three bills relating to the same advertisement and the use of these different formats by Tarun Bharat, we find it difficult to agree with the High Court that the election petitioners have established that Respondent No. 1 had incurred the expenditure of Rs.7000/- in respect of publication of Ex. 221. The findings appear to be rather laboured ones and if Tarun Bharat advertising office was not "very careful about giving the particulars to the bills which they issued and that the bills were not issued from bound books" as observed by the High Court, no adverse inference could be drawn against the returned candidate. Indeed, neither Shri Paunikar PW3 nor Bhojraj PW12 had any talk with Datta Meghe in respect of any of the advertisement and from the testimony of PW39 Laxman Joshi, it is not possible to hold that, pursuant to the talk he had with the returned candidate, the advertisement in question had been published by the returned candidate himself and not by or on behalf of NSUI in whose favour the bill had been drawn. As already noticed, neither in the verification of the petition nor in the affidavit, PW39 had been disclosed as the source of information. The appellants have not explained the basis for making the said allegations. The findings of the High Court in our opinion are based on surmises and conjectures and we agree with Mr. Manohar, learned senior counsel for the returned candidate that in the face of the vague pleadings and inconclusive evidence led by the election petitioner coupled with the discrepant evidence of PW39, who admittedly was not shown as the source of information for the said allegation, it is not possible to hold that the advertisement in question, Ex.221, had been released by and paid for by Datta Meghe himself. It is also relevant in this connection to note that no release order had been produced by the election petitioners in respect of this advertisement which could disclose who the real client was. We, are therefore, of the opinion that the material on the record was not sufficient to fasten the liability for the publication of the advertisement in the Election Special Issue of Tarun Bharat Ex. 221 for Rs.7000/- on the returned candidate. We, accordingly, set aside the finding of the High Court and hold that Rs.7000/- was not spent by the returned candidate for the publication of Ex. 221.

The High Court also found that an amount of Rs.9900/- in respect of Ex. 258 had been suppressed by the returned candidate from the return of his election expenses. The receipt Ex. 258 shows that an amount of Rs.9900/- was paid on 20. 5. 91 by *Sharad Pawar Mitra Mandal* for the publications of the advertisement. A consolidated bill had been issued in the name of *Sharad Pawar Mitra Mandal* as the publisher. According to PW4, Ashok Jain, the advertisements which appeared in Lokmat and Lokmat Samachar Ex. 83/18 and 83/19 dated 12. 5. 91 against bill No. 257 had been given for publication by Narayan Ahuja and *Sharad Paward Mitra Mandal*. From a careful consideration of the observations of the High Court in paras 183 to 187, the pleadings and the evidence in that behalf, we find that recourse has been taken by the learned trial Judge

to surmise and conjecture to hold that the expenditure had in fact been incurred by Respondent No. 1 in respect of the said advertisement. There is not even an iota of evidence on the record to show that the first respondent had incurred the expenditure of Rs.9100/- as alleged by the election petitioners in their evidence, though not specifically pleaded in their election petitions both original and amended. The election petitioners had learnt about the role being played by Narayan Ahuja even before they filed the election petition. It was for them to have examined Narayan Ahuja to elicit from him as to whose funds he was utilising for making payments for publication of various advertisements. The petitioners chose not to examine him for reasons best known to them. We do not think that there was any obligation on the part of the returned candidate to have examined Narayan Ahuja and led negative evidence to the effect that no funds had been provided to him by the returned candidate and that the payments had been made by the parties who were responsible for the publication of various advertisements through him. The observations of the High Court that Narayan Ahuja was a person "who had no financial or political background for representing organisations", is clearly based on conjecture because the evidence on the record does show that Narayan Ahuja had been working for the political parties and, without there being any pleading or evidence on the record, it was to say the least rather unfair for the High Court to conclude that Narayan Ahuja had "neither any financial status nor any political background". We do not find it possible to agree with the High Court that the returned candidate had suppressed the amount of Rs.9100/- in respect of Ex. 221 (receipt Ex. 258) and accordingly set aside the said finding of the High Court, which is not based on any satisfactory material on the record.

The finding of the High Court in respect of some of the items as detailed in Annexures 8 to 15, involving an expenditure of Rs.22,900/-, in our opinion are equally fallacious and conjectural. The same are not based even on correct appreciation of evidence. Resource has been taken to surmises and imagination to return these findings. We find it difficult to subscribe to the view of the learned trial Judge which is not supported by any material on the record. The positive evidence led by the election petitioners is that the returned candidate had *not himself or through his election agent* given any of the advertisements for publication and had *not* accepted any responsibility for making payment in respect of any of those advertisements, even though the advertisements were issued for the furtherance of his election prospects. There is no direct or circumstantial evidence led by the election petitioners to show that the amount paid in the name of Sharad Pawar Mitra Mandal had been placed at the disposal of the said Mandal by the returned candidate or his election agent. There is no evidence even to suggest that Respondent No. 1 had undertaken the responsibility of making the payments in connection with the expenses incurred by Sharad Pawar Mitra Mandal. The election petitioners, for reasons best known to them, chose not to examine any witness from Talmale Bandhu, Punpaj Woodcraft, Ranjit Engineering Works, Nitin Furniture, Sharad Pawar Mitra Mandal, D.M.M. Mandal and various other organisations under whose names either the advertisements had been published or who had according to the evidence made payments for those advertisements as per the bills and receipts on the record. If any evidence was led to the effect that none of the persons, parties or organisations had in fact issued the advertisements or they or any one of them had denied the making of any payment, it

may have been possible to argue that those advertisements may have been published by the first respondent himself or through his consent or with the consent of his election agent and, in the event, the onus may have shifted to the returned candidate to explain the source of the expenditure and in the absence of any satisfactory explanation it may have been possible to draw an inference that it was the money of the returned candidate. Since no such evidence was led and no proof was submitted in support of the alleged charge, the question of shifting the onus onto the returned candidate to prove his non-liability did not arise. The High Court, therefore, was not justified in saddling the returned candidate with any expense other than Rs.1320/- in addition to the expenses disclosed by him in the return of his election expense.

Thus, on the settled principles extracted in an earlier part of his judgement, we find that the election petitioners have miserably failed to discharge the onus of proving various charges levelled by them against the returned candidate regarding the commission of corrupt practice under Section 123 (6) of the Act. The High Court was justified in holding that the returned candidate had not committed any corrupt practice as envisaged by Section 123 (6) of the Act and in dismissing the election petition. However, the High Court fell in error in holding that certain items of expenditure totalling Rs.58,2220/- had been suppressed by the returned candidate and deserved to be included in the return of his election expense. Except to the extent of Rs.1320/- , no other liability can be fastened on the returned candidate in respect of the other items of the alleged expenditure on publication of advertisements etc. The election appeal consequently fails and is dismissed with costs. The cross-objections to the extent indicated above succeed and are allowed. The costs are assessed as Rs.1000/-.

Before parting with the judgement we would, however, like to express our disapproval of the manner in which amendments of the election petition were allowed on occasions more than once and how evidence was allowed to be brought on the record against the pleadings and settled legal principles.

Section 86(5) of the Act deals with the amendment of an Election Petition. It lays down that the High Court may upon such terms as to costs or otherwise, as it deems fit, allow amendment in respect of particulars but there is a complete prohibition against any amendment being allowed which may have the effect of introducing either material facts not already pleaded or of introducing particulars of a corrupt practice not previously alleged in the petition. The first part of Section 86(5) of the Act, therefore, is an enabling provision while the second part creates a positive bar. Of course, the power of amendment given in the Code of Civil Procedure can be invoked by the High Court because Section 86 of the Act itself makes the procedure applicable, as nearly as may be, to the trial of election petition, but it must not be ignored that some of the Rules framed under the Act itself over-ride certain provisions of the Civil Procedure Code and thus, the general power of amendment drawn from the Code of Civil Procedure must be construed in the light of the provisions of the election law and applied with such restraints as are inherent in an election petition. It appears to us that the High Court did not properly consider the provisions of the election law while repeatedly allowing amendments of the election petition

present case. The High Court allowed Ex. 27 filed by the election petitioner to amend the petition on 28. 11. 91. Yet another application for amendment of the election petition, Ex.44 was again allowed by the High Court on 18. 12. 91. The petitioner filed still another application, Ex.47A, to again amend the election petition and the High Court allowed the same on 18. 1. 92. Even after the pleadings were completed and the issues framed on 21st of January 1992 and a part of the evidence had been led by the parties, the High Court allowed one more application filed by the election petitioner No.1, Ex. 701, and permitted an amendment of the election petition, apparently to bring the evidence in conformity with the pleadings. In the first place, the High Court ought not to have allowed evidence to be led by the election petitioners which was beyond the pleadings of the parties for no amount of evidence can cure a defect in the pleadings but it was all the more improper for the trial court to have allowed the pleadings to be amended so as to be brought in conformity with the evidence already led in the case. To say the least, it was not a desirable or a proper course to be adopted in an election petition where, as pointed out by this Court in *Jagannath v Jaswant Singh* (1954 SCAR 892), the statutory requirements of the law of election must be strictly observed. Of course, since evidence was allowed to be led, though beyond the pleadings without any objections from the opposite side, the Court could have evaluated and analysed the same to determine the worth of that evidence, which in the facts and circumstances of the case came under a cloud, but to allow the amendment of the pleadings with a view to confer a 'legal status' on the evidence already led was, to say the least, improper. The reasons given by the learned trial judge to allow the election petition to be amended repeatedly ignores the sanctity which is attached to the pleadings and the affidavit filed in support of an election petition, which under law is required to be filed within a prescribed time and those reasons do not impress us. We need say no more on this aspect of the case.

.....J
(A.S. ANAND)

.....J
(M. K. MUKHERJEE)

July 18, 1995
New Delhi

THEME 9

THE MEDIA AND ELECTIONS

IN THE COURT OF APPEAL OF ALBERTA
EDMONTON SPECIAL SITTINGS
HEARD OCTOBER 1, 1993

	COUNSEL	TRIAL JUDGE	COURT
NATIONAL PARTY OF CANADA, MEL HURTIG and MEL HURTIG on behalf of the members of the NATIONAL PARTY OF CANADA	T.W.Wakeling R.D.Gibson G.D. Chipeur	Berger J	LIEVERMAN J A McCLUNG J A IRVING J A

Plaintiffs/Appellants

– and –

CANADIAN BROADCASTING CORPORATION	L.M. Huculak

Defendant/
Respondent

Elections – role of media – right of political party to be included in leadership debates.

Background facts

The Canadian Broadcasting Corporation ("C.B.C.") was part of a Broadcasters' Consortium which was planning to produce and broadcast leadership debates in French and English during a federal election campaign. Participation in the debates was determined by consensus within the Broadcasters' Consortium. The Broadcasters' Consortium decided to include in the debates those party leaders whose parties met certain criteria. The parties whose leaders were invited to the debate were the Progressive Conservative Party of Canada, the Liberal Party of Canada, the New Democratic Party, the Reform Party of Canada and the Bloc Quebecois.

Mel Hurtig, leader of the National Party of Canada, the leaders of other registered political parties, and the leaders of political parties accepted for registration, but had not yet registered, were not invited to participate in the debate Mr Hurtig and the National Party of Canada sought an order in the District Court of Edmonton requiring the C.B.C. to include him. His application was dismissed. He appealed.

Held

That the appeal was dismissed.

Cases cited in the original Judgement

Trieger v Canadian Broadcasting Corporation (1988) 66 O.R.

McKinnie v University of Guelph (1990) (2) 273 (out.H.C.J.) 16 D.L.R.(4th) 545(S.C.C.)

Her Majesty the Queen v Jobin 66 C.C.C. (3rd) 281

Mackay v Manitoba (1989) 2 S.C.R. 357

October 4, 1993

JUDGEMENT

National Party of Canada, Mel Hurtig – and – Mel Hurtig on behalf of the members of the National Party of Canada v Canadian Broadcasting Corporation (23726)

The Chief Justice (orally)

Notwithstanding your best efforts, I am afraid we are unable to accede to your request. It is only in the most extraordinary situations, such as issues of life and death, that we have abridged notice which this Court and responding and intervening litigants require to dispense justice adequately. This is not such a case.

The application for an order abridging the time within which these applications may be heard is denied.

C.J.C.

J.C.C.

MEMORANDUM OF JUDGEMENT
DELIVERED FROM THE BENCH

McClung J A (for the Court):

As I have said, we find it unnecessary to call upon counsel for the C.B.C.

The Court is in substantial agreement with the Reasons for Judgement of Mr. Justice Berger in Chambers, as well as those reasons rendered by Mr. Justice McKeown of the Federal Court of Canada dismissing a similar application by Natural Law Party.

Accordingly, we dismiss the appeal, but would add the following. Even if Mr Hurtig and the National Party of Canada, by their exclusion from the forthcoming debate, have been differentiated against, or even discriminated against, this Court is powerless to intervene under the Canadian Charter of Rights and Freedoms unless his antagonist is a governmental actor within the conduct that is complained about. Here Mr Hurtig says that the C.B.C. excluded him under a mandate from government, in that its Board of Governors are appointed by the Governor-General in Council. But nothing in the evidence points to the Broadcasting consortium and the debate qualifications it has erected as government driven. As well, there is no evidence that the Broadcasting Consortium is the child – at least as far as the C.B.C. is concerned – of anything but the journalistic freedom guarantees that are stressed in section 35(2) of the *Broadcast Act*.

Mr. Wakeling has not persuaded us that the activities of the C.B.C. must be judged on the mere potential for governmental influence, and not the impugned conduct itself – a functional test. We will simply say that we do not read the *Lavigne* case and the *McKinney* case as enthusiastically as Mr. Wakeling has in his argument of the appellant's cause. This was stressed in argument.

As I have said, the appeal is dismissed.

(Discussion re costs.)

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

Between:

NATIONAL PARTY OF CANADA, MEL HURTIG
and MEL HURTIG on behalf of the members of the
NATIONAL PARTY OF CANADA

Applicants

– and –

CANADIAN BROADCASTING CORPORATION

Respondent

REASONS FOR JUDGEMENT
OF THE HONOURABLE MR. JUSTICE R. L. BERGER

The Canadian Broadcasting Corporation (the "C.B.C.") is part of a Broadcasters' Consortium which is planning to produce and broadcast leadership debates in French and English in the early part of October during the current federal election campaign. The Broadcasters' Consortium consists of the C.B.C., C.T.V., Global Television Network, and S.R.C. Participation in the debates was determined by consensus within the Broadcasters' Consortium. The Broadcasters' Consortium decided to include in the debates those party leaders whose parties met all the following criteria (as set out in the affidavit of David Bazay sworn September 14, 1993):

- a. having at least one representative sitting as a Member of Parliament;
- b. showing itself consistently over recent years to have had an impact on the Canadian public inasmuch as each has scored more than 5% popularity in various public opinion polls;
- c. its leader [having] been involved in a very publicly visible manner in the constitutional and economic debates in Canada over recent years.

The parties whose leaders were invited to the debate are the Progressive Conservative Party of Canada, the Liberal Party of Canada, the New Democratic Party, the Reform Party of Canada and the Bloc Quebecois. The leaders of the five named political parties have accepted the invitation. The format of the debate is still being negotiated. The debates will be televised live and it is anticipated that the leaders will have no advance knowledge of the questions to be asked of them by the reporters and members of the public that will be present.

Mel Hurtig, leader of the National Party of Canada, the leaders of other registered political parties and the leaders of political parties accepted for registration but not yet registered were not invited to participate in the debates. Mr. Hurtig and the National Party of Canada seek an order requiring the C.B.C. to include him. No relief is sought against other members of the Consortium.

When the matter first came before the Court on September 15, 1993, counsel for the Applicants advised that he had not provided notice of the application to other members of the Consortium nor to the leaders of those political parties who have agreed to participate in the debates. I reminded counsel of the provisions of R. 388 of the Alberta Rules of Court. Counsel elected to proceed with his submission on the merits. His argument was not completed by the end of the day and court adjourned to Monday, September 20, 1993. On September 20th, counsel for the applicants advised that he had, on Friday, September 17, 1993, notified all of the foregoing parties and broadcasters of the current application and had also faxed to them a copy of the Statement of Claim and Notice of Motion but did not include copies of the filed affidavits. Certain other registered political parties received the same packet of information on September 17th. No one has formally appeared save for the C.B.C.

During the course of argument, counsel for the Applicants urged the Court to "define the constitutional obligations" of the C.B.C. in the present context and to declare that the actions of the C.B.C. in failing to include Mr. Hurtig in the scheduled debates, are contrary to the Charter of Rights and Freedoms.

Section 32 (1) of the Charter of Rights and Freedoms reads as follows:

- "32.(1) This Charter applies
- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
 - (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

The role of the Charter is to protect the individual against the coercive power of the state. With respect, I agree with the statement of Campbell, J in *Trieger v Canadian Broadcasting Corporation* (1988) 66 O.R. (2d) 273 (Ont. H.C.J.) that the Charter "represents a curb on the power of government, not a fetter on the rights of organizations independent of government which do not exercise the functions of government" (at p 278).

The question to be decided, accordingly, is whether the C.B.C. is a government entity for the purpose of attracting the provisions of the Canadian Charter of Rights and Freedoms. In *McKinnie v University of Guelph* (1990) 76 D.L.R. (4th) 545 (S.C.C.), Sopinka, J (at p 697) made the following observations:

"In attempting to classify the conduct of an entity in a given case it is important to know, first, that it is governmental body and, second, that it is acting in that capacity in respect of the conduct sought to be subjected to Charter scrutiny."

It follows that even if the C.B.C. is a governmental body, not all of its activities will necessarily be adjudged "governmental in nature" so as to attract the provisions of the Charter.

Indeed, in *McKinnie*, Sopinka, J found as follows (at p 697):

"I would not go so far as to say that none of the activities of a university are governmental in nature. For the reasons given by my colleague, I am of the opinion that the core functions of a university are non-governmental and therefore not directly subject to the Charter."

Sopinka, J was, of course, referring to the comments of LaForest, J in *McKinnie* (at pp 642–643) that:

"Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment. There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing here to indicate any participation in the decision by the government and, as noted, there is no statutory requirement imposing mandatory retirement on the universities."

What then is the legislative framework within which the C.B.C. functions? Section 47(1) of the *Broadcasting Act*, S.C. 1991, c. 11 designates the C.B.C. as an agent of the Crown. It reads:

"47.(1) Except as provided in subsections 44(1) and 46(2) the Corporation is for all purposes of this Act, an agent of Her Majesty, and it may exercise its powers under this Act only as an agent of Her Majesty."

Section 40 of the *Broadcasting Act* speaks of accountability:

"40. The Corporation is ultimately accountable, through the Minister, to Parliament for the conduct of its affairs."

The Act describes the C.B.C. as "the national public broadcaster" and calls upon it to provide "a wide range of programming that informs, enlightens and entertains" in a manner that will "reflect Canada". The C.B.C. is also required by section 3(1) of the Act to:

"safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" (para. (d(i));

provide "a wide range of programming that reflects Canadian attitudes, opinions, ideas, values....." (para. (d(ii));

"reflect the circumstances and aspirations of Canadian men, women and children, including equal rights....." (para. d(iii));

"be varied and comprehensive" (para. (i (ii));

"provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern." (para. (i (iv)).

Section 3(1) (b) of the *Broadcasting Act* also specifies that:

"The Canadian Broadcasting System comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty."

Counsel for the Applicants urged upon me that the foregoing provisions evidence the governmental character of the C.B.C. thereby, without more, attracting the provisions of the Charter. I do not agree. While the omnibus provisions of the *Broadcasting Act* applicable to the C.B.C. cited above assist in an assessment of the broad scope of its mandate, indeed, its *raison d'être*, the analysis does not stop there. It is not the mandate of the C.B.C. that is under scrutiny in the case at Bar. It is the decision to exclude Mr. Hurtig from the debates.

The C.B.C. has embarked upon a specific programming venture; along with other broadcasters, leadership debates are to be produced and televised. The relevant inquiry is whether in all of the circumstances it can fairly be said that the decision to organise the debates and to invite certain political leaders to the exclusion of Mr. Hurtig is a decision of government. Can it fairly be said that government, mindful of the entire legislative framework and the evidence before me, sufficiently partook in the decision-making process so as to render the decision an act of government?

Section 2(3) of the *Broadcasting Act* which is applicable to all broadcasters, including the C.B.C., provides as follows:

"2. (3) This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings."

Section 35 (2) of the *Broadcasting Act*, under Part III, applicable only to the Canadian Broadcasting Corporation, reads:

"35. (2) This part shall be interpreted and applied so as to protect and enhance the freedom of expression and the journalistic, creative and programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers."

Section 39 makes clear that the Board of Directors of the Canadian Broadcasting Corporation is responsible for the management of the businesses, activities and other affairs of the Corporation. Pursuant to section 44(3) the officers and employees of the Corporation (presumably, including journalists) are not officers or servants of Her Majesty.

Section 46 (5) is clear and unequivocal. It reads:

"46.(5) The Corporation shall, in the pursuit of its objects and in the exercise of its powers, enjoy freedom of expression and journalistic, creative and programming independence."

Even in respect of financial matters dealt with in sections 53 to 70 of the *Broadcasting Act*, Parliament has taken great pains to ensure that the C.B.C. functions as an autonomous body within its mandate. Section 52 (1) reads:

"52.(1) Nothing in sections 53 to 70 shall be interpreted or applied so as to limit the freedom of expression or the journalistic, creative or programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers."

The Court in *Trieger (supra)*, decided in 1988, addressed the issue of the Charter's application to a televised leadership debate. Although he did not resolve the issue, Mr. Justice Campbell observed:

"Analysing the function of the C.B.C. in accordance with the 'degree of control' test referred to by the Court of Appeal in *McKinnie and Board of Governors of the University of Guelph*, I think it quite possible on the basis of *Canadian Broadcasting Corp. v. The Queen* (1983) 1 S.C.R. 339 that the C.B.C., in discharging its parliamentary mandate as a broadcaster, is in exactly the same position as any private broadcaster. Whatever the application of the Charter may be to other aspects of the C.B.C., its independence from government in respect of its editorial decisions in its broadcast operations suggest to me that it should perhaps not, in respect of those editorial broadcasting decisions, be treated as if it were a governmental organization subject to government control and subject to the Charter."

Many of the provisions of the *Broadcasting Act* to which I referred *supra* were not in place in 1988. Parliament in its wisdom enacted in 1991 specific provisions aimed at protecting the journalistic, creative and programming independence of the C.B.C., Parliament recognised that the broadcast media must be free from government interference – a touchstone of a democratic society.

Although the C.B.C. is a Crown agency and although its functions are undoubtedly public in nature, the decision under scrutiny here, in my opinion, cannot properly be characterised as a decision of government. There is no evidence here to suggest that government participated in the decision-making process in any way whatsoever.

There is nothing in the *Broadcasting Act* nor in any other act of Parliament that compelled the C.B.C. to join the Consortium of Broadcasters and to organise the debates. Nor is there evidence of compulsion, statutory or otherwise, for the C.B.C. and its Consortium colleagues to have invited certain leaders to the debates and not others. On the contrary, the provisions of the *Broadcasting Act* applicable to such programming decisions and the affidavits filed with the Court lend support to the proposition that the C.B.C. and its Consortium associates exercised an independent judgement in respect of these matters unfettered by government influence or interference. Nor is there any suggestion of oblique or ulterior motive to manipulate the electoral process by shutting out Mr. Hurtig.

The statutory scheme, I find, has as its object to safeguard the journalistic integrity and programming independence of the C.B.C. Absent cogent evidence of mischief calculated to subvert the democratic process and absent evidence of statutory breach, this court should not enter the broadcasting arena and usurp the functions of the broadcast media. The political agenda is

best left to politicians and the electorate; television programming is best left to the independent judgement of broadcast journalists and producers.

In the result, I conclude that the decision of the Canadian Broadcasting Corporation to produce and televise along with its Consortium associates a leadership debate that does not include the participation of the leader of the National Party of Canada is a non-governmental decision and is not subject to Charter scrutiny. I am also unable to accede to the submission that the C.B.C. has acted in contravention of the *Broadcasting Act* or the Television Broadcasting Regulations, 1987.

Although the foregoing disposes of the application, I consider it appropriate to touch upon R. 388. It reads:

"388 If on the hearing of a motion or other application it appears that any person to whom notice has not been given ought to have had notice, the court may either dismiss the motion or application or adjourn the hearing thereof in order that notice may be given."

The Applicants have urged the Court to find that their rights pursuant to sections 2(b), 3 and 15 of the Charter have been infringed. It is trite law that Charter pronouncements, which often require a balancing of competing interests, should not be made in a vacuum. I so held in *Majesty the Queen v Jobin*, 66 C.C.C. (3d) 281. In *MacKay v Manitoba* (1989) 2 S.C.R. 367, Cory, J, speaking for a unanimous Court, stated at pp 361–362:

"Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues.....".

Campbell, J in *Trieger (supra)* at pp 279–280 said:

"There is a significant constitutional value at stake here in the freedom of the press and the other media of communication, particularly the broadcast media. The delicate balancing of their constitutional rights against the constitutional rights asserted by the applicants would involve a very complex factual process of broadcast regulation."

In the case at Bar, the constitutional rights of other members of the Broadcasting Consortium, without now deciding the point, might well be affected were the Court to grant the order prayed for. The same is true of the Charter rights of the leaders of those political parties who have chosen to debate with each other. The failure of the applicants to properly serve the Notice of Motion and supporting material upon all those who might have an interest in these proceedings

is, in my view, fatal. On that basis as well, I would dismiss the application. Counsel may speak to costs.

J. C. Q. B. A

DATED at the City of Edmonton,
this 23rd day of September, A.D. 1993.

Counsel:

T.W. Wakeling, Esq.

G.D. Chipeur, Esq.

R.D. Gibson, Esq.

for the Applicants

L.M. Huculak, Esq.

for the Respondent

FEDERAL COURT OF CANADA

TRIAL DIVISION

Ottawa, Ontario, the 29th day of September 1993

Present: The Honourable Mr. Justice McKeown

Between:

THE NATURAL LAW PARTY OF CANADA, DONALD JACKSON
and DONALD JACKSON on behalf of the members of
THE NATURAL LAW OF PARTY OF CANADA,

Applicants

and

CANADIAN BROADCASTING CORPORATION

Respondent

*Elections – **Role of Media** – Right of Political Party to be included in debates organised by consortium of other political parties to be broadcast by Canadian Broadcasting Corporation (C.B.C.) – Whether C.B.C. was under obligation to provide equitable treatment to political concerned.*

Background facts

On September, 1993, several media organisation disseminated the news that a broadcasting consortium composed of the major television services the CBC, Global Television Network and SRC (Société Radio Canada), had reached a deal to broadcast debates among the leaders of five political parties (the Progressive Conservative Party, the Liberal Party, the New Democratic Party, the Reform Party and the Bloc Québécois). Neil Paterson of the Natural Law Party was included. The participants in the debates were determined by consensus within the Broadcasters' Consortium and the format was still being negotiated with the five political parties. The C.B.C. had no power to unilaterally include other participants in the debates. The Broadcasters' Consortium considered certain criteria for the inclusion of political leaders in the debates.

The Natural Law Party and Donald Jackson privately and on behalf of the members of the Party brought an application for an interim order. The motion was for an interim order declaring that the law required that the C.B.C. provide equitable treatment to the Natural Law Party in all

television broadcasting of C.B.C.-produced Town Hall meeting and leaders' debates among federal political party leaders or their representatives, and, in particular, required C.B.C. to include the leader of the Natural Law Party of Canada, Neil Paterson, or his representative, in debates if C.B.C. continued to participate in the production of broadcast of debates.

Held

That motion was dismissed.

Cases cited in the Judgement

Green Party Political Association of British Columbia and Valsic Parker v Canada Broadcasting Corporation (Oct. 8, 1991) Vancour, B.C. Doc. No 9116786

Trieger v Canadian Broadcasting Corp. 54 D.L.R.(4th) 143 (Ont. HCJ 1988)

National Party of Canada, Mel Hurtig and Mel Hurtig on behalf of the members of the National Party of Canada v Canadian Broadcasting Corporation (unreported)(September 23, 1993) Q.B. No. 9303-18257 (Alta. Q.B.)

Upon the Applicants Notice of Motion dated September 27, 1993 for an interim order declaring that the law requires the Canadian Broadcasting Corporation ("C.B.C.") to provide equitable treatment to the Natural Law Party of Canada in all television broadcasting of C.B.C. produced "town hall" meetings and leaders debates ("debates") among federal political party leaders or their representatives and, in particular, requires C.B.C. to include the leader of the Natural Law Party of Canada, Neil Paterson, or his representative, in debates if C.B.C. continues to participate in the production of broadcast and a mandatory interlocutory injunction to that effect.

ORDER

For oral reasons the application is dismissed. Travel disbursements of the respondent shall be paid by the applicants.

W. McKeown

Judge

FEDERAL COURT OF CANADA
TRIAL DIVISION

T-2319-93

Between:

THE NATURAL LAW PARTY OF CANADA,
DONALD JACKSON and DONALD JACKSON on behalf of
the members of
THE NATURAL LAW PARTY OF CANADA

Applicants

– and –

CANADIAN BROADCASTING CORPORATION

Respondent

REASONS FOR ORDER

MCKEOWN, J

The Natural Law Party Donald Jackson privately and on behalf of the members of the Party brought this application for an interim order. The motion is for an interim order declaring that the law requires the Canadian Broadcasting Corporation ("C.B.C.") to provide equitable treatment to the Natural Law Party of Canada in all television broadcasting of C.B.C.-produced Town Hall meetings and leaders' debates ("debates") among federal political party leaders or their representatives, and, in particular, requires C.B.C. to include the leader of the Natural Law Party of Canada, Neil Paterson, or his representative, in debates if C.B.C. continues to participate in the production or broadcast of debates and a mandatory interlocutory injunction to that effect.

FACTS

On September 4, 1993, several media organisations disseminated the news that a broadcasting consortium composed of the major television services the C.B.C., Global Television Network and SRC (Société Radio-Canada), had reached a deal to broadcast debates among the leaders of five political parties (the Progressive Conservative Party, the Liberal Party, the New Democratic Party,

the Reform Party and the Bloc Québécois). Neil Paterson of the Natural Law Party was not included.

The participants in the debates have been determined by consensus within the Broadcasters' Consortium and the format is still being negotiated with the five political parties. The CBC had no power to unilaterally include other participants in the debates.

Due to the large number of political parties contesting the federal election, the Broadcasters' Consortium considered including in the debates leaders whose parties met all of the following criteria:

- a. having at least one representative sitting as a Member of Parliament;
- b. showing themselves consistently over recent years to have had an impact on the Canadian public inasmuch as each has scored more than 5% popularity in various opinion polls; and
- c. its leader has been involved in a very publicly visible manner in the constitutional and economic debates in Canada in recent years.

Once all of the details of the leaders' debates have been settled, the CBC intends to be involved in another television programme enabling the leaders of the parties not represented in the proposed debates to present their views to the public, and invitations were sent out on the date of this hearing to the nine remaining parties. The nature of the programme has not yet been decided upon.

The debates are considered by C.B.C. to be news events and C.B.C. considers its television coverage of these debates to be part of its overall news coverage of the federal election campaign. The debates will be in front of an audience and will be broadcast as they take place. The parties involved will have no advance knowledge of the questions to be asked of them by the reporters and members of the public that will be present.

The C.B.C. has also conducted two Town Halls and plans to present more. The Town Halls are also considered by C.B.C. to be news events and part of its overall news coverage of the federal election campaign. The Town Halls provide opportunities for voters and political parties to debate various issues and provide important information that could not be conveyed in the formal debates. The Natural Party has not been invited to any of the Town Halls. The C.B.C. has not told the representatives of the Natural Law Party why Mr. Paterson or other members of the Party were not asked to participate in the debates of Town Halls. The criteria were disclosed in an affidavit filed by Mr. Bazay of the C.B.C.

If any organisation or political party were to organise another debate or Town Hall, the C.B.C. would consider providing appropriate coverage of it.

JURISDICTION

The Natural Law Party of Canada is applying for relief on an expedited basis but the relief can be provided by the Canadian Radio-television and Telecommunications (CRTC) under sections 18(1)(d) and 12(2) of the *Broadcasting Act*, S.C.1991. c. 11 ("Broadcasting Act"). There is no provision in the Broadcasting Act for providing relief on an expedited basis, but this does not mean that the Federal Court of Canada can obtain jurisdiction. Section 23 of the *Federal Court Act* R.S.C 1985, c. F-7 (as amended) (Federal Court Act") limits the jurisdiction of the Federal Court to the extent that jurisdiction had been otherwise specially assigned. Since the Broadcasting Act has assigned jurisdiction to the CRTC, I do not have jurisdiction.

This Court is a statutory court. I am unable to rely on the inherent jurisdiction of other superior courts as was the case in *Green Party Political Association of British Columbia and Valerie Parker v Canadian Broadcasting Corp.* (October 8, 1991) Vancouver, B.C. Doc. No. C916786 where Collver, J accepted jurisdiction. Collver, J was a judge of the Supreme Court of British Columbia, which is not a statutory court. There is no gap in the jurisdiction.

INTERIM INJUNCTION

However, in the event that I am not correct in my views on jurisdiction, I would still refuse to grant an interim injunction for the reasons set out in *Trieger v Canadian Broadcasting Corp.*, 54 D.L.R (4th) 143 (Ont. H.C.J. 1988) (Trieger) and *National Party of Canada, Mel Hurtig and Mel Hurtig on behalf of the Members of the National Party of Canada v Canadian Broadcasting Corporation*, (unreported) (September 23, 1993) Q.B. No. 9303-18257 (Alta Q.B.) (National Party).

In my view, the C.B.C. is acting as a broadcaster and not as an agent of the government in its participation in the Broadcasters' Consortium. There is no legislation in Canada which prevents broadcasters from participating in such debates. The American jurisprudence is not of assistance in this respect.

In *Trieger, supra*, Campbell, J succinctly dealt with several important points in deciding that the public interest would not be served by depriving the public of the opportunity to hear the debate. He states at page 146:

Counsel have referred to no case in which any of our courts have purported to dictate to the broadcast networks what they should cover and what they should not cover as a matter of newsworthy public political debate during an election campaign. There is no issue raised in this case of the equal free time regulations or the paid time rules which obtain during election campaigns. The issue here is purely a question of the coverage of national leaders' debates which are considered newsworthy by the various networks in question.

In this case, the Town Hall meetings as well as the debates are involved, but Campbell, J's reasoning is applicable to the Town Hall meetings as well. In addition, all the other leaders have been invited to participate in another television programme enabling those leaders to present their views to the public in a forum to be determined.

Although the Natural Law Party has not brought a complaint to the CRTC, I must agree with Campbell, J when, at page 146 of the *Trieger* decision, he rejects the idea of the Court assuming the role of a regulator:

"Generally speaking, it is not the court to assume the role of the regulator. The C.R.T.C. is still dealing with the complaint of the applicants. I am satisfied that it is appropriate, for the purpose of disposing of this matter on the merits, for this court to assume the role of a regulator and to second-guess the C.R.T.C. on matters within C.R.T.C, jurisdiction. Neither is it for this court to conjure up out of thin air some new regulatory scheme to govern the broadcast agenda for national political debate in this country. Regulation of the airwaves is a matter for the Parliament to decide within any constitutional limits that may obtain. Parliament has chosen the machinery of the *Broadcasting Act*, R.S.C 1970, CB-11, and the C.R.T.C. for this purpose."

Campbell, J then proceeds to review why the Canadian Charter should not apply to the C.B.C. when it is operating as a broadcaster. He states at page 147:

"The *Canadian Charter of Rights and Freedoms* applies to government action. It represents a curb on the power of government, not a letter on the rights of organizations or individuals independent of government which do not exercise the functions of government.

It is not the function of the government or indeed the courts to dictate to the news media what they should report. The broadcasters are exercising a function that is very central to the democratic process. But it is a function that they perform quite independently of government.

The CRTC has not delegated any of its regulatory or other functions to the private broadcasters or to the Canadian Broadcasting Corporation (the "C.B.C."). By leaving broadcasters a wide individual discretion and responsibility to ensure fair treatment of issues, candidates and parties during elections, the C.R.T.C is emphasizing the editorial freedom of broadcasters rather than delegating to them any power of regulation."

Campbell J then deals with the merits of the application before him and, in view of the many parallels in the two applications, I apply the same reasoning to the application before me. He states at page 148:

"What the applicants are really asking this court to do is to dictate the content and the agenda of the political debate in the forthcoming federal general election. It is for the leaders of the various political parties to decide of their own free will and accord, without any coercion from this court, whom they want to debate and when and on what terms such debates should take place. It is not for this court to dictate the agenda of political debate. It is not for this court, certainly on an interlocutory application of this nature without full opportunity as at trial to canvas the facts and the legal issues, to interfere with the freedom of speech and expression of the various party leaders by dictating the debate format, content or participants. Neither is it up to this court to dictate in any way to broadcast editors what is news and what is not news, subject of course to non-publication orders in criminal cases and a few other exceptional cases. It is up to broadcasters and editors to decide what they wish to publish. Their decisions to cover a particular event or not to cover it are matters, to use the words of the U.S. Supreme Court in *Columbia Broadcasting System, Inc. v Democratic Nat. Committee; Federal communications comm'n v Business Executives' Move for Vietnam Peace; Post-Newsweek Stations v Business Executives' Move for Vietnam Peace; American Broadcasting Companies v Democratic Nat. Committee*, 412 U.S. 94 at P.118 (1973). "within the area of journalistic discretion". Those editorial decisions do not amount to the carrying out of any government functions.

There is a significant constitutional value at stake here in the freedom of the press and the other media of communication, particularly the broadcast media. The delicate balancing of their constitutional rights against the constitutional rights asserted by the applicants would involve a very complex factual process of broadcast regulation. It would require a great deal more factual material than this court has before it right now on the eve of the scheduled debate and so close to the actual time of the election itself.

Since 1991, the amendments of the new Broadcasting Act have the effect of strengthening the rights of the broadcasters to enjoy freedom of expression; see the Broadcasting Act; section 2(3), which concerns all broadcasters, and sections 35(2), 46(5) and 52(1), which specifically concern the C.B.C. There is nothing on the face of the criteria chosen which is so unreasonable as to require the intervention of the Court. The criteria are not arbitrary, unfair or based on irrational considerations on their face.

Campbell, J at pp 150–151 points out the dangers which could result from a court interfering in journalistic endeavours in order to satisfy the demands of groups seeking more attention from the media on the grounds of freedom of expression:

"The applicants say that their right to freedom of expression is infringed by the broadcast policy and by the non-enforcement of the broadcast policy. It is by no means clear on this record that their freedom of expression requires a court to force the media to carry their views to the public. It is by no means clear on this record that any citizen's right to vote is impaired by the failure of this group to get the media attention which is sincerely and profoundly believes it requires. To make the orders sought would not promote free public discussion in political debate. It would interfere with free public discussion and political debate by forcing on unwilling participants a certain debate format.

I will say little more about the merits of the constitutional arguments raised by the applicants. The applicants in my view have some very considerable legal hurdles to overcome at trial. As to free speech, the right to speak does not necessarily carry with it the right to make someone else listen or the right to make someone else carry one's own message to the public. That point was made by Thurlow CJ of the Federal Court in *Re New Brunswick Broadcasting Co... Ltd. v C.R.T.C.* (1984), 13 D.L.R.(4th) 77 at p.89, 2 C.P.R. (3rd 433, [1984] 2 F.C. 410 (C.A.)"

At page 152, Campbell J, concludes his discussion of the merits of the application before him:

"This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all.

The proper purpose of an interlocutory injunction is to preserve or restore the *status quo*, not to give the plaintiff his remedy, until trial". I refer to these remarks of Mahoney J in *Re A.G. Can, and Gould* (1984), 13 D.L.R. (4th) 485 at p 490, [1984] 1 F.C. 1133, 42 C.R. (3rd) 88 (C.A.), quoted by the Divisional Court in *Re Metropolitan Toronto School Board and Minister of Education* (1985), 53 O.R.(2nd) 70 at P.81, 23 D.L.R. (4th) 303 at p 313, 6 C.P.C. (2d) 281 at p 293.

I also seek to preserve the *status quo* until trial, and an interlocutory injunction in this application would have the effect of giving the applicants their remedy without a trial. Most of the foregoing reasoning was reviewed and accepted by Berger J in *the National Party case supra*. Due to the

necessity of producing these reasons quickly, I have not reviewed his reasons in detail, but I am in agreement with his judgement.

The foregoing reasoning is also applicable to the Bill of Rights. The Bill of Rights encompasses freedom of the press and again the Court should not attempt to balance that right with the right of freedom of speech in an interlocutory motion.

Despite the very able arguments by counsel for the applicants, I am not satisfied that they have met the legal test of a serious issue to be tried and I am not satisfied that they succeeded on the balance of probabilities. The motion will be dismissed.

William P. McKeown

Judge

OTTAWA, ONTARIO,
October 1, 1993

OPINION OF THE COURT

delivered by

THE LORD PRESIDENT

in causa

BRIAN HOUSTON AND PATRICK
CHALMERS,

-Pursuers;

against

BRITISH BROADCASTING CORPORATION,

-Defenders:

Act:- Dean of Faculty et
Boyd QC et Brown
Drummond Miller, WS,
for Pursuers

Alt:- P Taylor, Solicitor -
Advocate
McGrigor Donald for
Defenders

4 April 1995

OPINION OF THE COURT

delivered by

THE LORD PRESIDENT

in causa

BRIAN HOUSTON AND PATRICK CHALMERS

Pursuers

against

BRITISH BROADCASTING CORPORATION

Defenders

Elections – role of media – impartiality – whether extended interview with Prime Minister or Panorama Programme shortly before local government elections would be in breach of duty, under licence, to treat controversial subjects with due impartiality – locus standi of pursuers.

Background facts

*The British Broadcasting Corporation (BBC) planned to broadcast an extended interview on the Panorama Programme with the British Prime Minister on the eve of local government elections in Scotland. An action was brought against the BBC to prevent the programme being broadcast as planned. The action was based on two issues, namely, that, if the BBC were to broadcast in Scotland an extended interview with the Prime Minister on the Panorama Programme that evening, they would be in breach of their duty, under conditions of their licence, to treat controversial subjects with due impartiality; secondly, if such a **prima facie** case had been made out, the balance of convenience favoured the granting of interim interdict to prevent the programme being broadcast until after 9 p.m. on Thursday 6th April following the close of the poll in the local government elections which were to take place in Scotland on that day. The Lord Ordinary reached a discussion in favour of the pursuers in both of those issues and granted interim interdict in the terms sought.*

*The Lord Ordinary's decision was then brought before this Court on a reclaiming motion for review on a new issue, namely the ground that the pursuers, who were candidates at the local government election, had **locus standi** which was required to bring the proceedings against the BBC.*

Held

*That on the new issue a **prima facie** case had been made out which was sufficient to justify the granting of **interim** interdict on the balance of convenience. Motion for appeal to the House of Lords refused.*

Cases cited in the Judgement

Wilson v Independent Broadcasting Authority [1979] SC 351

Ross v Ross [1927] SC (HL) 4

American Cyanamid Co. v Ethicom Ltd. [1975] AC 396

Group 4 Total Security Ltd. v Ferrier [1985] SC 70

Hadmor Productions Ltd. v Hamilton [1983] 1 AC 191

4 April 1995

When this case came before the Lord Ordinary yesterday afternoon he was asked to consider two issues. The first was whether the pursuers had made out a *prima facie* case that, if the Corporation were to broadcast in Scotland an extended interview with the Prime Minister on the Panorama Programme that evening, they would be in breach of their duty, under the conditions of their licence, to treat controversial subjects with due impartiality. The second was whether, if such a *prima facie* case had been made out, the balance of convenience favoured the granting of *interim* interdict to prevent the programme being broadcast until after 9 p.m. on Thursday 6 April following the close of the poll in the local government elections which are to take place in Scotland on that day. The Lord Ordinary reached a decision in favour of the pursuers in both of these issues and granted *interim* interdict in the terms sought by them.

The Lord Ordinary's decision was then brought before this court on a reclaiming motion for review. Mr. Taylor made it clear at the outset of his argument that he was not seeking to challenge the decision of the Lord Ordinary on either of the two issues which had been debated before him. What he sought to do was to present a further argument, to the effect that the pursuers had not made out a *prima facie* case that they had a title and interest to bring these proceedings before this court. He accepted that there was a duty on the Corporation to act with due impartiality in terms of the licence. The issue was whether the pursuers, who are candidates at the local government election, had the locus standi which was required to bring proceedings against the Corporation based on an apprehended breach of conditions of the licence to which they were not a party.

The matter came before us half an hour before the programme was due to be broadcast. For obvious reasons it was not possible for the important issue which was raised by Mr. Taylor to be debated in detail under reference to a full citation of authority. We were however persuaded, under reference in particular to *Wilson v Independent Broadcasting Authority* 1979 SC 35, to which we were referred by the Dean of Faculty, that on this new issue a *prima facie* case had been made out which was sufficient to justify the granting of *interim* interdict on the balance of convenience. We were not asked to decide, and did not decide, any issue about the content of the programme. Nor were we asked to reach, or were we in a position to reach, a final decision on the issue of principle. The only issue for us was whether a *prima facie* case existed on a point which was not frivolous or vexatious but was open to argument. The issue of balance of convenience was not in dispute before us.

The Corporation have now enrolled for leave to appeal to the House of Lords against our interlocutor. That leave to appeal is required is not in question, as it was not disputed that both in form and substance our interlocutor was an interlocutory judgement. Section 40(1)(b) of the Court of Session Act 1988 requires leave of the inner House before an interlocutory judgement of this court can be appealed to the House of Lords. On that matter our decision is final and not subject to review by the House of Lords; see *Ross v Ross* 1927 SC (HL) 4 per Viscount Dunedin

p 6. The question is whether we would be justified in granting leave, having regard to the nature of the issue which was before us in the reclaiming motion and various practical considerations to which we shall refer.

The issue which was before us in the reclaiming motion was described by Mr. Taylor as a matter of considerable public importance, not only in Scotland but throughout the United Kingdom. For our part, we do not doubt for a moment that an important point of law has been raised in this case. It is one on which there is, so far as we are aware, no clear previous authority. The Dean of Faculty did not seek to challenge Mr. Taylor's submission as to the importance of the issue. It is equally clear however that it is not a matter which can be the subject of a final or definite decision at this stage. It is well established, both in England and in Scotland, that it is no part of the Court's function at the interlocutory stage in a litigation to try to resolve difficult questions of law which call for detailed argument and mature consideration: *American Cyanamid Co. v Ethicom Ltd.* 1975 AC 396 per Lord Diplock at p. 407; *Group 4 Total Security Ltd. v Ferrier* 1985 SC 70 at p.76. It was not possible for us in the time available to attempt to resolve that issue, nor was it possible for either side to present us with a carefully researched and fully developed argument. Nor indeed would it be possible for the House of Lords to resolve the issue in the event that we were to grant leave to appeal. The House of Lords would be in no better position than we were to determine the importance issue of principle. It is also clear that the question for the House of Lords in the exercise of their appellate function, in a matter of this kind which depends so much on the exercise of a discretion by this Court, would not be whether they would have decided the issue differently but whether we have gone so far wrong that they must set aside our decision to adhere to the decision of the Lord Ordinary to grant the *interim* interdict: *Hadmor Productions Ltd. v Hamilton* 1983 1 AC 191 per Lord Diplock at p 220 B-E. For these reasons, any idea which the Corporation may have at this Court has decided the issue of principle by coming to a definitive view upon it is misconceived. So also is any idea that the House of Lords in an appeal against our interlocutor affirming the decision of the Lord Ordinary would be able to come to such a view.

The importance of the issue and its novelty points clearly, in our opinion, to the conclusion that it is one which should be carefully and thoroughly debated in a proper manner without the pressure of urgency which has inevitably arisen in this case at the interlocutory stage. As the Dean of faculty put it, the importance of the issue makes it all the more important that it should be addressed after full argument. It was not disputed on either side that, whatever the result of today's proceedings, that issue was capable of being properly litigated before the Court at the appropriate stage.

Mr. Taylor then said that there were considerations pointing to the balance of convenience which justified our granting leave to appeal. He said that the Corporation were anxious to broadcast the programme as early as possible. It dealt with topical matters, and it was at least possible that they would lose their topicality if the broadcasting of the programme was to be further delayed. We were not impressed by this argument. In the first place the Lord Ordinary's decision on the

balance of convenience was not challenged in the reclaiming motion before us. In the second place it is far from clear – and Mr. Taylor was unable to elaborate on this point – that the issues which were discussed in the programme were of such a nature that it is a matter of urgency that they be broadcast. Further, the closer the broadcasting comes to the election day the stronger the pursuers' case becomes that the risk of prejudice would arise which has led them to bring the matter before this Court.

Then there are the practical considerations. Whatever the situation may be in England, the position in the case of an appeal to the House of Lords from the Court of Session in Scotland in terms of the statute requires various stages to be gone through. The first is the seeking of leave from this Court, where this is required. If leave is granted, the papers must then be made up for the use of the Appellate Committee in London. Among these there will require to be a written opinion from this Court giving the reasons for the decision so that there may be a basis for discussion in the appeal. The Appellate Committee must then decide whether the matter is of such urgency that it is willing to sit to deal with the appeal at very short notice. Its decision must then be reported to the House on a motion which may be open to debate before the judgement can be pronounced. Even then matters are not over, because a judgement of the House of Lords has no effect in Scotland until this court has pronounced a further interlocutor under rule 56.1 of the Rules of the Court of Session to apply the judgement. Before a motion to that effect can be enrolled copies of the judgement must be lodged in process in this Court.

It seems to us to be clear that, unless this could be regarded as a case of extreme urgency and importance – which is to, in our opinion – there is no reasonable prospect of all these steps being completed today. At best for the Corporation therefore the process would be completed tomorrow in time for the programme to be shown on Wednesday evening, but that is the evening before the local elections are due to be held. In our opinion these considerations far outweigh any advantage that the Corporation are likely to achieve by showing the programme twenty-four hours earlier than they could lawfully do so in terms of the Lord Ordinary's interlocutor.

For these reasons we shall refuse the motion for leave of appeal to the House of Lords.

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

IN THE MATTER OF of the Validity of Section 322.1
of the Canada Elections Act R. S.C 1985, c E-2 as amended

AND IN THE MATTER OF The Canadian Charter of Rights and Freedoms,
Part 1 of the Constitution Act, 1982
Sub-section 2 (b) and Section 3 and Section 24 (i) and 52
of the Constitution Act, 1992

B E T W E E N:	)	Peter Jacobsen
	)	for the Applicants
THOMSON NEWSPAPERS COMPANY	)	
LIMITED doing business as the	)	Debra M. McAllister
as The Globe and Mail, The Evening	)	for the Respondent
Telegram, Winnipeg Free Press and Times	)	
Colonist and SOUTHAM INC.	)	
	)	
Applicants	)	
	)	
- and -	)	
	)	
THE ATTORNEY GENERAL OF	)	
CANADA	)	
	)	
Respondent	)	

Elections – Canadian Charter of Rights and Freedoms – permits on publication of public opinion polls prior to holding a Federal elections – whether legislation was in breach of charter of Rights and Freedoms.

Background facts

The applicants were concerned with legislation purporting to place limits on the publication of the results of public opinion polls on surveys immediately prior to the holding of Federal elections. They sought a declaration that the Canada Elections Act, R.S.C. 1985, c.E-2, S. 322.1 as amended by S.C. 1993, c. C-19, S. 125, was of no force and effect in that it violates the Canadian Charter of Rights and Freedoms, R.S.C. 1985, Appendix II, No. 44, Sch.B, 5.2(b) and 3 and was not justified under section 1.

Held

That the evidence reviewed indicated that section 322.1 was a demonstrably justifiable limitation on free expression found in section 2(b) of the Charter. The application was dismissed.

Cases cited in the Judgement

Reform Party of Canada v Canada (A.G.) 10 March 1995) Appeal #13908 (Alta.C.A.)
National Citizens Coalition v Canada (AG) (1984), 11 D.L.R. (4th) 481
R v Butler [1992] 1 S.C.R. 452
Mattabi Mines Ltd v Ont. (Minister of Revenue) [1988] 2 S.C.R. 175
R v Terens, [1985] 1 SCR 613
Committee for the Commonwealth of Canada v Canada [1991] 1 SCR 139
R v McIntosh (23 February 1995), No. 23843 (S.C.C.)
R v Hasselwander, [1993] 2 SCR 398
R v Heywod [1994] 3 SCR 761
R v Prairie Schooner News (1970) 1 C.C.C. (3rd) 251 (Man.CA)
National Hockey League v Pepsi-Cola (1992),S.B.L.R. (2nd) 121 (B.C.S.C.)
Walt Disney Productions v Tripple Five Corp. et al (1994), 113 D.L.R.(4th) 229(Alt.CA)
Altrincham Electric Supply Ltd v Sale Urban District Council (1936),154 L.T.379(H.L)
Young v Young [1993] 3 S.C.R.3
Irwin Toy Ltd. v Quebec (A.G.) [1989] 1 S.C.R 927
Reference re sections 193 and 195.1(1)(c) of the Criminal Code,[1990] 1 S.C.R 1123
R v Keegstra [1990] 3 S.C.R 697
R v Zundel, [1992] 2 S.C.R. 731
Ford v Quebec (A.G.) [1988] 2 S.C.R. 712
Edmonton Journal v Alberta (A.G.)[1989] 2 S.C.R. 1326
Haig v Canada, 1993 2 S.C.R. 995
Reference re Prov. Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158
Reference re Public Service Employee Relations Act (Alta.)[1987]1 S.C.R.313
Slaight Communications Inc. v Damidson, [1989] 1 S.C.R. 1038

B.(R.) v Children's Aid Society of Metropolitan Toronto (27 January 1995),
No.23298(S.C.C.)
Dixon and A.G. British Columbia (1989), 59 D.L.R.(4th) 247 (B.C.S.C.)
Reform Party of Canada v Canada (A.G.)[1993] 3 W.W.R. 139 (Alta.Q.B)
Barrette v Canada (A.G.)(7 August 1992) [1994] R.J.Q 671
Re Jolivet (1993) 7 C.C.C. (3d) 431 (B.C.S.C)
Sauve v Canada (A.G.)[1993] 2 S.C.R. 438
R v Oakes (1986) 1 S.C.R. 103
R v Chanlk [1990] 3 S.C.R. 1303
Andres v Law Society of British Columbia [1989] 1 S.C.R. 143
R v Sauve (1992), 7 O.R. (3d) 481
Belczowski v Canada, [1992] 2 F.C. 440
Himies v Nova Scotia (1990), 73 D.L.R. (4th) 491 (N.S.S.C.T.D.)
R v Laba (1992), 74 C.C.C. (3d) 538 (Ont.C.A.)
R v Squires (1992), 11 O.R. (3d) 385 (C.A.)

SOMERS J

The application is concerned with legislation purporting to place limits on the publication of the results of public opinion polls on surveys immediately prior to the holding of Federal elections. It is brought under Rule 14.05(3) (g.1) and seeks a declaration that the *Canada Elections Act*, R.S.C. 1985, c. E-2, section 322.1 as amended by section C. 1993, c. C-19, section 125, is of no force and effect in that it violates the Canadian Charter of Rights and Freedoms, R.S.C. 1985, Appendix II, no. 44, Sch. B, section 2(b) and 3 and is not justified under section 1.

Section 322.1 provides as follows:

No person shall broadcast, publish or disseminate the results of an opinion survey respecting how electors will vote in 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.

The duration of this black-out is not readily apparent. Because federal elections take place on Mondays with polls closing at 8.00 p.m., this amounts to a 68-hour black-out period in any given time zone. With respect to dissemination across several time zones, a Vancouver broadcaster would have to stop broadcasting polling information in Newfoundland on Friday at 7.30 Pacific Time and could not resume broadcasting it until the close of polls at 8 o'clock Pacific Time for a black-out of 72.5 hours.

There is no penalty section attached to the prohibition under the Act, but a prosecution may be brought under the Criminal Code, R.S.C. 1985, c. C-46, section 126 which reads:

126. (1) Every one who, without lawful excuse, contravenes an Act of Parliament by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless a punishment is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

However, before a prosecution under s. 126 may be initiated relating to a breach of the Canada Elections, an official acting under the general supervision of the Chief Electoral Officer. Canada Elections Act, ss. 255 and 256 (1).

The Applicants argued that, by prohibiting the publication of polls in the days before an election, Parliament has violated the freedom of expression found in section 2(b) of the Charter of those wishing to disseminate that information and the correspondent "right to know" of voters who may be interested in polling results and who may wish to use such results to determine how to vote. Furthermore, the Applicants submitted that the black-out infringed the right to vote found in section 3 of the Charter which must be read to include the right to vote in an informed manner.

The violation caused by section 322.1 was such that the government could not justify the measure under section 1. The ban had the effect of restricting polling information to a political elite who could afford to commission private polls and was being imposed without any evidence that polls have a detrimental effect on the public on the public interest.

The Respondent conceded that there was a violation of section 2(b) of the Charter disagreed that polls were a type of political expression central to the constitutional guarantee of free speech. It also disputed that section 3 had been violated. The Government, invoking section 1 of the Charter, argued that polls could have an undue influence on voters because while they are scientific in appearance they are subject to weaknesses which are not fully explained to the public. Furthermore, the publication of polls right up to the end of an election leaves no time for a response from those wishing to dispute a poll's findings. This is of particular concern where the poll may be technically incorrect or, worse, may have mis-stated the results. In this context, a short publication ban minimally impairs freedom of expression and it is rationally justifiable.

The evidence presented to the Court took the form of documentary evidence from various commission reports, social science studies and excerpts from Hansard. As well, there were a number of affidavits filed. These essentially summarised and commented on the documents submitted directly to the Court. Much was made in argument about just what this evidence established with regards to the impact of polling and to what extent it justified the constitutionality of this legislation. It is therefore appropriate to review it in some detail.

The most comprehensive evidence concerning polling was in the form of a research study by Guy Lachapelle entitled *Polls and the Media in Canadian Elections: Taking the Pulse*, Dunburn: Toronto, 1991, (hereinafter the "Lachapelle study") done for the recent royal Commission on Electoral Reform and Party Financing. Prof. Lachapelle is an associate professor of political science at Concordia University and has written about provincial politics and the use of opinion surveys. His study contains a review of the literature on polling, of relevant legislation in foreign countries and of the numerous briefs submitted to the Royal Commission on this subject. All of this was very helpful. I found the Lachapelle study because of its breadth and thoroughness to be the most credible evidence put before the Court. This study was relied on by the Royal Commission on Electoral Reform and Party Financing when it tendered its final report: *(Reforming Electoral Democracy (Supply & Services: Ottawa, 1991), (hereinafter the "Lortie Commission,"))* after 42 days of hearings in 27 cities across Canada.

In 1986, the President of the Privy Council tabled a report entitled "White Paper on Election Law Reform" (the "White Paper"). Unlike the other reports presented to the Court, this document does not claim to be a non-partisan effort. The Committee that produced it was composed of government MPs and it held its hearings in camera. It does, however, pick up on recommendations made to Parliament by the Chief Electoral Officer. Also submitted to the Court were extracts from earlier studies including the Report of the 1966 Committee on Election Expenses (the "Barbeau Committee").

In addition, the parties referred in argument to Patrick Boyer's works on election law. I have looked at *Political Rights: The Legal Framework of Elections in Canada* (Butterworths: Toronto 1981) and "Political Rights and the Charter" (1982), 6: 6 Canadian Lawyer 4. I have also consulted the following academic articles on the subject: H. Kushner, "Election Polls, Freedom of Speech and the Constitution" (1983), 15 Ottawa L.R. 515; A. M. Barlow, "Restricting Election Day Exit Polling: *Freedom of Expression v The Right to Vote*" (1990), 58 Cinnati L.R. 1003; S. Bailey, "Opinions About Political Opinion Polls" (1987), 137 New Law J. 515. Wherever possible I have reviewed at the original documents referred to in the documentary evidence presented on the application.

Deponents of the various affidavits filed were Prof. Lachapelle himself and Jean-Marc Hamel (both for the Respondent); and Colin MacKenzie and George Perlin (both on behalf of the Applicants). Jean-Marc Hamel was Chief Electoral Officer of Canada from 1966 to 1990. He was also Special Advisor to the Lortie Commission and later Special Advisor to the C.B.C. during the Charlottetown referendum. Colin MacKenzie is Deputy Managing Editor of the *Globe and Mail*. George Perlin is a well-known professor of political science at Queen's University who has written extensively about Canadian elections and who is also director of the University's Centre for the Study of Public Opinion.

According to the Lachapelle study at pp 7-11, serious opinion surveying using relatively large representative samples first arose in the United States and in Britain in the 1930s. George Gallup, in many ways the founder of modern polling, opened Canadian and Australian offices in 1941. The first Canadian electoral poll was conducted in the 1945 national election but it was not until the 1960s that opinion polling "really began to take flight." Various Canadian polling companies subsequently came into existence including Goldfab Consultants, Decima Research and CROP. Since then the use of polls has continually expanded. During the 58 days of the 1988 federal election, 22 national polls and at least 37 regional, provincial, constituency, issue and party polls were conducted. Twelve of these were sponsored by the media. Coverage of the results of these polls has increased as well. As noted by the Lortie Commission at p 458: "the proportion of television news reported that mentioned polls increased from 16 per cent of all election items in 1980 to 30 per cent in 1988."

One recurring question in all of these works is the influence of the public of opinion polls. Because of their increased usage there has been growing concern about their impact on voters. The possible effects of polls on voters and the difficulty in assessing these effects were best summarised by the affidavit of Prof. Lachapelle at para. 16:

These effects include the bandwagon effect of rallying support for the leading candidate; the underdog effect of rallying support for the trailing candidate; the demotivating effect of abstaining from voting because of certainty that a candidate will win; the motivating effect of making voters aware of an election; and the free-will effect of voting to prove the polls wrong.

As well, Prof. Lachapelle considered the practice of strategic voting. Strategic voting arises when more than two candidates are running in an election. Supporters of the candidate running third may wish to shift their votes to the candidate they consider next best so as to ensure their least favourite candidate is not elected. Strategic voting also arises where voters want to elect a representative who will be member of the governing party for what ever local advantage that might have. Having the most complete and up-to-date polling obviously assists the strategic voters in making their choice and a black-out on polls impedes it. See also H. Kushner, *supra*, p 520 and Lortie Commission, *supra*, at p 458.

Despite the recognised existence of the rallying, demobilising and strategic effects of poll results publication, there is disagreement about its general effect on elections. Much was made by the Applicants of the fact that the relevant social science research was inconclusive and that therefore there was no proof that a black-out period was necessary. The affidavit of Prof. Perlin on behalf of the Applicants concluded, at para. 6, after a review of the relevant literature, that no reasonable basis existed for a black-out provision. Prof. Lachapelle summarised in his study at pp 13-14 the evidence and briefs submitted on this point to the Lortie Commission thus:

The basic argument of most of these briefs was that polls have undue influence on the election campaigns, especially a potential influence on voters Although some analysts believe that certain voters are likely to be influenced by opinion polls and that polls have a negative influence on grassroots party organization, these propositions remain contested. The impact of polls on party strategy and party organization is widely accepted but not fully verified.

As Prof. Lachapelle stated in his study at p 29:

Despite a flourishing debate on the role of polls in modern democratic societies, relatively few conclusions can be drawn. To date, theories about the decline of political parties and the undue influence of polls on voters have not been convincingly established.

The American research Prof. Lachapelle reviewed in his study at pp 66-67 suggested that the publication of exit polls while voting was going on either had no effect on voting patterns or caused a drop in turn-out of 1% to 5%. See also H. Kushner, *supra*, at p 519.

In 1986, the Government reached the same conclusion in its White Paper at p.26:

Experts found that in general the proportion of electors who were influenced by published results of polls was very small and further that this influence worked in both directions, thereby annulling itself. The "bandwagon" effect – people jumping on the expected winners' side – is counterbalanced by the underdog effect

- people who do the opposite because they feel sympathy for the expected loser or because they are afraid that the winner's majority will be too big.

The White Paper went on to recommend against a black-out period but in favour of the mandatory publication of methodological information alongside the poll results. However, the Lortie Commission in *Reforming Electoral Democracy* appears to have reached a different conclusion in its review of the social science data at p 457:

Notwithstanding the frequent assertion of pollsters that their data have minimal influence on voters, recent research provides strong support for the proposition that published opinion polls can significantly influence campaigns and voters.

The Commission based this conclusion on the fact that "[o]ur research demonstrates that polls did have measurable effects on the conduct of election campaigns and the choice voters make" (p 456). It cited another Canadian study to the effect that "polls penetrated deeply into the electorate" with awareness of poll results at levels of between 70% and 80% in the general public. The Commission at pp 457-8 also reviewed recent American and British research that pointed to real but limited effects of poll result publication in terms of a bandwagon effect and a drop in voter turn-out.

As already mentioned, the evidence presented dealt not only with the effect of polls on voters, but also with problems associated with the undue influence, late publication and accuracy of polls. The evidence pointed to a general worry about the "undue influence" of opinion polls on the election process. This influence is said to flow from two related factors. The first is that the polls are presented as scientific and authoritative. The second is that, despite this presentation, the public is often not given the information needed to gauge a poll's true accuracy.

The Lortie Commission wrote in its final report at p 455:

Because they are presented as "scientific", published opinion polls raise issues of public confidence in the integrity of the electoral process. Notwithstanding their claims to scientific validity and accuracy in representing the views of all potential voters, opinion polls are susceptible to many forms of error and misrepresentation. The apparent precision of the data they report fails to reflect the fact they are estimates of the distribution of opinion at a given time. Yet their apparent authority gives them considerable influence over the conduct of campaigns and the choices made by voters.

The conclusion was also reached by Peter Aucoin, a professor of Political Science at Acadia, before the Senate Standing Committee on Legal and Constitutional Affairs at Proceedings, issue 41, May 6, 1993 at p 17:

[P]olls themselves in our culture and in our practice have a claim to scientific validity, notwithstanding the fact that they do have their limitations. In that context, to the degree that one makes a difference between published polls and just any other comments made by those participating in the election campaign, candidates and parties are at a disadvantage if there is an authenticity associated with the very concept of poll.

Prof. Perlin disputes this in his affidavit however. He states that there is no evidence that the impact of polling is undue. He further asserts that no evidence exists demonstrating that the various effects attributed to polls (the bandwagon, underdog and motivating effects) have an excessive influence on voters. Instead polls are merely one of many influences to which a voter is subjected during an open election campaign.

Prof. Aucoin also testified at p 15 about the particular difficulties associated with the publication of polls late in the election:

[P]arties and candidates need access to the polls and this requires some time. In particular, it means they have to be able to respond to the poll. They cannot do that if the poll is published either on election day or the day before an election. Therefore, the ban of 72 hours is to ensure that polls cannot be published after a point in time where candidates and parties cannot respond.

The problems associated with the late polls were implicitly recognised by the C.B.C., which has a self-imposed policy against commissioning polls in the last ten days of the election, though it objects to any legislation in this regard. See testimony to House of Commons Special Committee on Electoral Reform in Minutes of Proceedings and Evidence, issue no. 9, January 7, 1993 at p 22.

Other witnesses took a stance clearly in favour of a black-out. Peter Grant, at the time Broadcast Arbitrator, stated to the Commons Special Committee at p 117:

[M]y answer to the problem of misleading polls is to have more reporting of what the problems of these polls are. You just get more out there. You don't curtail freedom of expression or dictate what it will say, you just try to promote professionalism.

However, I take a different view as you get closer and closer to the election date. You then have the problem of inadequate time for that response and critique. I take a different view than the broadcasters on for example, the release of polls within a day or two of the election date. I think in those circumstances I'm more troubled with it because of the inadequate time for professional critiques to emerge and be disseminated in the population.

Evidence before the Court supported this concern that the public was not given the necessary background information to assess polling data. The Lachapelle study at pp 113–115 and 119–121 found that during the 1988 federal election, the print media was ineffective in fully and consistently reporting the methodological facts the public would need to assess the accuracy of the poll, including the initial sample size, its regional breakdown and whether the sample was strictly random or weighted to ensure representativity. According to the study at p 123, one of the problems is that:

The absolute number of respondents in each category is always missing from the tables accompanying poll results. This element is essential, particularly when the pollsters go on to make regional projections ... because these regional percentages are missing, each region appears to be of similar significance in the overall sample.

Furthermore, the question posed is not consistently reported which caused the Lachapelle study to ask at p 123:

The dailies never present the wording of the questions in both official languages, and rarely is the wording of the question on voting intentions found on the chart or table presenting the results on this question. How can readers determine whether the question on voting intentions was worded in a neutral manner?

However, the print media did generally report the number of people from the initial sample who agreed to respond and the statistical margin of error of the survey. The Lachapelle study concluded on this point at p 132:

A review of Canadian daily newspaper reveals significant shortcomings in the journalistic treatment of polls. The methodological information provided is too sketchy (if present at all) to allow the public to assess the quality and reliability of the results presented.

The study reached similar conclusions on television and radio reporting but based on the limited data on broadcast coverage set out by Lachapelle, I would not make any findings to that effect. However, it is significant that the media best suited for detailed and careful coverage of opinion surveys ... namely print ... failed to include basic data the public would reasonably want to know. This lack of sufficient background information is exacerbated as election day approaches. In the middle of a campaign, there is time for a candidate or party to contradict an anomalous or misleading poll but this opportunity diminishes as the election comes on an end.

Whether this is a real danger was a matter of some debate on this application. Both the Lortie Commission in its final report and Prof. Lachapelle in his affidavit refer to various anecdotal instances where non-existent, false or misleading polls were published close to election day. The affidavit of Mr. MacKenzie was introduced to dispute the relevance of one incident cited by Prof. Lachapelle. Obviously, it is impossible to cite any one example without engendering a detailed

debate on its particular facts. However, 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.

The effect of polling has been a long-standing concern amongst those involved in the study of elections themselves. The first official recognition of some of the problems posed by political polling was given by the Barbeau Committee which submitted its report in 1966. The Committee was chiefly concerned with the cost of polling and wrote in its Report (Queen's Printer: Ottawa, 1966) at p 51:

Evidence was presented to the Committee that considerable sums are expended by parties and candidates on public opinion polls which are alleged to have propaganda value in the closing days of an election campaign. Polling surveys of this type are often urged on a candidate, thus increasing his costs, to off-set the purported results of an opponent's polling of public opinion. The Committee sees no purpose in prohibiting parties and candidates from using such surveys for their private purposes only, but confides their uncontrolled use of public purposes improper and thus an unnecessary expense to parties candidates.

The Committee recommended that:

The publication for public consumption of the results of any such poll, from the date of the issuance of the election writ to polling day, be prohibited. The prohibition of publication should include not only private polls arranged by parties or candidates, but polls conducted by any other organization during the same period.

More recently, the Lachapelle study analysed at pp 16-29 the some 90 briefs that the Lortie Commission received commenting on opinion surveys. The briefs were presented by a variety of organisations and individuals. Seven political parties, as well as numerous of their provincial and riding branches, submitted briefs as did senators, members of the House of Commons and party candidates. In addition, the Commission heard from media outlets and journalists' associations, from the pollsters themselves and from interest groups, such as municipal organisations and chambers of commerce. Finally, the Commission received briefs from individual Canadians.

While almost a quarter of the briefs were opposed to the regulation of electoral polls, 70% of them were in favour of government regulation of polls during elections, and 30% supported self-regulation. Of those recommending a black-out period, the contemplated period extended from the entire campaign to the final 24 hours. There was no argument on this application that these reports were necessarily representative of the population's view but they are evidence of an extensive concern about the effect of opinion surveys. As the Commission concluded in its final

report: "As our public hearings demonstrated, the publication of opinion polls during election campaigns is controversial" (p 455).

The concern about polls was also manifested by numerous private members' bills that have been tabled in the federal, Ontario and Quebec legislatures seeking to regulate the publication of opinion surveys. According to Jean-Marc Hamel, who as Chief Electoral Officer reported to Parliament for 24 years, the bills tabled in Ottawa were presented by members of all parties and all regions and are reflective of a public concern over this issue. The White Paper referred to over 20 federal private members bills calling for some form of restriction.

The Lachapelle study concluded that a 72-hour black-out period was needed. The final report of the Lortie Commission at p 456 advocated a 48-hour period to "prevent perceptions of undue influence." At p 460, the Commission wrote:

A strong case can be made for prohibiting the publication of polls during the blackout period just before voting day. This is done in many countries and some news organizations voluntarily adhere to a blackout. Such a prohibition reduces the impact of a last minute poll, to which parties and candidates often cannot respond. Perhaps more important, it combines with the advertising blackout that has been in place since 1936 to provide voters with a period of reflection at the end of the campaign to assess parties and candidates. Such a prohibition was supported by a number of pollsters and others at the public hearings.

The Commons Special Committee on Electoral Reform, set up to study the bill that followed the Lortie Commission, recommended at 72-hour blackout which was finally adopted in the form of section 332.1. See Third Report on the bill in Minutes of Proceedings and Evidence, issue no. 7, December 11, 1992, at p 56.

This does not of course mean that there was a consensus in favour of the black-out period. Indeed, the 1986 government White Paper opposed it. Prof. Perlin in his affidavit at para. 6 concluded, after a review of the Lortie Commission materials, that there was no reasonable basis for a black-out period. At least one member of the House of Commons, testified before the Senate Standing Committee that the ban was the "type of state manipulation of the media [that] smacks of the totalitarianism we use to see in Eastern Europe, not to mention the blatant disregard for the Charter of Rights and Freedoms" (Proceedings, issue No. 41, May 6, 1993, at p. 32). The majority of media organisations appearing before the Lortie Commission and during the parliamentary process opposed government restrictions of any sort.

Such restrictions would not be exceptional in the context of electoral legislation in Canada. Contrary to what one might first think, elections in Canada are not periods of unregulated free debate. In fact, as Hamel noted in his affidavit, there is a complex web of restrictions that apply to expression during the campaign and during actual voting. During the minimum 47-day

campaign, there is a ban on political advertising through newspapers, magazines and broadcasting during the first 18 days, as well as on the day before polling day and on polling day itself: Canada Election Act, section 48. There is also a complete ban on advertising outside Canada during the election (section 303). Furthermore, advertising by political parties and candidates must fall under legislated spending limits. Broadcast advertising is subject, since 1983, to detailed regulation by the Broadcasting Arbitrator during elections (sections 304–22). It should be noted that some of these restrictions were declared contrary to the Charter by the Alberta Court of Appeal in *Reform Party of Canada v Canada (A.G.)* (10 March 1995), Appeal No. 13908 (Alta. C.A.). Restrictions on third party election expenditures (since amended) were declared unconstitutional by the Alberta Court of Queen's Bench in *National Citizens Coalition v Canada (A.G.)* 1984), 11 D.L.R (4th) 481.

On election night, there is also a rolling black-out which prohibits the dissemination of early returns from Eastern time-zones until local polling booths have closed (section 328). For a Vancouver broadcaster seeking to announce Newfoundland results this amounts to a 4.5-hour black-out. So-called "strategic voters" are thereby deprived of useful information for the short time this prohibition is in effect. Significantly, there is also a ban on surveying voters while they are in a polling station (sections 129 (1) (a), (2) (c)). As well, loudspeakers and advertising are prohibited around polling stations (sections 157, 158). These site-specific restrictions also extend to the three days on which advance polls are held (section 281).

In 1939, the British Columbia legislature passed a ban on the taking and publication of polls during election campaigns S.B.C. 1939, c. 16, section 164. Until the repeal of this provision by the Election Amendment Act, S.B.C. 1982, c. 48, section 29, what became section 166 of the Election Act, R.s.B.C. 1979, c. 103 read:

No person, corporation or organization shall, after the issue of the writ for any election, take any straw vote which will, prior to the election, distinguish the political opinions of the voters in any electoral district.

No similar provincial legislation exists elsewhere. However, this does not mean that the issue has not been of concern. According to the Lachapelle study, the Regroupement québécois des sciences sociales recommended in 1979 that the Quebec Minister of State for Electoral Reform introduce a one-week black-out. Private members bills were introduced on this subject in 1983 and in 1985. Similar bills were introduced in the late Seventies in Ontario. As well, the Nova Scotia Royal Commission on Provincial Elections recommended in 1961 a ban on electoral straw polls.

Evidence of restrictions similar to section 322.1 in other democratic countries was also tendered to assist the Court in its analysis under section 1 of the Charter. The Lachapelle study of foreign jurisdictions revealed a wide variety of approaches from bans to partial black-outs to no regulation at all. Denmark, Germany, Great Britain, Ireland, Italy and the Netherlands have little or no restrictions. According to S. Bailey, *supra*, at p. 515, col. 3, in Turkey, a polling black-out was

declared unconstitutional. However, other countries have retained a black-out period: Belgium (two weeks), France (one week), Luxembourg (four weeks), Portugal (entire campaign) and Spain (five days).

The Belgian legislation, Loi relative à la publication des sondages d'opinion du 18 juillet 1985, Monit. 13 August 1985, Pasinomie 1985. 1137, provides for both the mandatory publication of methodological information and for a partial election blackout. The black-out provision reads as follows:

[Translation] 5. From the thirtieth civil day preceding the date of one of the elections governed by the electoral codes or one of the elections to the European Parliament, it is prohibited to divulge, broadcast or comment on, by any method whatsoever, the results of polls relating to these elections.

The offence is punishable by a small fine (BF 50 to 2,000). "Opinion polling" is defined at art. 1 as:

[Translation] the act of putting a certain number of questions determined in advance to a certain number of persons considered together to be representative of a given population so that the distribution of the answers obtained by means of polling leads to valid estimations of the entire above-mentioned population.

The issue to what was meant by "to divulge, broadcast or comment on" was raised during parliamentary debates (Pasinomie at p 1141), and the minister responsible argued that private communications and the internal use of polls by political parties was not meant to be prohibited by the legislation.

France appears to have the most elaborate legislative framework regulating polls: Loi no. 77-808 du 19 juillet 1977, J.O., 20 July 1977, 3837 as amended by Loi no. 85-692 du 10 juillet 1985, art. 12 J.O., 11 July 1985, 7805 and Décret no. 78-79 du 25 janvier 1978, J.O., 26 January 1978, 503 and Décret no. 80-351 du 16 mai 1980, J.O., 17 May 1980, 1226. The legislation at art. 2 mandates that published polls include the name of the polling organisation and of the person paying for the poll and detailed methodological information. As well, the poll must be made available to the Commission des sondages, a regulatory tribunal composed of senior judges (art. 4, 6). The electoral black-out period is set out as follows:

[Translation] Art 1 – The provisions of the present statute govern the publication and broadcast of any opinion survey relating directly or indirectly to a referendum, presidential election or one of the elections regulated by the Electoral Code as well as the election of representatives to the European Parliament.

Art 11 – During the week that precedes each round of voting, as during the voting itself, are banned, by any means whatsoever, the publication, broadcast and commentary of any survey as defined by Article 1.

The publication of polls during by-elections is also restricted. The punishment is found by reference to the Code electoral, art L. 90-1, as amended by Loi no. 92-1336 du 16 décembre 1992, J.O., 23 December 1992, 17568 which provides for a fine of up to FF 500,000. See also Cass., 21 February 1984, B.C. no. 63.

The relevant Japanese legislation states:

[Translation] 138(3) – With respect of elections, no person shall publicise the results of popularity polls or opinion polls results or trends predicting who will gain an official government position.

While Britain is one of the jurisdictions that does not restrict, there has been considerable debate there on the subject. In 1968, the Speakers Conference on Electoral Law, recommended a 72-hour ban, and in 1985 and 1987 private members bills were introduced with similar restrictions. See s. Bailey, *supra*, at 515, col. 2.

The Lachapelle study concluded its international survey at p. 68.

At comparison of the various laws and provisions covering polling during elections indicates that the list of countries that have imposed a partial or total ban on polls during elections is getting longer.

And latter goes on to say:

A review of the legislation of various countries reveals that governments tend toward outright banning of polls near the end of election campaigns rather than requiring the publication of a specifications sheet. Only France has chosen both options. However, every law is imperfect and can only partially regulate as multifaceted a practice as polling [emphasis added].

It was the general trend towards a short black-out that Parliament followed in adopting section 322.1.

Before deciding the constitutional questions, it is necessary to determine, if possible, the scope of section 322.1 using the traditional canons of statutory interpretation. This follows the procedure set out in *R. v Butler*, [1992] 1 S.C.R. 452 at p 471 where the Supreme Court of Canada conducted an extensive review of the impugned obscenity provision before commencing

its Charter analysis at p 486. This interpretation provides the firm basis upon which the constitutional analysis can be constructed.

The Chief Electoral Officer, no doubt because of the broad language of section 322.1, of the Canada Election Act issued an interpretation bulletin on the section. Such bulletins can have persuasive force where there is an ambiguity in the statute: *Mattabi Mines Ltd. v Ont. (Minister of Revenue)*, [1988] 2 S.C.R. 175 at p 196. However, in this application, this bulletin is of little use to the Court in interpreting the provision. It has no legal force. The Chief Electoral Officer who issued it is not the person directly charged with consenting to election-related prosecutions under the Election Act. This responsibility rests with the Commissioner of Canada Elections who operates only under the general supervision of the Chief Electoral Officer. Nor can such an interpretation bulletin be considered a limit "prescribed by law" under section 1 of the Charter: *R. v Therens*, [1985] 1 S.C.R. 613 at p 645; *Committee for the Commonwealth of Canada v Canada*, [1991] 1 S.C.R. 139 at p 164 per Lamer C J and Sopinka J. At the very most, it is a policy guideline. Accordingly, I place little reliance on the bulletin in guiding my interpretation of the section.

There is no definition given of the phrases "broadcast, publish or disseminate," "opinion survey," or "election issue." The Applicants argued that each of these terms should be given a broad range of meanings. The first phrase on dissemination could include even private communications. The term "opinion survey" could sweep into the black-out period informal and humorous surveys, so-called "hamburger polls" where customers supposedly indicate their voting intentions by purchasing a product identified by the merchant with a particular party. Finally, "election issue" could include any matter raised by any candidate or, for that matter, any voter.

Before sorting out these interpretative difficulties, it is necessary to set out some basic rules of interpretation. For this I refer to the recent case of *R. v McIntosh* (23 February 1995), No. 23843 (S.C.C.) which dealt with the interpretation of the self-defence provision of the *Criminal Code*. Lamer C J held for the majority at pp 8-9:

I take as my starting point the proposition that where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect. This is another way of asserting what is sometimes referred to as the "golden rule" of literal construction: a statute should be interpreted in a manner consistent with the plain meaning of its terms. Where the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise (*Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p 29).

However, where the terms have an imprecise meaning, one may resort to a contextual approach. A contextual approach involves looking at the broader context of the section including other provisions of the statute and Parliamentary intent. As Lamer C J stated in *McIntosh* at p 13:

The contextual approach allows the courts to depart from the common grammatical meaning of words where this is required by a particular context, but it does not generally mandate the courts to read **words** into a statutory provision. It is only when words are "reasonably capable of bearing" a particular meaning that they may be interpreted contextually. [emphasis in original]

A good example of this approach is found in *R. v Hasselwander*, [1993] 2 S.C.R. 398, which concerned the definition of prohibited weapons. The issue was whether the words "capable of firing bullets in rapid succession during one pressure of the trigger" meant "immediately capable" or "readily capable" after minimal retooling. Cory J, in deciding that "readily capable" was correct, referred extensively to the purpose of firearms legislation at pp 414–15 before turning to the precise words employed.

There are, of course, restrictions on such a purposive interpretation. As the Court held in *McIntosh, supra*, at pp 14–15:

It is a principle of statutory interpretation that where two interpretations of a provision which affects ???are liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation.

I keep this in mind given the penalties possible for a violations of section 322.1 of the *Canada Elections Act* under section 126 of the *Criminal Code*. The imprisonment provided for is up to two years, and because it is an indictable offence there is no maximum fine.

The general purpose of the Canada Elections Act is to ensure that elections that are free and fair take place. They can be said to be free in that there is no restriction on the views that registered political parties can express nor on the number of recognised parties, provided that they meet certain minimal requirements concerning membership and number of candidates (section 24(1) (h), (2) (a)). Independent candidates may operate free of even these basic requirements. There are also strict prohibitions on the exercise of undue influence on voters that would pressure them into voting in a certain way (sections 250, 253) and there are guarantees of a secret ballot (sections 105(2), 114(3), 129(1) (a), (2), 132 (2) (a)). Restrictions on the free speech (spending limits, the ban on reporting elections results from other time zones and the advertising and survey black-outs) are, under the Act, exceptions to the free flow of ideas, rather than the rule.

The legislation also seeks to ensure that elections are fair. Elections are governed by an independent officer, the Chief Electoral Officer, who enjoys the tenure of a federal judge (sections 5 and 6) and reports directly to Parliament (section 195). Judicial recounts are provided for (sections 176-88) and related legislation, the *Dominion Controverted Elections Act*, R.S.C 1985, c. C-39, sections 50, 51 and 54, allows for the cancellation of elections vitiated by illegal practices. Voters who must work during polling hours must be given time off to vote (*Canada*

Elections Act, sections 148). There are spending limits that seek to ensure that one voice does not drown out others (section 39). The Broadcasting Arbitrator, in allotting advertising time cannot allocate more than 50% to any one party regardless of its popular support (section 310 (2)).

The purpose of the black-out provision should be viewed in this context. The parliamentary record on section 322.1 itself refers to multiple but related objectives. Parliamentary documents are admissible to determine legislative intent, though they should not be used directly to define the words of the statute: *R. v Heywood*, [1994] 3 S.C.R. 761 at pp 787-89. The black-out was in part aimed at providing a response time to candidates or parties who thought themselves victims of misleading or inaccurate polls. Senator Frith stated that under section 322.1 "[p]arties and candidates will have one more day on which to respond to any poll results released on Friday" (*Debates of the Senate*, May 3, 1993 at p 3134).

Senator Rivest, introducing the bill containing section 322.1 for the Government in the Senate, stated that the provision attempted to "reconcile the freedom of speech and the freedom of the press with the right of the voters to make a judgement peacefully, come election time" (*Debates of the Senate*, April 29, 1993, at p 3117). Despite this stated objective of providing a rest period, the Respondent did not rely on this purpose in argument in order to justify the provision.

The Lortie Commission recommended at pp 455-61 a black-out and drafted a provision that is substantially found in 322.1 (except that the blackout period has been extended by 24 hours). It recognised that a black-out would provide a period of reflection and reduce the undue impact of a last minute poll by providing a response time. This background may assist the Court in interpreting the phrases "broadcast, publish or disseminate," "opinion survey," and "election issue" found in section 322.1. What is meant by these terms?

The term "broadcast" is not defined but under the *Canada Elections Act*, section 2 broadcasting is defined by reference to the *Broadcast Act*, R.S.C. 1985, c. B-9, section 2. It states "'broadcasting' means any radio communication in which the transmissions are intended for direct reception by the general public." The equivalent French term used in section 322.1, "announcer," conveys the same notion of sharing the results with the public. The Applicant submitted that the term "publish" might criminalise even private discussions between pollsters and their clients after the Friday midnight deadline. While this may be sufficient to establish publication under defamation law it is not appropriate in this context. First, "publish" is found in the section between 'broadcast' and 'disseminate'. These two words suggest a wider distribution of information than that which takes place in private or internal communications. Secondly, if "publish" could be interpreted to mean to discuss privately, then the black-out period would amount to a ban on the taking of polls since taking a poll by its very nature requires some discussion of it. This is clearly not the intent of section 322.1. The Act's other black-out section on political advertising, prohibits publication but only in papers, magazines and periodicals.

Though there is nothing in section 322.1 to define "publish" this narrowly, it is an indication that such provisions are aimed at regulating public debate not internal communications.

Read together, it is clear that the phrase "broadcast, publish or disseminate," refers to efforts to spread poll results to the electorate and does not cover internal communications between clients and pollsters (so long as these communications are not colourable ???attempts to disseminate the results to the public which would undermine the obvious purpose of the black-out). This interpretation also accommodates the rule of strict construction of penal statutes by restricting the type of communications that are illegal under section 322.1.

The Applicants submitted that the term "opinion survey" could be interpreted as banning unscientific polls – the so-called "hamburger polls," used by merchants as marketing device during elections, where goods are matched to political parties. The sales of each item are then claimed to reflect public sentiment. Such polls are manifestly not statistically representative of opinion in general and the public can readily distinguish them from polls using more precise sampling and averaging. As such, the concern about undue influence and the public being misled are simply not present and the legislature cannot be read as prohibiting them. As the Lortie Commission stated at p 457:

Although many estimates of public opinion are described as opinion polls, most do not qualify in the strict sense of the term. Unrepresentative phone-in surveys or mail-in questionnaires, haphazard street interviews, or "hamburgers polls" obviously do not meet the standards required of a public opinion poll. Their characteristics usually make it easy, however, for voters to assess their credibility. Opinion polls that claim scientific validity must be based in responses of a representative sample of a defined population. We define an "opinion poll" here as a survey of the public based on a scientific random sample that purports to be representative of a defined population, such as all Canadian residents eligible voters in a defined region or constituency.

While there is no definition in the Act of "opinion survey" as there is in the Belgian legislation, the term has been the subject of judicial commentary in various contexts before the passage of section 322.1. In *R. v Prairie Schooner News* (1970), 1 C.C.C. (3d) 251 (Man.C.A.), an obscenity case, Dickson J A (as he then was) held at pp 265–266:

Basic to the admissibility of such surveys has been the acceptance of the public opinion polling as a science when approved statistical methods, social research techniques, and interview procedures are employed.

Essential to admissibility is the requirement that the witness testifying be possessed of expert knowledge. Essential also is the selection of the proper 'universe', i.e., that segment of the population whose characteristics are relevant to the question being studied. In the case at bar, the 'community' whose standards are being considered is all of Canada. The universe from which the 'sample', i.e.

the individuals to be polled, is to be selected must be representative of Canada and not be drawn from a single city. If, and only if, the sample is correctly selected can it be said that the opinions found to exist in the sample are representative of the entire universe. [emphasis in original]

This interpretation was recently adopted in two passing-off mark cases: *National Hockey League v Pepsi-Cola* (1992), 5 B.L.R. (2d) 121 (B.C.S.C.) at pp 134-35 and *Walt Disney Productions v Triple Five Corp. et al* (1994), 113 D.L.R. (4th) 229 (Alta. C.A.) at p 235.

In my view, the Courts in those cases were not only establishing criteria for the admissibility of polls but were also giving effect to what is commonly thought of as an opinion poll – something which does not include sampling conducted by take-out food operators and the like. Indeed in argument, the parties referred to "hamburger polls" in contra-distinction to opinion surveys proper. If I am incorrect and the "opinion survey" can reasonably be said to include such sampling, then I would feel it appropriate to restrict, in the name of strict construction, the definition of opinion surveys to scientific polls using a representative sample. However, I also think that the legislature intended to include in the term "opinion survey" those polls such as phone-in surveys that may on their face appear to be representative or based on scientific methodology. If this were not the case, then the purpose of reducing the impact of misleading polls would be effectively undermined.

Another point of contention was whether the black-out covered public discussion of previously published survey results. There is nothing on the face of this section that would limit "opinion survey" to new, previously-undisclosed results. However, absurdity would result if the black-out was to include old polls. One of the purposes of the legislation is to provide a response time to those who consider themselves victims of misleading polls. One of the most effective ways of responding is to refer to previous polls and show how the new poll is inconsistent with or less accurate than earlier polls. If such discussion of earlier polls is barred, then the right of full response contemplated by Parliament is seriously weakened. Furthermore, with respect to previously published polls, there has already been time to examine them critically and to expose their weaknesses. This means the danger of undue influence of the possibility of the public being misled has been substantially reduced. Accordingly, the danger that the legislature has sought to attack has been assuaged when it comes to previously published material.

On the issue of absurdity, Lamer C J in *R. v McIntosh*, *supra*, at p 17 adopted *Altrincham Electric Supply Ltd. v Sale Urban District Council* (1936), 154 L.T. 379 (H.L.):

...if the language of an enactment is ambiguous and susceptible of two meanings, one of which is consonant with justice and good sense while the other would lead to extravagant results, a court of law will incline to adopt the former and to reject the later, even although the latter may correspond more closely with the literal reading of the words employed.

While Lamer C J also warned at p. 13 against lightly adding words to statutes, I am of the view that "opinion surveys" in section 322.1 must be understood to refer only to surveys that are not already in the public domain. This limitation accords with the purpose of the legislation and with what the majority held in *McInosh, supra*, at p.17 i.e. that the "overriding principle governing the interpretation of penal provisions [.....] that ambiguity should be resolved in a matter most favourable to the accused persons." Indeed, if a charge were laid under section 322.1 against a person for having publicly discussed after Friday midnight the result of a poll already disclosed, days or months earlier, I find it difficult to believe that a court reasonably interpreting the section would convict.

I confess to having more difficulty in interpreting what exactly is meant by "an election issue that would permit the identification of a political party or candidate". One could say that there are as many issues as there are electors and candidates and one can wonder whether the drafting of the phrase does not create vagueness problems. However, this issue was not raised by the Applicants. I note briefly what L'Heureux-Dubé J stated in *Young v Young*, [1993] 4 S.C.R. 3 at pp 73, 75 about the constitutional doctrine of vagueness:

the standard requires that the provisions permit the framing of an intelligible legal debate with respect to the objectives contained in the legislation.....

It is important to recall that the vagueness of a legislative provision cannot be examined in the abstract but must be considered within the context of the particular legislative objectives in question, bearing in mind that some objectives will require a panoply of judicial remedies for their meaningful fulfilment.

In that case, she had to define what was meant by "best interests of the child" in custody cases. Given this standard, I think it possible to have a legal debate and arrive at a judicial understanding of what an "election issue" is. One of the difficulties in an application for a declaration such as this is that it must take place in a factual vacuum. However, if there were to be persecution, it would be possible to adduce evidence of party platforms and public declarations so as to define what an issue permitting identification of a party or candidate might be in particular situation. In my opinion, the phrase "election issue that would permit the identification of a political party or candidate" is complimentary to the core prohibition of the section relating to voting intentions and is aimed at attempts to circumvent it.

The main ground of attack on section 322.1 of the Canada Elections Act is that it impringes on the right to free expression specifically protected in the Charter section 2(b) of the Charter reads as follows:

2. Everybody has the following fundamental freedoms:

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

The Respondent immediately conceded that section 322.1 violated section 2(b). This conclusion seems inescapable given the definition of "expression" set out by the Supreme Court of Canada in *Irwin Toy Ltd. v Quebec (A.G.)*, [1989] 1 S.C.R. 927 at p 969:

...if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee.

In Reference re sections 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123 at 1180-1181, the Court stated:

s. 2(b) of the Charter protects all content of expression irrespective of the meaning of message sought to be conveyed.

This broad definition is in keeping with the importance given to the constitutional protection afforded free speech. The results of polling obviously do convey meaning (i) about the voting intentions of those surveyed and (ii) through the extrapolations taken from them. The Supreme Court has held that commercial expression, sexual solicitation, hate propaganda and false news, are all protected by sections 2(b) and has excluded, as a category, only violent forms of expression: *Irwin Toy, supra*; *Reference re ss. 193 and 195.1(1)(c) of Criminal Code, supra*; *R. v Keegstra*, [1990] 3 S.C.R. 697; *R. v Zundel*, [1992] 2 S.C.R. 731. It would surely follow that a less objectionable form of expression such as opinion survey results would also be protected and there is no particular policy reason for excluding them.

It should also be noted that when a violation of section 2(b) arises not only are the rights of the person expressing infringed but also those of the listener. This was noted in *Ford v Quebec (A.G.)*, [1988] 2 S.C.R. 712 at p 767 and *Edmonton Journal v Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at p 1339. The real debate on the application centred on the gravity of the breach and whether section 322.1, by restricting the dissemination of political speech, infringed the core values section 2 (b) was meant to protect. As Dickson C J noted in *Keegstra, supra*, at pp 763-64:

Moving on to a third strain of thought said to justify the protection of free expression, one's attention is brought specifically to the political realm. The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide range of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent

harming the openness of Canadian democracy and its associated tenet of equality for all...

Moreover, I recognise that hate propaganda is expression of a type which would generally be categorised as 'political', thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process. [emphasis added]. In contrast, the Supreme Court has explicitly recognised that communications of matrimonial information, or solicitation for the purpose of obtaining or offering sexual favours may not have the same constitutional value as speech about political matters: *Edmonton Journal*, *supra*, per Wilson J at p 1355; Reference re sections 193 and 195.1(1)(c) of the Criminal Code, *supra*, at p 1136.

The Applicants argued that poll results were political expressions about political topics and therefore at the core of section 2(b). The strength of this argument is apparent on its face. Political opinion surveys are information about the democratic process and this characteristic is amplified during elections. The Respondent argued that polls results were not central to the free speech guarantee. It may be said that while polls are about politics, they are not themselves political.

Obviously, the dispute about whether the black-out affects political expression cannot be answered by a yes or a no. The Supreme Court jurisprudence adopts an encompassing approach to protected expression not a rigid categorisation of it. Thus, even if polling is not, properly speaking, the political or partisan expression that is deemed most deserving of protection, it is by its very subject matter close to the core of section 2(b).

More hotly contested on this application was whether section 3 was also violated. Obviously, freedom of expression and the right to vote are intimately connected. As A.M. Barlow, *supra* at p 1020, noted:

Every news, item, every sidewalk conversation, every bumper sticker about the issues and candidates in an election carries with it the potential to change a voter's choice at the polls. These forms of communication are the very essence of free political expression, but they are also the foundations of the right to vote.

Section 3 of the Charter provides:

3. Every 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.

On its face, this section does not provide for a right to receive polling information in the three days before the close of voting. Instead, the section appears to be a guarantee of enfranchisement. In *Haig v Canada*, [1993] 2 S.C.R. 995 at p 1031, L'Heureux-Dubé J noted, for the majority, that

the "wording of the section, as is immediately apparent, is quite narrow." However, she went on to hold that:

The purpose of s. 3 of the Charter is, then, to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives.

In *Reference Re Prov. Electoral Boundaries (Sask.)*, [1991] 2. S.C.R. 158, McLachlin J wrote at p 181 for the majority:

The right to vote, while rooted in and hence to some extent defined by historical and existing practices, cannot be viewed as frozen by particular historical anomalies. What must be sought is the broader philosophy underlying the historical development of the right.

The philosophy underlying the Charter can be derived from the international human rights documents reflective of Canada's commitments and from which the Charter's drafters drew inspiration: *Reference re Public service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313 at p 348; *Slaight Communications Inc. v Davidson*, [1989] 1 S.C.R. 1038 at p. 1057; *B. (R). v Children's Aid Society of Metropolitan Toronto* (27 January 1995), No. 23298 (S.C.C.) per Lamer C.J. at pp 23–24: Referring to the sections of those documents dealing with democratic rights, I note that the *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc A/810 (1948), art. 21(1) and (3), speaks of "freely chosen representatives" and "genuine elections". The Organization of American States' *American Declaration of the Rights and Duties of Man*, 1948, art. XX, reproduced I. Brownlie ed., *Basic Documents on Human Rights*, 3rd ed. (Oxford: Clarendon, 1992) at 491, guarantees "popular elections, which shall be by secret ballot, and shall be honest, periodic and free." The European Convention for the Protection of *Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Protocol 1, art. 3, guarantees free elections "under conditions which will ensure the free expression of the opinion of the people in the choice of legislature."

It is clear then that the "right to vote" must be read broadly to encompass the right to vote in free genuine multi-candidate elections. Section 3 must protect more than the bare right to mark a ballot, otherwise it would be a purely formalistic guarantee. It is therefore generally necessary to consider the whole context of the electoral process to determine whether section 3 has been violated.

Taking this expansive approach, P. Boyer in *Political Rights: The Legal Framework of Elections in Canada* at p 89, argued that section 3 included the right to have sufficient information about public policies to permit an informed decision. This "right to information" was endorsed in *Re Dixon and A. G. British Columbia* (1989), 59 D.L.R. (4th) 247 (B.C.S.C.) at p 259; in *Reform Party of Canada v Canada* (A.G.), [1993] 3 W.W.R. 139 (Alta.Q.B) at 155, affirmed on this point (10 March 1995), No. 13908, per McFadyen J A at 36 *Barrette v Canada* (A.G.), (7 August

1992), Beauharnois 760-05-000252-898, J.E. 92-1333 (Sup. Ct.), affirmed on this point, [1994] R.J.Q. 671, per McCarthy J A at p 674. In *Re Jolivet* (1983), 7 C.C.C. (3rd) 431 (B.C.S.C.), the Court held concerning section 3 at pp 434-435:

It means the right to make an informed electoral choice reached through freedom of belief, conscience, opinion expression, association and assembly – that is to say with complete freedom of access to the process of "discussion and the inter-play of ideas" by which public opinion is formed. Denial by the State of the freedoms necessary for the making of a free and democratic electoral choice involves denial also of the sort of right to vote contemplated by the Charter.

These cases are obviously persuasive, though not determinative, that a right to information exists under section 3. However, this right is not explicitly found in section 3. Rather it is inferred as part of the right to vote in free, open elections which is itself read into the words "right to vote in an election" contained out in section 3. It would be a mistake therefore, even under a broad and purposive approach, to grant to this implied "right to information" the same scope and standing as the right to vote in democratic elections that is at the core of the section 3's purpose. While the right to information gives substance to the right to vote, it remains ancillary to it. This means that under section 3, the constitutional question is not directly whether the "right to information" was breached but whether a restriction placed on information has diminished or undermined the right to vote in a genuine election. It is therefore necessary to examine the information restriction in the context of the whole electoral process before finding section 3 was violated. In other words, the farther away one travels from the core value of section 3, the more the constitutional protection lessens, though it never disappears. The Supreme Court itself has resisted an overly broad expansion of section 3. In *Haig, supra*, the majority refused at p 1032 to read section 3 to include the right to vote in a referendum and in *Reference Re Prov. Electoral Boundaries (Sask.) supra*, the majority declined at p 183 to find that section 3 ensured equality of voting power.

However, these decisions are to be contrasted to cases where the right to vote is directly removed, as for example by statutes disenfranchising convicts. There, section 3 is obviously violated: *Sauvé v Canada (A.G.)*, [1993] 2 S.C.R. 438. Section 3 is also to be contrasted to cases under section 2(b) where even slight restrictions must result in a Charter breach. In section 2(b), freedom of expression is directly rather than implicitly protected as the right to information is under section 3.

Looking therefore at the electoral process as a whole, it is true to say that a complete ban on polls would substantially undermine the votes of those who wished to cast them strategically, for the candidate most likely to win or beat out a candidate they particularly dislike. As one member of the House of Commons opposed to the provision noted before the Senate Standing Committee in Proceedings, issue 41, June 6, 1993 at p 32:

What this legislation and the people who drafted it are saying is that they also want to deny Canadians the ability to vote strategically. People should be allowed to vote however they like. If that means voting strategically, then so be it. Unfortunately, the banning of polls makes strategic voting impossible; hence another fundamental right will be overridden by this bill.

Such an argument would be of graver concern if the prohibition contained in section 322.1 of the *Canada Elections Act* lasted for the entire election or a substantial part of it. In fact, the black-out lasts only for approximately 3 days in an electoral campaign that lasts a minimum of 47 days under section 12(4) of the Act. This means the publication of poll results is restricted during less than 7% of the campaign. This compares to the advertising black-outs at the beginning and end of the campaign of 18 and 2 days, covering over 40% of the election period. Granted the last three days of the campaign may be important ones for the strategic voter if there are still a large number of undecided voters or there is a close race. But it cannot be realistically said that the strategic voter's right to vote is infringed by this short black-out period. Given the great number of polls that are legally published during the other 44 days of the campaign, it cannot be said that the possibility of strategic voting is vitiated or truly undermined. I conclude therefore that section 3 is not violated by section 322.1.

Returning to section 2(b) of the Charter there being an admitted violation of it, it is necessary to proceed to examine whether the infringement is saved by section 1 of the Charter. The test under section 1 is set out in *R. v Oakes*, [1986] 1 S.C.R. 103 and its subsequent evolution has been argued at great length and detail before the Court. Having found an infringement of a Charter Right, the onus of proof now shifts from the Applicant to the Respondent who must prove on a balance of probabilities that the violation is saved by section 1: *Oakes, supra*, at pp 137. Section 1 reads:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The analysis first set out by the Supreme Court of Canada in *Oakes, supra*, at pp 138-39 reads as follows:

It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.

Second, once a sufficiently significant objective is recognized then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R.v. Big M Drug Mart Ltd., supra*, at p. 352... There are, in my view, three important

components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right of freedom, and the objective which has been identified as of "sufficient importance."

See also *R. v Chaulk*, [1990] 3 S.C.R. 1303 at pp 1335–36. On this application, three parts of that test were in issue: whether a pressing and substantive objective existed, whether black-out rationally connected to this objective and whether it was a minimal impairment.

As to the question of a pressing and substantial objective, I refer to the reasons of Dickson C J in *Oakes*, *supra*, at p 138 where he stated:

The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection.

This test is not static or monolithic. McIntyre J wrote in *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p 184:

In *Oakes*, it was held that to override a *Charter* guaranteed right the objective must relate to concerns which are "pressing and substantial" in a free and democratic society. However, given the broad ambit of legislation which must be enacted to cover various aspects of the civil law dealing largely with administrative and regulatory matters 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.

He proposed, in the context of a case dealing with the right of non-citizens to practice law, a lesser threshold question:

...whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective.

In deciding which standard was applicable when a violation of electoral rights was at issue, both the Federal and Ontario Courts of Appeal have opted for the more stringent "pressing and substantial" test found in *Oakes*: *Belczowski v Canada*, [1992] 2 F.C. 440 at p 452; *R. v Sauvé*

(1992), 7 O.R. (3d) 481 at p 485. This more stringent test also accords with the admonition of Cory J in *Edmonton Journal*, *supra*, at p 1336:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the Charter which guarantees the qualified right to be secure from unreasonable search. It seems that rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances. [emphasis added]

Still, section 1 analyses are rarely blocked by the absence of a pressing and substantial objective. See, exceptionally, *R. v Zundel*, *supra*, at p 765 on the false news provision in the *Criminal Code*, and *Hines v Nova Scotia* (1990), 73 D.L.R. (4th) 491 (N.S.S.C.T.D.) at p 499, where it was found that a blanket prohibition on diabetics driving commercial vehicles did not address a pressing objective. The reasons of the Ontario Court of Appeal in *R. v Laba* (1992), 74 C.C.C. (3rd) 538 (Ont. C.A.) also turned on the whether the issue was pressing and substantive. The dispute provision of the *Criminal Code* dealt with a reverse onus provision relating to the sale of minerals. Tarnopolsky J A said at p 550 that the "pressing and substantial" test was generally a formality:

The circumstances must be rare indeed before a court can question a decision of Parliament concerning the objective of a statute duly enacted as lacking sufficient importance.

However he noted at p 551 that:

The Crown bears the onus of establishing that an objective is of pressing and substantial concern and must present evidence which is both cogent and persuasive. Such evidence may consist of, but is not limited to, reports, studies, international conventions or domestic legislation which address and document the severity of the particular social problem in issue.

Citing a paucity of evidence on the frequency of mining theft, he concluded that the objective was not made out as being important enough to justify a Charter violation.

On appeal to the Supreme Court of Canada, [1994] 3 S.C.R. 965, the appellant Crown was permitted to adduce new evidence of the importance of the mineral theft. Sopinka J noted at p 1004:

The opinions with respect of the extent of the problem are weakened by the fact that they are not supported by either statistics, details or facts.

However, given that the provision at issue was part of a criminal offence dealing with theft, it was possible to find that Parliament's objective was sufficiently important "in the absence of extrinsic evidence" at p 1007.

In the case at bar, the Court has amassed voluminous extrinsic evidence on the objective of the black-out. This is not a case like *R. v Zundel, supra*, at p 763, where there was no documentation on why the impugned provision was passed. As noted above, there have been numerous sociological studies on the effects of opinion surveys. All agree that polling is becoming a growing part of the electoral coverage in the media. In the 1988 federal election, there were 22 national polls taken and 37 regional or issue ones, and poll results were mentioned in 30% of television election coverage. Some of the studies have concluded that the publication of surveys late in the election had no impact, others that the evidence was inconclusive, yet others that there was a demobilising effect. Some recent American studies considered by the Lachapelle study reported a drop in turn-out of between 1% and 5% caused by the broadcast of exit polls. It was the considered opinion of the Lortie Commission at pp 457-58, relying on American and British research, that the impact of polling was such that a short black-out period was required. This conclusion was not met with unanimous approval and at least one prominent political scientist, Prof. Perlin, deposed against blackout on this application. However, for an objective to be found pressing and substantial, Parliament need not demonstrate that its objective is based on a consensus. Indeed almost by definition, the legislature will only act in areas that are the subject of some controversy. Legislation is often introduced to resolve disputes and it would be paradoxical for the courts to impose as a constitutional prerequisite that there be no dispute.

Furthermore, it would be a mistake to look only at social science evidence in assessing whether the objective is pressing and substantial. The Charter gave the duty to assess legislation to the courts not to university departments of sociology, criminology or political studies. Of course, social science data are ready evidence of the importance of different problems, but it is not the only evidence courts should consider, nor should it be given decisive weight or considered requisite to government action. Thus, even if social science evidence is found to be inconclusive, it is still possible to ground a pressing objective on evidence of extended public debate of an issue or by looking at the actions of other democracies. On this application, it is clear from the number of times a concern about polling was raised by the public and in reports stemming from public consultation that many considered this to be a pressing issue. As noted above, some 90 briefs before the Lortie Commission raised the issue of the effect of polling. The Lachapelle study spoke of a "flourishing debate" on this subject. In a democracy, it is to be expected that representatives will reach to such a debate, either through private members bills or government legislation; it might be an institutional failure if they did not. As A. M. Barlow, *supra*, at p 1006 wrote about evidence on the effect of the publication of exit polls in American elections while voting is still taking place on the West Coast:

Assuming, arguendo, that no consensus can be reached between the empirical studies on election projections, the issue does not therefore become moot. The sheer volume of the complaints of western voters couple with the corresponding risk that they will become distrustful of the legitimacy of our democratic process, is reason enough in itself to entertain debate over some of the proposals by congressional and state lawmakers.

Furthermore, it is an issue of sufficient concern that it has provoked other countries with similar electoral and media cultures, such as Belgium, France, Portugal and Spain, to act in like fashion. None of this proves that the provision is constitutional, but it is, in my view strong evidence of a pressing objective.

The Applicants further submitted that under the rational link test of *Oakes, supra*, the government must demonstrate that there is a casual ??? link between the publication of opinion surveys and harm to the electoral process. While I accept this proposition, it is my view that a reasonable fear of harm is sufficient and that actual harm need not be proved. This conclusion is dictated by *R v Vutler, supra*, at p 504 where the Court held that it was sufficient that Parliament have "reasoned apprehension of harm" in order to be able to legislate constitutionally. See also *R. v Squires* (1992), 11 O.R. (3d) 385 (C. A.) per Tarnopolsky J A (dissenting on other grounds) at pp 413-14.

Butler, supra, is similar to the instant application, in that on the subject of obscenity, "the literature of the social sciences remains subject to controversy" (at p 501). This did not prevent the Court however from concluding at p 502:

While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a casual relationship to changes in attitudes and beliefs.

Likewise, in this case, it is reasonable to presume that polls can harm the electoral process. I rely here on the following evidence:

- (1) the sheer prevalence of polling results (22 national polls reported during the 1988 election, mentioned in some 30% of television coverage);
- (2) awareness of poll results amongst 70 ???to 70% of the public;
- (3) methodological information necessary of critical evaluation is very frequently absent from reporting;
- (4) the lack of a corrective response time when polls are published close to election day.

Apart from this deductive reasoning, some of the evidence submitted, while it does not meet with unanimity, does show noticeable drops in voter turn-out when the polls make the result seem a foregone conclusion. Furthermore, there has also been a longstanding concern about polling dating back at least to the Barbeau report in 1966 and culminating in the 90 briefs to the Lortie Commission on this subject. This could also ground a reasoned and reasonable apprehension of harm.

More convincing on the rational connection test, was the Applicant's submission that the black-out was in fact irrational. The argument was two-fold. First that during the black-out, the public would have access only to "hamburger polls" and "person on the street" interviews, which are less accurate and can be more misleading than the statistical polls that are banned. As I have stated above, blatantly unscientific measurements such as "hamburger polls" are not covered by the ban because they are plainly unscientific. No-one is misled and therefore they are not potential sources of misleading information. The danger of undue influence, which stems from the apparent reliability of true opinion surveys, is simply not present. The public knows it cannot grant to such informal tests of the public mood the same weight as to statistically representative polls.

Secondly, the Applicants argued that one of the most effective responses to a bad poll is to be able to refer to a better or more recent poll. If one of the objectives of the black-out is to allow for a response time, then the black-out effectively undermines the effectiveness of this response by banning reference to more accurate polling. There is some truth to this. However, given that on a reasonable and strict interpretation of the section, it does not prevent references to and a critique of pre-black-out polls, the response time afforded by the black-out grants a meaningful right to reply.

Accordingly, it is my opinion that there is a rational connection between the objective and section 322.1.

The most critical test under section 1 is probably the minimal impairment test. The democratic nature of our political institutions means that they will seldom legislate on matters that are not of some import and will seldom act in an irrational manner. However, it is possible that Parliament may, in the pursuit of a legitimate objective by legitimate means, simply enact unacceptably broad restrictions on Charter rights.

In assessing the impairment caused by the legislation, it should not be forgotten that a Charter right has been violated, particularly where the right violated is freedom of expression. As noted in *Keegstra, supra*, 764:

Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.

It is therefore not open to the government to simply say that it must restrict free speech in order to save the electoral process. This would be to undermine democracy in the name of saving it.

However, in *Keegstra, supra*, Dickson C J also noted at pp 784–85:

In assessing the proportionality of a legislative enactment to a valid governmental objective, however, section 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a charter right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim. [emphasis added]

In my view, these comments on alternative means and on seeing the restriction in context are particularly relevant to this case.

With respect to alternative means, the applicant suggested that the government could have avoided some of the harm alleged by imposing mandatory publication of methodological information or by punishing the publication of false polls instead of imposing a black-out. However, each of these solutions has its own shortcomings.

First, the mandatory publication of methodological information, while it might go some way to preventing polls from having undue influence, poses practical and constitutional problems of its own. The Lortie Commission recommended that media outlets be forced to carry background information, but this met with resistance during the legislative process. Broadcast journalists appearing before the Commons Special Committee in particular objected to having to broadcast technical information claiming it was unworkable because it would take up too much time. See testimony in *Minutes of Proceedings and Evidence*, issue no. 9, at pp 19, 52, 116. Furthermore, the forced inclusion of methodology might itself offend section 2(b), in that forced speech might not be considered free speech. See *Lavingne v O.P.S.E.U.*, [1991] 2 S.C.R.211, per Wilson J at p 267–81. Finally, proposals to impose mandatory methodological content almost invariably require that the methodology always be printed, even outside critical election periods. The impugned black-out, while perhaps a grave violation of free speech, is nonetheless a much shorter one lasting only three days, or under 7% of the duration of a campaign.

Second, the applicant suggested that a ban on false polls might be a less restrictive means of achieving the objective. This is true if the objective of the legislature was limited to preventing the disseminating of false information. However, the objective was also to restrict polling information from being presented in a misleading way that lent an aura of scientific precision to

poll results. As well, it is evident that Parliament had additional purposes in mind in passing section 322.1, including allowing for a rest period and for a response time, neither of which would be satisfied by a ban on false polls.

Furthermore, a ban only on false polls would be less effective than the complete black-out in section 322.1. According to *R. v Chaulk*, *supra*, per Lamer C J at p 1341:

Recent judgements of this Court (*R.V. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy Ltd., v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; and Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123) indicate that Parliament is *not* required to search out and to adopt the absolutely least intrusive means of attaining its objective. Furthermore, when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the "same" objective or would achieve the same objective as effectively. [italics added]

The black-out is a clearer prohibition less subject to debate in the few critical days before voting and it is more likely to prevent abuses. Like an interim injunction, it is strict but short-lived. It is needed in the final days of the campaign, where the publication of a misleading poll without adequate response time could do irreparable harm.

Also, as noted in *Keegstra*, *supra*, at p 785, the Court must take into consideration that the impugned provision is part of a "larger programme of action." In this case, the black-out is part of the highly structured scheme found in the *Canada Elections Act*. Under the Act, 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. The restrictions under the Act include related blackouts on advertising and on early returns and bans on opinion surveying in polling stations. In that sense, the restriction contained in section 322.1 is not anomalous or extraordinary in the context of electoral law.

It is also worth noting that many other democracies have black-out periods of varying lengths that are similarly drafted: Belgium (two weeks); France (one week); Luxembourg (four weeks); Portugal (entire campaign) and Spain (five days). Further, the Lachapelle study noted that the general trend was for countries to impose a short election black-out rather than require the continuous publication of polling methodology. Canada's actions are in that direction. This is not a case like *R. v Zundel*, *supra*, at p 767 where the majority was not able to find in other jurisdictions a provision analogous to the false news provision in the *Criminal Code*.

Finally, generally support for the constitutionality of section 322.1 can also be drawn from the Supreme Court of Canada's reasons in *Irwin Toy*, *supra*. In that case, the impugned provisions banning advertising directed at those under 13 years of age were upheld. There are several parallels between that case and this application. In both cases, the restriction on expression is

strictly limited in scope. In *Irwin Toy* the limitation is by age (under 13); in this application it is by date (the three days before the close of voting). Both provisions carry with them the possibility of imprisonment. And in both cases, the legislature had to evaluate uncertain social studies and mediate between various interest groups. In this application, Parliament had the difficult task of balancing the different interests of several groups:

- (1) the public's interest in:
 - (a) getting as much electoral information as possible;
 - (b) being protected from misleading information;
 - (c) having the information they receive tested by debate;
- (2) the media's interest in:
 - (a) free to cover the election as they see fit;
 - (b) able to offer to their readers, listeners and viewers an interesting and saleable product;
- (3) the parties and candidates interest in being able to have sufficient time to respond to potentially misleading information.

The following comments in *Irwin Toy, supra*, at pp 990, 993, 994 are therefore apposite:

If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another. [.....] We note that in *Ford, supra*, at pp 777-79, the Court also recognized that the government was afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence.....

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.....

In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.

The Court upheld the legislation. See also *Keegstra, supra*, at pp 784–85, *McKinney v University of Guelph* [1990] 3 S.C.R. 229 at pp 285–86; *Butler, supra*, at pp 504–05.

Under this test, the evidence reviewed above satisfies me that section 322.1 is a demonstrably justifiable limitation on free expression found in section 2(b) of the Charter. I might add that if I was in error on the question of whether section 3 was also violated, my analysis of section 1 or my conclusion under this heading would not be altered.

I would accordingly dismiss this application with costs to the Respondent.

Released: May, 1995

W. P. Somers J

THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR JUSTICE HARRADENCE
THE HONOURABLE MR JUSTICE BELZIL
THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE MR JUSTICE COTE
THE HONOURABLE MADAM JUSTICE McFADYEN

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPELLANT

and

REFORM PARTY OF CANADA, DIANE ABLONCZY
AND DIANE ABLONCZY ON BEHALF OF THE MEMBERS
OF THE REFORM PARTY OF CANADA

RESPONDENTS

APPEAL FROM THE DECISION
OF THE HONOURABLE MR JUSTICE MOSHANSKY

REASON FOR JUDGEMENT OF THE HONOURABLE MADAM JUSTICE McFADYEN
CONCURRED IN BY THE HONOURABLE MR JUSTICE BELZIL
CONCURRED IN BY THE HONOURABLE MR JUSTICE COTE

DISSENTING REASONS FOR JUDGEMENT OF
THE HONOURABLE MADAM JUSTICE CONRAD
CONCURRED IN BY THE HONOURABLE MR JUSTICE HARRADENCE

Elections – role of media – political parties freedom to advertise – control of election expenditure – reservation of free and purchasable time – procedure and formula for allocation of reserved time.

Background facts

The Reform Party of Canada and Diane Ablonczy (suing on her own behalf and on behalf of other members of the Reform Party) commenced an action seeking a declaration that certain sections of the Canadian Elections Act, R.S.C. 1985 were invalid, on the grounds that they infringed or were inconsistent with right under certain sections of the Charter, the Bill of Rights and an implied Bill of Rights. The impugned legislation governed advertising by political parties during federal election campaigns. The respondents to the position that regulation of political advertising and broadcasting during election campaigns was not necessary and that the scheme adopted by Parliament infringed the rights of smaller, emerging, and non-established political parties by discriminating against them and unduly favouring well-established political parties.

At the original trial, the Judge granted the declaration that section 310(1) of the Canada Elections Act was invalid in that it infringed or restricted the plaintiffs' freedom of expression guaranteed by section 2(b) of the Charter.

The Attorney General appealed. The respondents also appealed on grounds that the learned trial judge erred in deciding that other provisions of the Act which govern pre-election advertising were constitutionally valid and erred in dismissing the respondents' contention that the impugned legislation also violated their rights under sections 2(d), 3, 6, 7 and 15 of the Charter.

Held

That the provisions of sections 319(c) and 320 were invalid as being in conflict with section 2(b) of the Charter. The cross appeal was allowed to that extent, otherwise the cross appeal was dismissed.

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The Queen v Morgantaler, [1988] 1 S.C.R. 30

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REASONS FOR JUDGEMENT OF
THE HONOURABLE MADAM JUSTICE McFADYEN

The Attorney General of Canada appeals the decision of Moshansky J (1992) 7 Alta. L.R. (3d) 1, declaring section 310(1) of the **Canada Elections Act** invalid, on grounds that it infringes or restricts the Respondents' freedom of expression guaranteed by section 2(b) of the **Charter**.

The Attorney General appeals on grounds:

- (1) that the learned trial judge erred in finding that a factual basis existed for the constitutional argument,
- (2) that he erred in finding that the Respondents' freedom of expression has been limited by sections 307 and 310(1) of the **Canada Elections Act**, in violation s. 2(b) of the **Charter**, and
- (3) that the learned trial judge erred in finding that the limitation is not saved by s. 1 of the **Charter**.

The respondents' cross appeal on grounds that the learned trial judge erred in deciding that other provisions of the **Act** which govern pre-election advertising were constitutionally valid and erred in dismissing the respondents' contention that the impugned legislation also violated their rights under sections 2(d), 3, 6, 7, and 15 of the **Charter**.

The Reform Party of Canada and Diane Ablonczy (suing on her own behalf and on behalf of other members of the Reform Party) commenced an action seeking a declaration that sections 303, 304, 307, 311, 316, 319, and 320 of the **Canada Elections Act**, R.S.C. 1985, c. E-2 are invalid, on grounds that this legislation infringes or is inconsistent with rights under sections 2(b), 2(d), 3, 6, 7 and 15 of the **Charter**, the **Bill of Rights** and an implied Bill of Rights. The impugned legislation governs advertising by political parties during federal election campaigns. The Respondents that the position that regulation of the political advertising and broadcasting during election campaigns is not necessary and that the scheme adopted by Parliament infringes the rights of smaller, emerging, and non-established political parties by discriminating against them and unduly favouring well-established political parties.

This appeal was first argued prior to the federal election in October, 1993. The Court called for a re-hearing of the appeal before an expanded panel and these reasons for judgement deal with the argument presented on the rehearing of the appeal, subsequent to the election.

BACKGROUND

The evidence at trial consisted of an agreed statement of facts; the Reports of three Royal Commissions, the Aird Commission (1929), the Fowler Commission (1957) and the Lortie Commission (1991); the reports of two parliamentary Committees, Beaubien (1936) and Barbeau

(1966); the testimony of Diane Ablonczy; two expert witnesses called by the appellant, and one called by the respondent.

At the time of trial, this legislative scheme had operated for several years and governed two federal elections. Since the trial, a third election has been held.

At trial, the evidence disclosed the importance of political parties of advertising and other exposure on radio and television during election campaigns, and supported the finding of the learned trial judge that television broadcasting is the most effective means of reaching voters. In 1990, 1600 AM and FM radio outlet and 3700 television transmitters and cable systems operated in Canada. Approximately 1400 cable operators provided up to 60 television channels which served in excess of 8,779,000 homes. No doubt those numbers have increased since that date.

It is common ground that television advertising is also a very expensive means of reaching voters. The parties admitted that, from the time Parliament adopted this scheme to the date of trial, no political party had purchased all of its allotment of broadcasting time on any television station. The full allotment of time was purchased on a limited number of radio stations. At the time of the previous Federal election, the Reform Party had been allotted three minutes of paid advertising time and purchased none of it. It used its free time. In the 1994 election campaign, the Reform Party had 17 minutes of advertising time available for purchase from each broadcaster.

In the agreed statement of facts, the parties admitted that at certain times of the year the prime time advertising inventory of many television stations is sold out. In the past, broadcasters have voluntarily arranged for advertising time to be reassigned in some election campaigns. Such a voluntary arrangement was made prior to the October 26, 1992 constitutional referendum and operates during provincial elections. However, other than the impugned legislation, nothing compels broadcasters to provide broadcast time to political parties during election campaigns. The fact that they have done so in the past, does not mean that broadcasters will continue to provide such time in the future or that they will provide sufficient time to meet the needs of the political parties at reasonable cost. If this legislative scheme is struck down in its entirety, as the Reform Party suggests, nothing compels broadcasters to provide time at a reasonable cost.

The current legislative scheme was enacted by Parliament in 1983, in response to Royal Commission studies which recognised the importance of radio and television broadcasting during election campaigns, the necessity to assure that some time would be available to all parties, and the necessity of controlling election expenditures, especially television and radio advertising which constitute a large part of such expenditures.

The impugned legislation does not regulate advertising by individual candidates, just advertising by political parties.

LEGISLATIVE SCHEME

The impugned sections of the **Canada Elections Act** may be divided into three categories:

- (1) Provisions which require broadcasters to reserve free and purchasable time;
- (2) Provisions which provide a procedure and a formula for the allocation of the reserve time;
- (3) Prohibition sections.

(1) The Reservation Sections

Section 307(1) of the **Canada Elections Act** requires each broadcaster in Canada to make 6.5 hours of prime time broadcasting time available for purchase by the political parties. Where a broadcaster is affiliated with a network, the network operator and the broadcaster may agree on the portion of the 6.5 hours which will be available for network broadcasts.

Section 316 of the **Canada Elections Act** requires each network operator to provide to political parties at no cost, a certain amount of broadcast time. Under this provision, each party receives two minutes of free broadcast time. The balance of free time, if any, is allocated in the same proportion as purchasable time.

Pursuant to the provisions of section 321, a broadcaster may not charge a rate that is higher than the lowest rate charged by that broadcaster for an equal amount of equivalent time which the broadcaster makes available to other customers. The validity of this section has not been specifically challenged.

These provisions, in effect, expropriate broadcast and advertising time and make it available either free or for purchase to the registered political parties, in accordance with the allocation formula agreed on by the parties or imposed by the Broadcasting Arbitrator, in accordance with the legislation. These provisions impose obligations and restrictions on broadcasters, not on anyone else. I will refer to these provisions as the "reservation provisions".

(2) The Allocation Sections

The political parties have an opportunity to agree among themselves to the allocation of the reserved time (section 309(2)). They are to be convened for a meeting for that purpose (section 303). If they cannot agree, then the Broadcasting Arbitrator decides on the allocation in accordance with a formula set out in section 310(1) which takes into account:

- (a) the percentage of seats in the House of Commons held by each political party after the last general election;
- (b) the popular vote obtained by each party in the last election; and
- (c) the percentage of candidates endorsed by each party at the last general election,

with the first two factors being given double the weight of the last. The Broadcast Arbitrator is appointed by agreement of the political parties represented in the House of Commons, or, if they cannot agree, by the Chief Electoral Officer.

Section 311 requires that broadcast time be allocated to new parties who request it and sets the procedure for allocating that time.

Pursuant to section 310(2), no political party may be allocated more than 50 per cent of the reserved time.

The *Act* recognises that the formula may produce some unfairness. Section 310(4) provides that if, in the opinion of the Broadcasting Arbitrator, the allocation produced by this formula is unfair to any political party or is contrary to the public interest, the Broadcasting Arbitrator may modify the allocation as he sees fit.

The allocation is reviewed annually.

Section 315 permits a political party to agree with the broadcaster from which it wishes to purchase time as to its preference for commercial time or programme time and the time and days which it wishes. Again, the Broadcast Arbitrator is authorised to resolve any disputes in this respect between the broadcaster and the political party.

I will refer to these sections as the "allocation provisions".

(3) **The Prohibition Sections**

Section 319(c) provides that broadcasters who make any additional time available to any political party must offer additional time to all parties in accordance with the allocation formula. The Broadcasters may not charge any fee for such additional broadcast time. Anyone who fails to comply is guilty of an offence (section 320).

Section 303 prohibits everyone from using broadcasting stations outside Canada during an election campaign for the purpose of influencing that election.

The full text of these sections is attached hereto as Appendix A.

TRIAL JUDGEMENT

The learned trial judge found that section 307, combined with section 310(1), limits freedom of expression (i) because it has the effect of providing traditional major parties with more advertising time than less established parties; and (ii) because the parties were not free to go into the market place to purchase more broadcasting time than allotted to them.

The learned trial judge accepted that the primary purpose of the legislation was that set out by the Attorney General of Canada:

- (1) to ensure adequate supply of prime broadcasting time during federal election campaigns for use by registered political parties in communicating information useful to the public in electing a government; and
- (2) to provide an equitable allocation of that reserved time.

The learned trial judge rejected the evidence and submissions of the respondents that each political party should be free to negotiate with broadcasters to purchase time and that in busy periods, the parties could compensate other advertisers for their lost advertising time and thus obtain time otherwise occupied. He found that an entirely free market place would lead to domination of the broadcast time by the party who could afford to outbid the others. A party with substantial means could price other parties out of the market. At best, an undesirable escalation of costs would result.

The learned trial judge found that, although the purpose of the impugned provisions was valid, section 307, coupled with section 310(1) had the effect of limiting the freedom to expression of smaller and emerging parties. At trial, the respondents argued and learned trial judge accepted that section 307 limited the total amount of time available for political broadcasts. (A.B. pp 531–533) It appears that he made this finding without reference to the prohibition sections.

In addressing the question of section 1 justification, the learned trial judge found that legislation reserving and allocating broadcast time during election campaigns addressed a substantial and pressing concern, providing broadcast time to all parties and not just to those who could outbid others. He found a rational connection between the restriction and the pressing purpose. Further, he concluded that some imbalance in the allocation of time was necessary to ensure that the time which the broadcasters were compelled to give or sell to the political parties was used in the public interest, being the right of the public to receive information on issues and on the position of the parties who stand a realistic chance of forming the next government. The legislation assured that the limited time available would not be unduly occupied by groups who had not

interest in or chance of succeeding in the election. In this respect, he stated as follows (A.B. p 49):

There are a number of political parties in Canada which, while having chapters nationwide, might be considered "single-issue", "fringe", or satirical in nature. The formula therefore was intended to ensure that the time allocated is to a large extent, reflective of those parties which present a viable option to the electorate, and have some chance of forming the next government. While this ensures that fringe parties are not allowed to unduly encroach upon the limited broadcasting time available to "contender" parties, its effect is to limit availability of broadcasting time to the new or emerging national parties as well."

After applying the tests enunciated in *R v Oakes*, [1986] 1 S.C.R. 103, 26 D.L.L.R (4th) 200, the learned trial judge concluded that the limits on freedom of expression imposed by section 307 of the **Canada Elections Act** were saved by section 1 of the **Charter**. He held, however, that the allocation formula in section 310(1) did not meet the test of proportionality as it unduly discriminated against new, emerging and less-established political parties who were not free to enter the market to negotiate for the purchase of other broadcast time. He found that section 310(1) was not saved by section 1.

POSITION OF THE PARTIES

The respondents (and cross-appellants) seek a declaration that sections 303, 304, 307 to 311, 316, 319 and 320 are invalid because they violate the provisions of sections 2(b), 2(d), 3, 6, 7, and 15 of the **Charter**.

The Reform Party submits that the whole of this legislative scheme has the effect of limiting or restricting its freedom of expression in that section 319 and section 320 limit the total advertising time which can be purchased by political parties and section 310(1) allocates to it, less advertising time than is allocated to the major, or established political parties. The respondents first submit that a reservation scheme is not necessary; that political parties can obtain sufficient time without such controls. The respondents further argue that the allocation formula unfairly discriminates against smaller and newly-emerging parties and unduly favours established political parties resulting in the suppression of the message and ideas which new and emerging parties wish to communicate. They suggest that if a reservation scheme exists, time must be divided equally among all political parties, irrespective of the level of their public support.

Counsel for the Attorney General submits that the legislative scheme does not conflict with the provisions of the **Charter**, and alternatively, to the extent that it does, it is saved under section 1. He argues that, to succeed, the respondents must establish that rights guaranteed to them under the **Charter** have actually been restricted or infringed by the legislation. He says that the

respondents may succeed only if they establish that the Reform Party intended to and could afford to purchase advertising in excess of that allotted to it by the Broadcast Arbitrator, and that the respondents have failed to do so.

ANALYSIS

THE APPEAL

VALIDITY OF s. 307 (1) and s. 310(1)

RESTRICTION OF FREEDOM OF EXPRESSION

I. DOES THE LEGISLATIVE SCHEME RESTRICT FREEDOM OF SPEECH OR EXPRESSION?

(A) The Reservation Provisions

I disagree with the finding of the learned trial judge that section 307(1) limits the amount of broadcast time which a political party can purchase. Section 307(1) provides:

In the period beginning on Sunday, the twenty-ninth day before polling day at a general election and ending on the second day before polling day, every broadcaster shall, subject to the regulations made pursuant to the Broadcasting Act and the conditions of its licence, make available for purchase by all registered parties for the transmission of political announcements and other programming produced by or on behalf of the registered parties an aggregate of six and one-half hours of broadcasting time during prime time on its facilities.

This section and the other reservation sections impose an obligation on broadcasters to provide prime-time broadcasting time for purchase by the registered political parties and to provide some free time (section 316). Reserved time is limited. The cost of purchasable time is regulated. By themselves, the legislative provisions which require broadcasters to supply free and purchasable time during election campaigns do not infringe on the freedom of expression of political parties. As I read these sections, they provide for a reservation of time. The right of a political party to purchase and a broadcaster to sell additional unreserved time, is not affected by the reservation provisions. These provisions seek only to make time available which can be purchased or used by the political parties. They do not restrict or otherwise interfere with the rights of registered political parties, their members or candidates to communicate or express themselves. On the contrary, they enable political parties to have access to broadcast time at a reasonable cost which might otherwise not be available to them or which might be available only at excessive cost.

(B) The Allocation Provisions

Next, the legislation provides the means whereby this time is allocated (section 310(1)). By themselves and in conjunction with the reservation of time provisions, the allocation provisions do not interfere with or restrict any political party's right to communicate with voters or to use the electronic media for that purpose. Restriction of freedom of expression is neither the purpose nor the effect of these provisions. The allocation provisions divide the reserved time between political parties in accordance with a formula which seeks to allocate time on the basis of the public support which the parties enjoyed in the previous election. The provisions do not interfere with the right of a political party or its representatives to contract with any broadcaster for such additional time as they choose. The reservation and allocation provisions do not directly or indirectly limit or restrict speech or expression.

(C) The Prohibition Sections

Finally, I look to the prohibition sections. Sections 319 and 320 of the Act prohibit broadcasters from selling additional broadcast time to registered political parties, and prohibit broadcasters from giving more free time to any political party unless they also offer time to all other parties in proportion to the allocation formula. While not directly restricting speech or expression by political parties, these sections could have that effect, as broadcasters are unlikely to provide much additional time when they cannot charge a fee for it.

Section 303 prohibits advertising by political parties outside the country and directly restricts speech.

The learned trial judge found that freedom of expression of smaller emerging political parties was infringed because they were allotted less time than the established parties and because they were not free to negotiate for additional time. It is only when sections 307 and 310(1) are considered in the context of sections 319 and 320, as part of an unservable legislative scheme that the freedom of expression of a political party can be said to be affected by sections 307 and 310(1). I will deal with the question of the severability of the prohibition sections later in these reasons.

II. DID THE LEARNED TRIAL JUDGE ERR IN FINDING THAT S. 310(1) IS NOT SAVED BY SECTION 1 OF THE CHARTER?

For now, I will assume (without deciding) that the legislative scheme, as a whole, restricts freedom of speech. Did the learned trial judge err when he said that the allocation scheme, section 310(1), was not saved by section 1 because the allocation scheme unduly discriminated against smaller emerging parties and unduly favoured established political parties by not taking into account increased support since the last election?

For ease of reference, I will set out the formula accepted by the Supreme Court for analysis of the section 1 justification issue, in *Edwards Books and Art v R.* (1986) 35 D.L.R. (4th) at p 43:

Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern." Secondly, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirements, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective, they must impair the right as little as possible, and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is, nevertheless, outweighed by the abridgement of rights.

A. The Discretion of the Broadcast Arbitrator

(1) Trial Judgement

In finding that the provisions of section 310(1) had the effect of limiting freedom of expression, and were not saved by section 1, the learned trial judge relied exclusively on the wording of section 310(1) which applies a rigid formula based on popularity in the last election and has no regard to changes in the popular appeal of any political party since the last election. While considering the issue whether the impugned legislation had the effect of restricting freedom of speech, the learned trial judge had indicated that the discretionary power granted to the Broadcast Arbitrator in section 4 should be considered in the section 1 analysis. Having done so, he does not appear to have again returned to the provisions of section (4) when he decided that section 310(1) had a disproportionate discriminatory effect on new and emerging political parties and was thus not saved by section 1. In referring to this discretionary power in the other context, the learned trial judge stated: (A.B. 524)

It is necessary when assessing the constitutionality of legislation not to do so in a vacuum. In my opinion, ss. (4) provides the necessary degree of flexibility to the determination of time allocations, and provides an appropriate balance to the specific allocation formula in ss. (1). Far from being constitutionally vague, it is a provision that ensures fairness and adherence to the public interest.

I am of the view that the learned trial judge erred in failing to take into account the existence of the broad discretion given to an independent arbitrator to relieve against any unfairness or discriminatory effects which arose from the strict application of the discriminatory effects of the application of the formula.

Section 310(4) provides:

Where the broadcasting arbitrator considers that an allocation determined in accordance with subsection (1) would be unfair to any of the registered political parties or contrary to the public interest, he may, subject to subsections (2) and (3) modify the allocation in any manner he deems fit and the modified allocation shall constitute his allocation under section 309.

(2) Vagueness of Discretionary Power

However, the respondents submit that this discretion is so vague as to be constitutionally invalid and of no assistance in providing any relief in the case of unfairness. They rely on the decision of the Supreme Court of Canada in *R. v Morales* (1992) 77 C.C.C. (3d) 91. The Supreme Court of Canada considered the validity of section 515 (10)(b) of the Criminal Code. The section set out two grounds on which pre-trial detention of the accused was justified: (1) that detention is necessary to assure the accused's attendance in court, and (2) that "detention is necessary in the public interest or for the protection or safety of the public." The majority of the Court held that the portion of section 515(10) (b) authorising detention "in the public interest" was too vague. Lamer C J C stated at p 99:

In view, the criterion of "public interest" as a basis for pretrial detention under s. 515(10)(b) violates s. 11(e) of the Charter because it authorizes detention in terms which are vague and imprecise.

In referring to previous authorities dealing with the doctrine of vagueness, Lamer C J C noted that all other cases had dealt with provisions which either defined an offence or prohibited certain conduct. The respondents cite no authority for applying a doctrine of vagueness to a discretion granted to an arbitrator grant relief against unfairness in the operation of a formular set out in the legislation, in a civil context.

In *R. v Farinacci et al* (1993) 109 D.L.R. (4th) 97, a five-judge panel of the Ontario Court of Appeal had before it an application to strike provisions of section 679 (3)(c) of the **Criminal Code** on the grounds of vagueness. Section 679 deals with bail pending appeal and provides that a judge of the court of appeal may release an appellant on bail pending appeal if the appellant establishes that (1) his appeal is not frivolous; (2) that he will surrender into custody in accordance with the terms of the order; and (3) by section (c) that his detention is not necessary in the public interest.

The Ontario Court of Appeal distinguished the **Morales** decision on grounds that, after a conviction, the presumption of innocence no longer no longer applied, and that the wording of section 679(3) differed substantially from section 515(10) (b). Because public protection and

safety were separately dealt with in section 515(10) (b), the meaning of "the public interest" became vague. Arbour J A, giving the judgement of the Ontario Court of Appeal, stated:

The applicants submit that Chief Justice Lamer in *Morales* has already concluded that the term "public Interest" in section 679(3)(c) of the Criminal Code is unconstitutionally vague because he considered cases decided both under sections 515 and 679 of the Code without drawing a distinction between them. I cannot agree with that submission. The Supreme Court in *Morales* concluded that trial and appellate courts across Canada had failed to give sufficiently precise meaning to the term "public interest" to satisfy the constitutional requirement that pre-trial bail not be denied without just cause. I can find nothing suggesting the "public interest" will be unconstitutionally vague every time it appears in a statute conferring discretion, nor can I find anything to suggest that "public interest" has not workable meaning in the constitutional context governing s. 679 of the Criminal Code.

And at p. 114:

The fact that judicial discretion established by statute is worded broadly does not, by itself, suggest that it is unconstitutionally vague.....

And at p. 115:

The constitution itself provides a useful model of an acceptable statutory standard to overcome vagueness. Vagueness is avoided if discretion is guided by principle and the principles are capable of judicial definition.

In this case, when the discretionary provision is viewed in its context, there is no unconstitutional vagueness in the term 'public interest'. The discretion is guided by principle and the term 'public interest' is capable of judicial definition. Surely, the nature of the relief must be and will be structured to provide a solution to the problems which invoked the granting of the relief, that is the alleviation of the unfairness, or of a situation which is contrary to the public interest. Proof that the last election results fail to reflect increased public support for a specific party will be a factor to be considered in determining this question. This is the logical conclusion to be drawn in this case. I here refer to the decision of Lamer J (as he then was) in *Slaight Communications v Davidson* (1989) 59 D.L.R. (4th) 416 (S.C.C.) where he stated:

As the Constitution 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, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the **Charter**, unless, of course that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the

legislation to be of no force or effect, unless it could be justified under s. 1. Although this court must not add anything to legislation or delete anything from it in order to make it consistent with the **Charter**, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the **Charter** and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the **Charter** rights to be infringed."

3 CONCLUSION

In addressing another issue, the learned trial judge considered the question of the vagueness of section 310(4), and stated at p 524 (A.B.):

"It is necessary when assessing the constitutionality of legislation not to do so in a vacuum. In my opinion, ss.(4) provides the proper degree of flexibility to the determination of time allocations and provided an appropriate balance to the specific allocation formula provided in ss. (1). Far from being unconstitutionally vague, it is a provision that ensures fairness and adherence to the public interest."

I can do no better than to adopt the language used by the learned trial judge. While the formula in section 310(1) may unduly discriminate against parties gaining in popularity, Parliament has provided in sub-section (4), a means whereby any such unfairness or undue discrimination can be addressed and corrected. Section 310 must be considered in its entirety when the question of section 1 justification is addressed. When it is so considered, the response of Parliament becomes one that is proportionate, because sub-section (4) provides an internal mechanism by which any discriminatory effect or unfairness can be corrected. The learned trial judge erred in finding that the Appellant has not established that any limit imposed by section 310(1) on freedom of expression was saved by section 1 of the **Charter**.

III ASSUMING THAT S. 307 AND S. 301(1) RESTRICT SPEECH, ARE THEY SAVED BY S.1?

A. Purpose of the Legislation

Attorney General of Canada states that the purpose of the legislation is two-fold:

- (1) to ensure adequate supply of prime broadcasting time during federal election campaigns for use by registered political parties in communicating information useful to the public in electing a government; and
- (2) to provide an equitable allocation of that time among the registered parties.

The respondents do not take issue with this statement of the purpose of the legislation. At trial, they did not seek to challenge the position taken by the Attorney General as to the purpose of the legislation and do not do so before us.

B. Pressing and Substantial Concerns

The validity of this purpose has been recognised by Royal Commissions and Parliamentary Committees which have investigated and studied election advertising. They concluded that a legislative scheme controlling the use of radio and television advertising by registered parties during election campaigns was necessary. Such legislation sought to provide greater access for political parties to electronic media advertising and broadcasting, and to provide a fair allocation of the broadcast time made available, and to control costs.

Dr. Fletcher, an expert in elections and media and broadcast policy called by the respondents, testified that the legislation resulted from concerns about the cost of election advertising and a desire to ensure that adequate broadcast time was provided for the use of political parties. He further stated that cost problem has become greater than ever. There has been a proliferation of radio and television stations which has increased the available broadcast time. Dr. Fletcher testified that at the time of the trial, the need to reserve time to ensure that adequate broadcast time would be available, was not as great. He thought that with the large number of radio and television stations in most communities, political parties could purchase adequate time without legislated reservation of time. In cross-examination, he agreed that some reservation scheme coupled with an equitable allocation of time continued to be necessary. He did not suggest that there be no legislation. He recommended a different allocation system, one which would more accurately reflect current popular support.

In my view, the objective of Parliament in enacting the legislation reserving broadcast time addressed pressing and substantial concerns, being the availability of broadcast time to political parties during federal election campaigns and the control of costs at which such time would be made available. As found by the learned trial judge:

- (1) Radio and television advertising and broadcast are an important means whereby political parties communicate to the public information which the public requires to make an informed choice in the selection of the next government.
- (2) Broadcast time is limited. There are periods when available television advertising and broadcast time is fully committed. These often coincide with preferred election campaigns times. The learned trial judge correctly rejected suggestions that the parties be left to the market place. At

worst, time might be acquired by one party or might not be available. At best, such a plan would result in an undesirable escalation of costs. Without such legislation, broadcast time may not be available or may be available only at a greatly increased cost.

- (3) The provisions assure that advertising time is available to all parties. The question of access is not left to be determined by broadcasters who may not favour the broadcast of certain messages which may not agree with their philosophy or which may be unpopular.
- (4) Costs of such broadcast time are controlled to ensure that no one party is able to outbid others and thus occupy all or substantial portions of available time.
- (5) The legislation assists in achieving control over total election spending.

These findings are reasonable and are supported by the evidence.

C. Proportionate Response

(1) *Unequal allocation of time*

I agree with the learned trial judge that equal allocation of these limited resources is not feasible and is not in the public interest which requires that the public be informed of the major issues in an election and the position being taken by political parties which stand a realistic chance of forming a government. While other voices and interests have the right to be heard, lesser access to the free and purchasable time, which broadcasters are required by legislation to provide, is a reasonable and proportionate response to the problem. Broadcast time is limited. It must be used primarily for the purpose intended by the reservation provisions, providing information to voters to permit them to make an informed choice when they exercise their vote with the object of choosing the next government. A formula granting less time to registered parties whose objects are satirical or the promotion of a single issue or regional interest is justified. If the reservation and allocation provisions restrict freedom of expression, they are saved by section 1.

(2) *Unfairness to new and emerging political parties*

I agree with the learned trial judge that, viewed alone, the formula in section 310(1) which is based entirely on popularity in the last election, may operate unfairly and be unduly discriminatory against political parties whose popularity has increased substantially since the last election. However, where an unfairness arises because of the operation of the formula, or where

the formula produces a result that is contrary to the public interest, the Broadcasting Arbitrator is given the power to provide appropriate relief. (section 310(4))

(3) Free time provisions

The respondents submit that the application of the allotment provisions to free time further points out the difficulty with the legislative scheme. Again, major political parties are given an advantage by the allotment of more time. However, this section does not limit speech or expression of the Reform Party or its members. The mere fact that some other party obtained more free broadcast time does not mean that the Reform Party's freedom of expression was curtailed.

Without this legislation, no political party would have free broadcast time. The unequal distribution of time, made available as a result of this legislation, does not infringe freedom of expression. This provision does not alter my view that the provisions of section 310 when viewed in their entirety, if they conflict with section 2(b), are saved by section 1 of the **Charter**.

(4) Conclusion

The Attorney General has established that any limit or restriction on freedom of expression in section 307 and 310 of the **Act** is designed to address a pressing and substantial concern and that the means chosen are a proportionate and appropriate response of these concerns.

IV. CAN DISCRIMINATING RESULT IN AN INFRINGEMENT OF FREEDOM OF EXPRESSION?

The Appellant further says that the trial judge erred in that he relied on the discriminatory effect of the legislation as evidencing a breach of freedom of expression. The appellant submits that discriminatory effect can only be considered in the context of section 15 which, the appellant says and the learned trial judge found, is inapplicable in this case.

The Attorney General of Canada relies on the decision of the Quebec Court of Appeal in *Attorney General of Canada v Barette, Payette et al* (unreported, Mar. 18, 1994) that section 242 of the **Canada Elections Act** did not infringe section 2(b) or section 3 of the Charter. Section 242 provides that only these candidates that obtained at least 15 per cent of the votes were entitled to recover one half of their allowable election expenses. At trial, Gomery J, relying on discriminatory effect, concluded that the provisions contravened sections 2(b) and 3 of the **Charter**. This decision was reversed on appeal. McCarthy J A stated at p 5:

Quite properly the judge emphasizes the right of a voter to know, and of the candidate to make known, the candidate's views. Quite properly the judge on the other hand avoids saying that section 3 (or section 2(b)) of the Charter obliges the legislator to supply candidates with the means necessary to make known their views. Nor do the respondents argue that the legislator has such an obligation. What the respondents do argue, and the judge appears to accept the argument, is that if the legislator does supply such means, in whole or in part, he must supply them without discrimination in purpose or effect (subject to the possible application of section 1 of the Charter). Discrimination in this sense is supposedly something different from discrimination under section 15, which the judge, at least, concludes is not present here. However, I see nothing in the Charter to support the supposition that there are two kinds of prohibited discrimination, one explicitly prohibited and one implicitly prohibited. In other words, if the portions of the Act here in question are unconstitutional it must be because they infringe not section 3 or section 2(b) but section 15. They do not impede the right to vote or to stand for election or to express oneself freely; the question is whether they encourage with discriminatory purpose or effect the exercise of any of those rights.

The Quebec Court of Appeal concluded that candidates who run for election do not come within the class of persons protected by section 15. I agree with this conclusion.

For the purposes of these reasons, it is not necessary for me to decide whether a complaint based on the discriminatory effect of legislation can ever result in a breach of charter rights (other than section 15). In this case, the discriminatory effect is based on unequal access to broadcast time which becomes available for use by political parties only by reason of the impugned legislation. I will later deal with the complaint in the context of section 15. I now indicate that, on the facts of this case, unequal access to broadcast time does not infringe other freedoms and rights guaranteed by the *Charter*. Time becomes available only because of the legislation. The unequal access to this time does not restrict any political party's freedom of speech. I know of no principle which says that the legislature cannot provide a solution to a public problem or concern unless it gives everyone involved equal access to the resources provided. Nor do I agree that unequal access restricts or limits free speech of a person who gets less of a resource which would not be there but for the legislation. To the extent that the learned trial judge found that undue discrimination against new and emerging parties resulted in a restriction of expression, he erred.

Further, as I indicated earlier, I am of the view that the allocation and reservation provisions, taken separately or together, do not have the effect of restricting or limiting freedom of expression of any political party. These sections merely reserve time which might otherwise not be available and provide for a distribution or allocation scheme. Smaller and emerging parties are not treated equally with larger parties. I will address the section 15 implications of such unequal treatment, when I deal with the cross-appeal. For now, I find that inequality of treatment does not result in a restriction of freedom of expression. I would allow the appeal on this ground as well. Section

307 and section 310 do not infringe the freedom of expression of either respondent. The appeal is allowed and the declaration made by the learned trial judge that section 310(1) is of no force and effect is set aside.

THE CROSS APPEAL

The respondents (cross-appellants) cross appeal the dismissal of their application to have other provisions regulating advertising during federal election campaigns declared invalid and appeal against the findings of the learned trial judge that their rights under sections 2(d) 3, 6, 7, and 15 of the *Charter*, and the implied Bill of Rights had not been infringed.

I. Sections 2(d), 3, 6, 7 of the CHARTER

For the reasons given by him, I agree with the learned trial judge that this legislation does not come into conflict with sections 2(d), 3, 6, 7 of the *Charter*. There is no evidence to support any other finding. Nor am I convinced that obiter comments by the Supreme Court of Canada in *Reference re Alberta Legislation* [1938] S.C.R. 100, suggesting the existence of an implied Bill of Rights protecting freedom of expression, adds anything to the debate in an age when rights and freedoms is expressly protected in Canada in the *Charter of Rights and Freedoms* which has been enshrined in the Constitution.

II. SECTION 15

I now turn to the question of a section 15 breach.

Section 15 provides:

Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

First, section 15 deals with individuals and counsel for the respondents concedes that its provisions do not assist the Reform Party. However, he says that section 15 protects the rights of individual members and candidates of the Reform Party and that these individuals are disadvantaged because the legislation discriminates against the political party they support. I do not agree. The impugned provisions do not affect the right of an individual candidate to advertise or to obtain broadcast time, or otherwise communicate. The impugned provisions do not discriminate against individuals who are members of the party, either directly or indirectly. Individual members of parties are treated equally under the legislation.

Further, I do not accept that there is unfairness to or discriminating against individual members of political parties by unequal access by political parties to broadcast time. I do not accept that a political party, which enjoys limited support of a small number of individuals who wish to promote a specific interest or to ridicule the process is the equal of a political party which has the support of a far greater number of voters and genuinely strives to provide information about its programme for the governing of the country. Seen from the point of view of an individual member, such a scheme would result in discrimination against individuals in the larger group, by giving each individual in the small party greater access to broadcast time than that enjoyed by each individual of the larger party. Fairness is achieved, not by equal treatment of political parties, but by fair treatment measured by popular support with the objectives of the election process in mind.

In any event, members of political parties or candidates who run for office are not within the class of persons protected by section 15 of the *Charter*. Sections 307 and 310 do not discriminate against individuals on enumerated or analogous grounds. It may be that in some circumstances, membership in a political party could be an analogous ground. That is not the case here. The impugned legislation does not discriminate against the individuals.

In *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. the Supreme Court of Canada interpreted section 15 of the *Charter*; McIntyre J gave the following analysis of section 15 at p 174:

I would say then that discrimination may be described as a distinction, whether individual or not, based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

at p. 180:

The analysis of discriminating in this approach must take place in the context of the enumerated grounds and those analogous to them.. The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. Those words are a form qualifier built into s. 15 itself and limit those distinctions which are forbidden to those which involve prejudice or disadvantage.

and at p. 182:

The third, or "enumerated and analogous grounds" approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above and

leaves questions of justification to s. 1. However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discriminating and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact upon him or her in the protection or benefit accorded by the law but, in addition, must show that the legislative impact of the law is discriminatory.

The individual respondent has failed to establish that her rights under section 15 and those of other Reform Party members have been infringed by the impugned provisions of the *Canada Elections Act*.

III. CONSTITUTIONAL VALIDITY OF ss. 307, 311, and 316 OF THE CANADA ELECTIONS ACT

Regarding the question of the constitutional validity of the other provisions of the *Canada Elections Act*, nothing in the evidence or the argument convinces me that the provisions of sections 307, 311, and 316, which merely require broadcasters to set aside free and purchasable broadcast time during which political parties can convey their respective messages to the public, conflict with the rights of the respondents. On the contrary, sections 307(1), 311, and section 316 (the "reservation sections") assure access by political parties to broadcast time which might not otherwise be available or affordable. In this case, the respondents do not question the right of Parliament to control broadcasting or the broadcast industry. The constitutional attack is limited to the broadcast provisions of the *Canada Elections Act* and the effect which these provisions have on the freedom of expression or communication of a political party, the Reform Party and its members. As earlier indicated, I am also of the view that the allocation provisions do not infringe the *Charter*.

IV. CONSTITUTIONAL VALIDITY OF ss. 303, 319(1) and 320 of the CANADA ELECTIONS ACT

S. 303 limits the right of candidates and other persons to use broadcasting stations outside Canada for the purpose of influencing an election in Canada. On its face, this provision restricts speech or expression. This restriction is minimal when weighed against the extensive time which is provided by broadcasters located in Canada to political parties as a result of the provisions of the

Act. The respondents submit that the provision restricts the right of voters who reside or are visiting outside of Canada to be fully informed. There is no evidence that any political party is interested in targeting this group of people in its broadcasts or advertising. The problem which section 303 addresses is the use of broadcast facilities located outside Canada to reach voters in Canada.

As found by the learned trial judge, all witnesses, concede the efficacy and necessity of such a provision. As an example, Dr. Stanbury (a witness called by the Respondents) was of the view that control of expenditures during an election campaign is of paramount importance to the maintenance of the integrity of the electoral process. Expenditures within Canada can be verified by examination of the books of the newspapers and broadcasters. Such control would not be possible in the case of radio and television outlets operating outside the country. The purpose and effect of section 303 is to ensure that political broadcasting remains in Canada where it is subject to Canadian laws and to the scrutiny and control of Canadian election officials who have the duty of ensuring compliance with the laws of Canada. Further, the section maintains the general objective of reservation and allotment of available time is ???that no one party with sufficient resources can obtain exclusive or the bulk of advertising and broadcasting enjoys a large listening or viewing audience within Canada. While this section restricts speech, I agree with the trial judge that such legislation is a necessary, and proportionate response and therefore is saved by section 1.

Section 319(c) provides:

"Every broadcaster or network operator who

- (c) makes available to a registered party or political party within the period described in s. 307(1), broadcasting time in excess of that required to be made available by it to that party under an allocation under sections 309 and 310 or an entitlement under section 311 without making available, to all other registered parties or political parties proportionate amounts of equivalent broadcasting time in excess of those required to be made available, having regard to the proportions established by the allocation of broadcasting time under sections 309 and 310 or the entitlements under s. 311, is guilty of an offence....."

By the provisions of section 320, the broadcaster is prohibited from charging any fee for this excess time. Sections 319(c) and 320 have the effect of restricting freedom of speech of political parties by expressly limiting the total amount of broadcast time which a broadcaster can sell to any political party. These provisions prevent a political party from negotiating for the purchase of advertising or broadcast time in excess of its allotted time when it has used all its allotted time

with a particular broadcaster. The only justification offered by the Attorney General for this provision is that these provisions preserve the integrity of the allocation of time in accordance with the formula provided in the *Act* and assist in the control of expenditures during political campaigns. However, the respondents point out that total election expenses are strictly controlled and limited by other provisions of the *Act*. Enforcement is assured by requirements of disclosure and verification.

The Attorney General of Canada has failed to establish that section 319(c) and 320 which have the effect of preventing a political party from negotiating for the purchase of additional broadcast time with individual broadcasters, when it has used all of its allotted time, is an essential part of the legislative scheme or that the infringement of the freedom of expression which results is justified under section 1.

The respondents submit that they should be free to determine how they may best use their limited expenditures. Keeping in mind that election expenditures are effectively controlled by other provisions expressly enacted for that purpose, the Attorney General has not established that the provisions of sections 319(c) and 320 address a pressing and substantial concern or are a proportionate response justifying the substantial limit imposed by these provisions on freedom of expression. Once all parties have some access to broadcasting time of all broadcasters on a priority basis as provided by sections 307, 311, and 316, the objective of the legislation is achieved and little justification remains for the prohibition of sale of additional advertising time to political parties who wish to negotiate their own deal with a particular broadcaster.

The respondents argue that sections 319(c) and 320 are not severable and, if the Court finds that sections 319(c) and 320 are invalid as infringing freedom of expression, then the whole legislative scheme must fail. I do not agree.

I accept the following statement in *Hogg, Constitutional Law of Canada*, 3rd ed. 1992, Vol. 1, 15–21, as to the applicable rule:

The rule which the courts have developed is that severance is inappropriate when the remaining good part "is so inextricably bound up with the part declared invalid that what remains cannot independently survive," in that event, it may be assumed that the legislative body would not have enacted the remaining part by itself.... On the other hand where the two parts can exist independently of each other so that it is possible to regard them as two laws with two different "matters", then severance is appropriate because it could be assumed that the legislative body would have enacted one even if it had been advised that it could not enact the other.

Counsel for the respondents cites several decisions of the Supreme Court of Canada where the test referred to above was applied. In each of the cases to which he refers the Court found that either

that the legislation constituted a scheme or code which could not exist without the invalid provisions, or that the remaining provisions were ancillary to the invalid provisions. This is not to say that no legislative scheme can survive the striking of some of the provisions which make up the scheme as contrary to the Charter. The *Morales* decision referred to earlier is a good example of exercise of the severance power in that the Supreme Court of Canada struck down the offending part of a section permitted the rest to remain in force.

Here, the provisions of sections 319(c) and 320 are not essential to the functioning of the reservation and allocation provisions. In fact, the allocation and reservation provisions meet the purpose of the legislation as set out by the Attorney General without the assistance of sections 319(c) and 320. These prohibition provisions add nothing to the objective of assuring that adequate broadcast time is available during election campaigns or the equitable allocation of the time so reserved, keeping these objectives in mind. The Attorney General has not established that these two provisions were essential to the proper functioning of the reservation and the allocation scheme. Had that been established, I would have decided not to strike the entire scheme, but to find that any infringement to freedom of expression which resulted from the provisions of sections 319(c) and 320 was saved under section 1 of the *Charter*.

V. PROOF OF INFRINGEMENT OF THE RESPONDENTS' RIGHTS: THE FACTUAL BASIS

The Attorney General submits that the learned trial judge erred in striking down legislation in the absence of proof by the Reform Party that its speech or expression was in fact limited to restricted??? as a result of the legislation. To achieve this, the Attorney General submits that the respondents must prove that the Reform Party intended to and was able to purchase more time than was allotted to it under the scheme. The Attorney General says that because the Reform Party bases its claim on the effect (not the purpose of the legislation) to establish a restriction of its freedom of speech, it must establish that its rights were in *fact* restricted or breached.

The Attorney General relies on *McKay v Manitoba*, (1989) 61 D.L.R. (4th) 385 at 388, where the Supreme Court of Canada set out a requirement that evidence should establish a sufficient factual base for a finding of limitation of freedom or breach of a right before a remedy can be granted. At. p 388, Cory J stated:

"Charter decisions should not be and must not be made in a factual vacuum. To attempt to do so, would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of the facts is not, as stated by the respondent a mere technicality. Rather, it is essential to a proper consideration of the Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect the court to deal with an issue such as this in a

factual void. Charter decisions cannot be based on the unsupported hypotheses of enthusiastic counsel."

Counsel for the Reform Party cites *Minister of Justice v Borowski*, [1981] 2 S.C.R. 575, [1981] 1 W.W.R.97, *R. v Big M Drug Mart*, [1985] 1 S.C.R., 18 D.L.R. (4th) 321, and in *R. v Seaboyer*, [1991] 2 S.C.R. 577, 83 D.L.R. (4th) where the Supreme Court of Canada granted the remedy without proof that the rights of the applicant had been breached. In these cases, the legislation directly and on its face affected rights, therefore raising an issue as to the validity of the purpose of the legislation. Here, the respondents raise only the question of the effect of the legislation. However, it is not necessary in this case to resolve this issue.

In the *McKay* case, there was no evidence of any kind. Here, at trial, there was no evidence that the respondent intended to or was able to take advantage of more broadcast time than had been allotted to it by the Broadcast Arbitrator. The Broadcast Arbitrator already exercised his discretion to allot additional time to the Reform Party because of the increase in its support since the last election. At trial, the evidence established that the potential existed that the Reform Party could be restricted in planning its advertising campaign in the manner in which it wished and in spending its permitted expenditures as it wished. While the Reform Party did not establish that it could use all the time allotted to it, it established that its ability to target a particular region or to concentrate its advertising with a particular broadcaster could be restricted at least by the provisions of sections 319 and 320 of the *Act*. Accepting that some factual basis is necessary, at trial the Reform Party provided sufficient proof of the restriction of its rights.

IV. FRESH EVIDENCE APPLICATION

The respondents seek to introduce fresh evidence at the re-hearing of this appeal. At the trial and at the first hearing of this appeal, counsel for the Attorney General of Canada argued that the respondents had failed to establish a factual base for their action in that they had failed to prove that the legislation had the effect of restricting their freedom of expression. The respondents now seek to introduce evidence relating to the Reform Party's radio and television advertising and broadcasting campaign leading up to the election held in October, 1993.

In *Palmer v The Queen*, [1980] 1 S.C.R. 759, the Supreme Court Canada set out the following criteria for the admission of fresh evidence (at p 775):

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The evidence which the Reform Party seeks to introduce deals with its actual expenditures during the 1993 election campaign. This evidence was not available at the trial which was held before the commencement of the election campaign. Such evidence is relevant. I doubt that it is decisive or piratically conclusive. However, I need not decide the issue here as I have already dealt with the factual basis and have decided that issue in favour of the Reform Party without reference to the new evidence.

VII. CONCLUSION

As a result, the provisions of sections 319(c) and 320 are declared invalid as being in conflict with section 2(b) of the *Charter*. The cross appeal is allowed to this extent, otherwise the cross appeal is dismissed.

JUDGEMENT DATED at
CALGARY, Alberta, this
10th day of March, 1995.

McFADYEN, J. A.

BELZIL, J. A.

COTE, J. A.

1 CONCUR:

DISSENTING REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE CONRAD

This appeal raises the constitutional validity of sections 303, 304, 307-11, 316, 319 and 320 of the *Canada Elections Act*, R.S.C. 1985, c. E-2 (the "Act"). Those sections create a scheme for the reservation and allocation of broadcast time during elections. The allocation formula contained within the scheme favours the more established political parties and forbids the sale to, and purchase of, time by any political party outside the scheme. It also provides for two minutes free time to each political party, plus the allocation of further free time in accordance with the same formula.

The broad question concerns where this legislative scheme infringes sections 2(b), 2(d), 3, 6, 7, or 15(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter"), and if so, whether it, or any part thereof, can it be saved by section 1 of the Charter? The trial judge found that section 310 did infringe section 2(b) of the Charter and that the infringement could not be justified under section 1. The Attorney General for Canada ("AG Canada") appeals that decision. The trial judge upheld the balance of the impugned section, and the respondents cross-appeal the decision in that regard.

I have had the distinct advantage of reading the draft reasons for judgement of McFadyen J A, but find myself unable to agree with all aspects of her disposition of this case. For the reasons that follow, I would dismiss the appeal and allow the cross-appeal by striking, in addition to section 310, sections 303, 307, 316, 319 and 320. The legislative scheme and background facts are set out in the judgement of McFadyen J A.

Issues

In answering the broad question, the following issues arise:

- (1) What is the purpose of this legislation, and is this purpose constitutional?
- (2) Does either the purpose or effect of the legislation infringe any rights enumerated under the Charter?
- (3) Is the legislation saved by section 1 of the Chart of Rights and Freedoms?
- (4) Is severance applicable to save any of the impugned sections?

The Supreme Court of Canada, in the case of *Irwin Toy Ltd. v Quebec (A.G.)* [1989] 1 S.C.R. 927, sets out a systematic approach to be taken by courts when assessing the validity of a piece of legislation attacked on the basis that it infringes freedom of expression (See also *R. v Keegstra*,

[1990] 3 S.C.R. 697; *R. v Zundel* (No.2), [1992] 2 S.C.R. 731.). The first step is to determine whether the activity at issue is within the sphere of conduct protected by freedom of expression.

It is common ground that the broadcast of political messages is within the sphere of freedom of expression. It is difficult to imagine any expression more vital, or deserving of protection, than electoral free speech.

As outlined by *Irwin Toy, supra*, the second step is to determine whether the purpose or effect of the government action is to restrict freedom of expression. Since *R. v Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 ("Big M"), the Courts have approached Charter challenges to legislation by first examining the purpose of the legislation, and if that is found to be constitutionally sustainable, the effects of the legislation are then analysed. If the effect of the legislation infringes the freedom, then it is necessary to determine if the legislation is saved by section 1 of the Charter.

Issue One: What is the purpose of this legislation, and is this purpose constitutional?

As McFadyen J A correctly points out, this case proceeded in the court below, and at appeal, on the basis that it was the effects of the legislation, and not its purpose, that infringed the Charter. The purpose stated by AG. Canada and not challenged by the respondents, was two-fold:

(1) to ensure adequate supply of prime broadcasting time during federal election campaigns for use by registered political parties in communicating information useful of the public in electing a government; and (2) to provide an equitable allocation of that reserved time among the registered political parties. The trial judge appears to accept those dual purposes for this scheme: *see Reform Party of Canada v Canada (Attorney General)*, (1992), 7 Alta. L.R. (3d) 1 at 25.

The constitutional question raised by this appeal is incapable of resolution without examining and ascertaining the true objective of this legislation. While the adoption by all parties of the two-fold purpose is helpful, it is not complete. In the normal case, I would not embark on a path not presented by counsel. However, in this constitutional challenge, the ascertainment of purpose of the legislation, in the sense that word is employed by the Supreme Court of Canada in *Big M, supra*, is critical. In response to questions from the court on purpose, the parties acknowledge that in view of *Big M*, if legislation does not pass the purpose test, it is unnecessary to embark on an analysis of its effect, or section 1 justification. The parties also acknowledge that, in the final analysis, it is the court's responsibility to determine the real purpose or objective of the legislation.

Without determining the exact legislative purpose, it is impossible to determine whether that purpose infringes the Charter. The stated two-fold purpose of 'reservation' and 'equitable allocation' is inadequate for determining the true legislative aim without clothing the words 'equitable allocation' with meaning. The true objective of Parliament is not ascertainable, nor is

it capable of evaluation in terms of the section 1 analysis. For instance, if the words 'equitable allocation' were intended to mean 'equal or fair' distribution, that objective is quite different from an objective where the words 'equitable allocation' were intended to mean a distribution favouring the granting of significantly more air time to established parties who have performed well in past elections. Moreover, it is impossible to evaluate the conclusions reached by the trial judge in justifying, or striking, the legislation without first ascertaining the true purpose of that legislation.

Trial Judgement

While the trial judge states his acceptance of the of the two-fold, he uses different, and sometimes inconsistent, objectives of the legislation as the basis for his section 1 analysis. At times, he seems to use the aim of "fairness to emerging parties" as the purpose of the legislation, for instance, at p 28:

I conclude that the regulations in question were indeed enacted to address a pressing and substantial concern. Based on the evidence, I am of the view that reliance on the marketplace would invariably lead *to an unfair domination of the airwaves by those parties with the means to outbid the others. It is legitimate concern that new and emerging parties, primarily those with a less established financial base, not be priced out of the advertising market.* The Plaintiffs' other expert witness, Dr. Fletcher, also agreed that some threshold was desirable. The documentary evidence before the Court also compels this conclusion.

(emphasis added)

Thus, in finding a pressing and substantial concern he indicates that the legislative objective is to ensure that wealth does not dominate the airwaves such that the new and emerging parties, or those with a less-established financial base, are disadvantaged. The use of an objective of fairness to emerging parties resulting from wealth domination is quite a different objective than that of reservation and equitable allocation suggested by the formula and agreed upon by the parties. These two objectives are internally inconsistent. The use of 'unfairness created by wealth domination' to support the challenged sections would indicate that the purpose of the legislation is to ensure fairness to emerging or less financially secure parties by ensuring that the established parties, or wealthy parties, could not have an advantage because of their established financial base. Such an objective is aimed at ensuring parties are on a more or less equal, or at least fair, playing field.

In my view, the twin purposes of 'reservation' and 'equitable allocation' as set out in the legislation are not capable of being interpreted as having an objective of fairness for emerging or less financially secure parties. The formula is totally inconsistent with being aimed at ensuring *fairness* to new and emerging parties. The allocation formula has nothing to do with wealth and, in fact, adds another dimension by which emerging parties are treated unequally, and unfairly, in

relation to established parties. They are restricted in the time they can purchase, whether they have funds. They are prohibited from ever having equal time until they are successful in an election. The allocation formula confers an advantage on the established parties of both *free time* and overall *quantity of air time*.

The trial judge, in part, justified the legislation on the basis of an objective of fairness to emerging parties when that is not what he stated to be the purpose of the scheme designed by the impugned sections, nor can it reasonably be interpreted as being the purpose.

There seemed to be a shift in the reasoning of the trial judge as to the purpose throughout the judgement. When dealing with the formula for allocation of the reserved time, the trial judge states at p 31 of *Reform Part of Canada, supra*:

While the primary purpose of the regulatory scheme has been discussed elsewhere, the evidence has disclosed that the adoption of an allocation formula such as that articulated in s. 310(1) was necessary to ensure that those parties with the greatest national appeal receive proportionally more air time.

He goes on again at p 31 and states:

There are a number of political parties in Canada which, while having chapters nationwide, might be considered "single-issue", "fringe", or satirical in nature. The formula, therefore, *was intended to ensure that the time allocated is, to a large extent, reflective of those parties which present a viable option to the electorate, and have some chance of forming the next government. While this ensures that fringe parties are not allowed to unduly encroach upon the limited broadcasting time available to "contender" parties, its effect is to limit availability of broadcasting time to the new or emerging national parties as well.*

(emphasis added)

Here the trial judge refers to a different purpose and one closer to that submitted by the A.G. Canada. At no time, however, does the trial judge ever evaluate whether there is a pressing and substantial need not ensure that contender parties receive more time. There is no finding, nor any basis for a finding, that it is a pressing and substantial concern that time for parties should be allocated in accordance with a formula designed to favour past performance or national appeal. In fact, the trial judge recognises the allocation formula cannot stand and that the advantages created by it are not justified. He continues in his reasons to revert to the "emerging parties' " needs when he strikes s. 310) (1). He states at p 32:

I find that the means chosen by Parliament for allocating the reserved time between the parties are not proportionate or appropriate to the ends. The allocation formula has a discriminatory effect which tends, in my opinion, to

favour the existing parties at the expense of new or emerging parties. The infringement of the Plaintiffs' s. 2(b) rights is thus not saved by s. 1.....

The trial judgement lacks a consistent definition of the purpose of the legislative scheme, and a section 1 analysis of the legislation in accordance with that purpose. In my view, the inconsistencies arise because the argument is advanced without reference to purpose and on the basis of an agreed purpose. Yet the trial judge recognised the inherent problem in the distribution scheme. It is unfortunate he did not have the purpose argued because his judgement recognises the numerous alternatives. Throughout the trial judge's analysis, a variety of purposes or justifications were mentioned with respect to the legislation. These include ensuring that voters are properly informed, ensuring that wealth is not permitted to dominate the airwaves, ensuring that smaller parties are not priced out of the market to air time, ensuring that "single issue" or "fringe" parties do not unduly encroach on "contender" parties' air time, ensuring that established parties receive proportionately more air time, etc. Evidence was led on the various problems encountered in an election. The *Canada Elections Act* deals with many issues. In particular, it restricts campaign expenditures and prohibits the broadcasters from raising their prices during an election campaign. The Reform Party does not challenge those sections. They acknowledge the problem that may be created by wealth, and the inequities that may result if there is no control. The Reform Party does not challenge those sections. They acknowledge the problem that may be created by wealth, and the inequities that may result if there is no control. The Reform Party acknowledges that, standing alone, section 307, which provides for the reservation of prime time, would be unobjectionable to them, although they say that it is impossible to ascertain if this section would have been passed absent the free time and the formula. The objection, they say, is to the challenged sections which, taken together, constitute a scheme favouring the established parties in the limitation and distribution of air time.

For all the above reasons, I revisit the "purpose" of the legislation. The most difficult issue of this constitutional challenge is to identify the aim of Parliament, yet it is critical that the true objective be ascertained. It is only then that the court can determine whether it is a constitutional purpose that can be saved, and whether it can be saved by a proper section 1 analysis, and whether severance of some of the sections is proper in view of the overall objective.

Big M Drug Mart

In dealing with the purpose and effect of legislation in a constitutional context, the necessary starting point in the judgement of the Supreme Court of Canada in *Big M* because it is necessary to determine the meaning to be attributed to the word "purpose". There the court was faced with legislation (the federal *Lords Day Act*) which was found to offend the constitutional guarantee of freedom of conscience and religion found in section 2(a) of the Charter. Dickson J (as he then was) (for the majority) stated the following at p 331-2:

In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity.

Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact.

He went on at p 334 to say the following:

(T)he legislation's purposes is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid....(T)he effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

Finally at p 353:

The characterization of the purpose of the Act as one which compels religious observance *renders it unnecessary to decide the question of whether s. 1 could validate such legislation* whose purpose was otherwise or whether the evidence would be sufficient to discharge the onus upon the appellant to demonstrate the justification advanced. (Emphasis added)

Thus, where legislation with an otherwise proper purpose infringes *Charter* rights because of its effects, it may be saved by section 1 of the *Charter* if the infringement is a reasonable limit imposed by law that is justifiable in a free and democratic society. However, when legislation

infringes Charter rights in its very purpose there is no need to enter into section 1 analysis because unconstitutional effects can never be justified by an unconstitutional purpose.

The following year Dickson C J rendered another freedom of religion decision in *R. v Edwards Books and Art Limited*, [1986] 2 S.C.R. 713 ("Edwards Books").

In that case, the court was assessing Ontario labour legislation known as the *Retail Business Holidays Act*. The court found that the legislation was enacted with the intent of providing uniform holidays to retail workers and was not a "surreptitious attempt to encourage religious worship" (at p 744). At p 752 Dickson C J stated:

(t)he Act has a secular purpose which is not offensive to the Charter guarantee of freedom of conscience and religion.

The key difference between Big M and Edwards Books was the court's characterisation of the legislative purpose of the Act in question.

It is notable that there is no other case where government legislation has been struck down at the Supreme Court of Canada on the basis of purpose. Two Ontario Court of Appeal cases have struck down legislation on the basis of invalid purpose: *Zylberberg et al v Sudbury Board of Education* (1988), 29 O.A.C. 23 and *Corporation of the Canadian Civil Liberties Association et al v Ontario (Minister of Education) and Board of Education of Elgin County* (1990), 37 O.A.C. 93. These cases were not appealed to the Supreme Court, and Zylberberg has been explicitly followed on at least two occasions by lower courts in other provinces: *Russow v British Columbia (Attorney General)* (1989), 62 D.L.R. (4th) 98 (B.C.S.C.); and *Manitoba Assn. for Rights and Liberties Inc. v Manitoba* (1992), 94 D.L.R. (4th) 678 (Q.B.).

The freedom of expression cases that followed *Irwin Toy* also appear at first blush, to narrow and conflict with the approach taken in Big M, as they moved to a section 1 analysis of the legislation to determine if it passes constitutional muster, even if it is recognised that the legislation was designed to infringe freedom of expression. The reason for this is that following the earlier pronouncements in *Irwin Toy*, the Supreme Court of Canada decided that the content of the expression has not bearing on whether the Charter right is engaged. Freedom of expression is absolute and in order to allow any restriction at all, based on the content, a section 1 analysis was necessary. However, it is important to note that in the subsequent cases, the legislation, while designed to restrict freedom of expression, had a valid legislative aim or objective. For instance, the legislative aim or objective was to prevent harm to women (*Butler*, [1992] 1 S.C.R. 452) or promotion of hatred against minorities (*Keegstra and Zundel*). In such cases there was a competing Charter right, such as equality under section 15, which overruled the freedom of expression in the context of harmful expression. Thus, while it appears that even if the legislation is designed to curb expression, if it has a valid aim or objective based on another *Charter* right, it moves to a section 1 analysis. However, if the aim or objective of the legislation is the very

evil for which the guarantee was put in place, Big M governs and a section 1 analysis is unnecessarily.

The meaning attributed to the word "purpose", as that word is used in Big M, is crucial. It is not merely that the legislation was designed to offend the *Charter*, it is the reason or objective for which it was so designed. It is the *legislative objective* that is referred to when legislation is said to offend the *Charter* in its very purpose. In Big M, the legislative objective was found to be the enforced observance of a certain religion. When the innocuous "aim" of providing a common day of rest for working people became the core objective of the legislation, as in *Edwards Books*, it became possible to move on to a section 1 analysis of the legislation because the very purpose of the legislation no longer offended the Charter.

The apparent conflict can be resolved by defining the word "purpose" as it used in Big M. Côté J A, of this Court, emphasised the difference between legislation designed to restrict a freedom, for some valid objective, and legislation where the very aim or objective is the restriction of the freedom. He discusses this difference in *Epilepsy Canada v Alberta* (1994), 155 A.R. 212 (C.A.), where he states at p 214:

Despite what the respondent argued, this legislation directly and expressly affects speech or expression; it does not merely do so indirectly or have that effect. It was passed (among other reasons) to prevent fraud. But the means which it uses, the express provisions of the statute, directly and expressly bar certain speech. They say that one cannot ask or advertise (without a license). That is what *Charter* case mean when they speak of legislation "intended" to impair a Charter right: *Irwin Toy v A. G. Quebec*, *supra* at 974–76, 978–79 (S.C.R.); *R. v Zunkel* (No. 2.), [1992] 2 S.C.R. 731; 759 cf. *Osborne v R.*, [1991] 2 S.C.R. 69, esp. at 92–3. For example, the *Irwin Toy* case says that a ban on T.V. ads or on handing out pamphlets is an attempt to restrict expression, even if the *aim* is to protect children or prevent littering. And *Zundel* says the "false news" prohibition has as its "purpose" restricting expression, even if the *aim* is to prevent harmful consequences. When the cases speak of legislation which merely has the effect of impairing a *Charter* right, they mean legislation whose words do not mention any activity protected by the *Charter*. That is not the case here.

In *Epilepsy Canada*, *supra*, the purpose of the legislation was not the very evil the Charter guarantee was meant to prevent, so Côté J A moved on to a section 1 analysis.

What then is the objective or aim of the impugned legislative scheme? What is the evil it attacks, or the good it hopes to ensure?

Purpose

The starting point for the ascertainment of purpose is an examination of the scheme as a whole. If there were other unchallenged sections that impacted on the determination of the objective I would look at them as well. With respect, I disagree with the approach taken by McFadyen J A of dividing the challenged scheme into three groups with individual purposes without first examining the scheme to determine an overall objective. Only then is it proper to move on to ascertain if severance is applicable and consistent with the overall legislative objective. It is, in my view, dangerous to examine individual sections of the scheme, and attribute to those sections individual purposes which, on their face, appear justifiable or valid, because when viewed with the remaining sections it may be obvious that such was not the aim. That appears to be what occurred, in part, with the trial judgement. Such an approach can result in the individual sections having purposes inconsistent with the scheme as a whole. Would Parliament have intended both?

In fact, the appellant's first argued position was that the scheme should be examined as a whole, and that the sections restricting sale of additional time (sections 319 and 320), and prohibiting the use of broadcasting stations outside Canada during an election (section 303), were necessary to the integrity of the legislative scheme. If that is so, then the analysis breaks down when the sections are justified individually unless severance is possible, because the aims are different.

The Scheme

The legislative scheme in question regarding the use of broadcast time provides for the following:

- (1) There is a reservation of prime time available for use by registered political parties (section 307).
- (2) Prime time was to be distributed in accordance with the following formula set out in s. 310(1) which takes into account:
 - (a) the percentage of seats in the House of Commons held by each political party after the last general election;
 - (b) the popular vote obtained by each party in the last election; and
 - (c) the percentage of candidates endorsed by each party at the last general election.

The first two factors are given double the weight of the last.

- (3) An arbitrator has the right to vary the results if he thought those results created unfairness. There is no guideline for the exercise of his discretion as to what he considers fair. However, it is clear there is no suggestion within the scheme that fair meant equal. There is nothing in the legislation to suggest that equality was a desirable object, nor was there anything in the legislation to suggest that emerging parties should have equal time.

- (4) There is a provision for free time (s 316). Each major network shall make available at least as much free time as they did in the previous elections. Each registered party is guaranteed a minimum of two minutes' free time. The balance of free time is allocated in the same proportion as purchasable time. No commercial value is attributed to the free time for the purposes of calculating the election expenses of the party. (See Appendix "A" Canada Elections Act, *supra*) Political Broadcasts – sections 303 to 322.)
- (5) There is an absolute prohibition against using broadcasting stations outside Canada during an election campaign for the purpose of influencing an election (section 303), and an absolute prohibition against broadcasters providing additional time to any political party without offering it to all of them in accordance with the allocation formula (section 319). Moreover, they cannot charge for any extra time. And if they do they are subject to being charged (section 320). It is fair to conclude that the effect of sections 319 and 320 is that no additional time will be granted.

In arriving at the purpose of this legislation, two facts must be kept in mind. First, these sections place a restriction on the total amount of time which all parties may purchase. Secondly, the sections prohibit parties having equal time (either purchased or free time), because equal time would be totally inconsistent with the aim of the allocation formula. Those two facts go a long way to eliminating some of the suggested objectives of this legislation, as well as negating the possibility of severance. I, therefore, propose to examine the various aims referred to by the trial judge for consistency with the entire scheme.

Possible Purposes

(1) Communication of information

While the reservation of time, and the provisions for free time, could arguably be to ensure that information will be made available to the public, the prohibition against the purchase of time outside the parameter of the scheme is totally inconsistent with that aim.

It is true that the reservation of 6.5 hours of prime time for political broadcasts is inconsistent with an aim that time will be made available for political advertising. While an objective of "providing information" might well result in legislation ensuring minimum time, such an objective would not place a ceiling on the total amount of time in which that information could be communicated. That section does not stand alone and must be read in the context of all of its supporting sections in the first instance. The extremely disproportionate allocation of free time is indicative of an objective that goes well beyond more communication of information. It belies an objective to communicate some information in preference to other information. In an election, all information is valuable and legislation aimed at ensuring the public is aware of the issues would not prohibit the purchase of additional time.

It must be recognised that the government already controls the broadcast air time by virtue of the *Broadcasting Act*, S.C. 1991, c. Bw-901. In fact, the restrictions on use of the airwaves for broadcast purposes occur, in the first instance, as a result of the *Broadcasting Act* (which is not challenged in this case). As the government controls all broadcast time in Canada, it could make available more time if needed to allow all parties the opportunity to communicate. Moreover, the evidence indicated much of the reserved time was not used by the party entitled, yet there were restrictions on its purchase. The AG Canada agrees, and in fact argues, that it is necessary to keep sections 303 and 320 because they preserve the integrity of the scheme by restricting the purchase of time outside the scheme. Thus, communication of information to the public is not the real purpose of this scheme. The allocation formula, and prohibiting sections are part of the scheme and are inextricably involved in its purpose.

(2) *Unfairness to new and emerging parties created by wealth*

As mentioned previously, all parties recognised that the potential inequality created by wealth domination was one objective that was addressed by the *Canada Elections Act*. With respect to political advertising, that objective is supported by a section prohibiting broadcasters from raising prices during an election, as are the sections limiting expenditures. No issue is taken with those sections. The respondents accept that wealth domination was an objective of some sections in the *Canada Elections Act*, but it is not the objective of the sections composing this scheme. If wealth domination is the evil objected to, then the real fear is the disproportionate broadcast time the wealthy could obtain. The objective would be to create a more level playing field. It creates the very inequity which it is feared wealth would create; favouritism and free time to the established parties. Moreover, that free time does not need to be accounted for in election expenses. Thus it cannot be the lack of equality, or fairness, created by wealth that is the objective of this particular legislation, because the allocation formula is inconsistent with such a goal.

(3) *Availability of time and method of distribution*

One of the main arguments for the reservation system was the need to ensure availability of time. That is a laudable goal, at least so far as political parties are concerned. Thus, says the appellant, there must be a means by which to distribute that time. The fear of preference of certain parties by broadcasters raises justifiable concerns, particularly in view of the fact that broadcasting is controlled.

Section 8 of the Television Broadcasting Regulations, 1987, SOR 87 – 49 provides:

Political Broadcasts

8. During an election period, a license shall allocate time for the broadcasting of programmes, advertisements or announcements of a partisan political character on an equitable basis to all accredited political parties and rival candidates represented in the election or referendum.

It is recognised that is not a total safeguard, but at least the word "equitable" becomes the governing rule. Parliament could have similarly provided for "equitable distribution" without a formula. Obviously the word "equitable" on its own was not sufficient to meet the government's true intent, nor were they will to leave distribution of time to the broadcasters, who have an obligation to distribute time equitably. The word "equitably" on its own is capable of being interpreted as equally, or nearly equally, or at least fairly. Not so the allocation formula. That formula becomes pivotal, and lends support to the fact that this legislation was passed for the very purpose of imposing the allocation formula on the parties, granting all free broadcast time in accordance with its guidelines and restricting the right to purchase time outside that formula.

(4) Restrict fringe parties

There was also an argument that this legislation was aimed at ensuring the fringe or the satirical party did not take up the valuable broadcast time necessary to communicate to the electorate. Why should a party, which is not a serious contender, receive time, particularly equal free time? The objective, however, is not limited to these parties, because it works a similar disadvantage on other new and emerging parties, as well as established parties who did not perform well in the last election. They are all still serious contenders, as was illustrated by the 1993 election, when two of the emerging parties, despite their disadvantage, were second and third place in the election. Moreover, if the suggestion is that satirical, fringe parties do not have sufficient support to be serious contenders, it is the government who defines the qualifications for becoming a political party, and has the right to change them. If they meet those qualifications, who is to say they are not serious contenders, or have serious messages, that would help evaluate serious contenders. It is not possible to interpret his legislation as being aimed solely at the fringe or satirical party – again its true objective goes beyond that.

(5) Create unequal opportunity to broadcast time in favour of established parties

It is obvious the intent of this legislation is to control access to broadcast time, limit the time available to broadcast messages, and to share that time unequally. Equality is not an objective of this scheme. The statute has provided an allocation formula which is the starting point for any distribution of time. That formula is designed to ensure the established parties receive the most broadcast time, both free and purchasable; the main criterion for distribution being past performance. It is designed to favour incumbents. Nor does access to the arbitrator alter that purpose, because the formula is the starting point for the arbitrator's analysis. As referred to later in this judgement an arbitrator would never exercise his discretion to achieve equality because equality, or near equality, has nothing to do with the obvious intent of Parliament.

The object of this legislation flows from the formula. Its object is to control the use of the main medium of communication and to ensure that all distribution of broadcast time is made in favour of the established parties on the basis of past performance. It is structured to reserve time, to distribute it disproportionately in favour of the established parties, and then restrict the ability of

political parties to broadcast time in any manner outside the allocation scheme. The AG Canada agrees that the purpose of this legislation is to ensure that the air time is used primarily for the benefit of the parties who have the best chance of forming the next government. They argue that the restrictive sections (sections 303, 319 and 320) support the integrity of the system, and are necessary for it. Otherwise parties could purchase time and destroy the distribution scheme. *The appellant argues that it is a legitimate legislative objective to recognise that all messages are not of equal value, and it is important to prevent the over-saturation of the airwaves with messages of lesser value, to ensure that the messages of those parties who have a chance of forming the next government reach the electorate.* This legislation restricts the ability of all political parties to broadcast in any manner outside the allocation scheme and the scheme is aimed at benefiting parties on the basis of past performance. This legislation is designed to regulate and control the messages that reach the public. That objective is consistent with both the construction of the section itself, and the position stated by the AG Canada.

Legislative History

It is also construction that is consistent with the history of this legislation in Canada. An examination of the historical documents exhibited at trial, as well as certain academic articles, provides a telling insight into the purpose of the reservation and allocation of broadcast time. Parliament has consistently wanted to control this major form of political influence, and ensure that the political parties who benefit are those with a proven representative following. As stated by J. Lacalamita in "The Equitable Campaign: Party Political Broadcasting Regulation in Canada" (1984), 22 Osgoode Hall L.J. 543 at 545, "From the very first, the goal of social cohesion and the role of government were stressed." The prevailing attitude of fear of this new form of political influence is aptly summarised in the 1928 Aird Commission report in its recommendation with respect not political broadcasting:

While we are of opinion that broadcasting of political matters should not be altogether banned, nevertheless, we consider that it should be very carefully restricted under arrangements mutually agreed upon by all political parties concerned.

(Exhibit 2, Binder 1, Tab 1 at p.11):

One need look no further than the Parliamentary debates prior to the 1935 election to note the concerns expressed by various Parliamentarians. From the Right Honourable W. L. MacKenzie King, Leader of the Opposition:

Personally, I feel that the radio today plays such an important part in all matters affecting public opinion that it would be quite proper that some provision should be made whereby, for example, *each political party which has a representative following should be entitled to have broadcast at the expense of the state one or*

two addresses which would set forth its platform or policies for the people.....

Apart from that I think there ought to be some definite understanding that radio where it is to be used for political purposes will be *used in a manner which will not give one party which may happen to have more in the way of financial backing than other parties, a larger use of that national instrument.* (House of Commons, *Debates*, 30 June 1934 at 4511.)

(Trial Exhibit 2, Binder 1, Tab 2)

And in answer Prime Minister R. B. Bennette (same cite):

... I assure the right hon. gentleman that I agree with him that something will have to be done to prevent any abuses or cause for complaint that the radio facilities are placed by contract or otherwise at the disposal of one party *to the exclusion* of others.

(emphasis added)

However, the Prime Minister balked at the use of public funds for any free broadcasts. The issue was not pursued by the Leader of the Opposition, however, Mr. E. J. Garland of the United Farmers of Alberta cited the lack of financial resources of his party as grounds for support for some broadcasting paid for by the state.

These exchanges illustrate the fear that the monied interests could attain undue influence through the use of this new and powerful tool of expression, and the fear of one party gaining an advantage against others. It is also a recognition that one party could gain control of facility for the purpose of broadcasting to the exclusion of others. The context of these debates is important to understanding the views of the members. The material before the Court reveals that there was a desire to nationalise the broadcasting industry, but insufficient funds to accomplish the task. It was common for only one broadcasting outlet to service an entire community, so there was a fear that those who happened to control the license could dictate which messages would be broadcast. As well, providing free time on the CBC was viewed as unfair competition to both private broadcasters and newspapers.

The report of the 1936 Report of the Special Committee of the House of Commons on the Canadian Radio Commission ("Beaubien Report") (Trial Exhibit 2, Binder 1, Tab 3) again asserted a commitment to the eventual nationalisation of the broadcast industry. They also found that there had been "serious abuse of broadcasting for political purposes" during the 1935 election. Based on these findings the report recommended that dramatised political broadcasts be banned; that full sponsorship of all political broadcasts be required; *that the limitation and distribution of time for political broadcasts be under the complete control of the corporation, whose duty it shall be to assign time on an equitable basis between all parties and rival candidates;* that no political broadcasts be allowed on an election day or during two days immediately preceding same: House

of Commons, Special Committee on the Canadian Radio Commission, Ottawa, King's Printer, May 26, 1936, pp 785–86.

This report led to the passing of the *Canadian Broadcasting Corporation Act*, S.C. 1936, c. 24. As noted by Lacalamita, *supra* at p 546 of his paper, the legislation implemented all of the above recommendations, "(h)owever, the legislation itself did not solve the largely organisational problem of equitable allocation of time." Thus the "equitable allocation" of political broadcast air time was left to CBC policy directives until the age of television. The allocation of formula used to this day in section 310 has its roots in the Statement of Policy With Respect To Controversial Broadcasting, July 8, 1939 ("White Paper"). As stated at p 3 of the White Paper:

The Corporation assumes this obligation as a function of public service broadcasting, in accordance with its general policy of encouraging fair and adequate presentation of controversial questions which are of public interest and concern. The CBC accepts..... the task of bringing to all listeners within reach authoritative statements of the position and policies of the respective parties. Full discussion of the principal contending points of view on national issues is a vital part of the democratic process.

(Exhibit 2, Binder 1, Tab.4)

It is notable that that policy had provision for free time only; no other national network political broadcasts were allowed. The While Paper, *supra*, went on at p 3–4 to say:

The national political parties will be given the opportunity of speaking to the people over the national network in accordance with factors other than simply their capacity to buy time... the political parties may welcome the arrangements as a means of avoiding unnecessary competition between themselves which often results in the purchase of time for beyond actual requirements. The provision of national network time on a free basis will relieve the parties of an expense which has rapidly become one of the most onerous features of modern political contests.

Thus, it is noted that the provision of free time for the purpose of communicating messages was an important one. It is also important to note that the only broadcast time was that within the government's scheme.

The White Paper at p 6 then went on to state the criteria which replaced wealth (note that under section 310 of the current Elections Act the first three criteria remain intact and are weighted 2:2:1); (i) standing in the house at dissolution; (ii) popular vote in the previous election; (iii) number of candidates in the preceding campaign; (iv) standing in the House of Commons at the preceding dissolution; and (v) a "factor designed to give recognition to the principle that the listener is entitled to an equal presentation of the points of view of al the existing parties." The blatant inconsistency of this last factor seems to have escaped the authors of the White Paper.

In the current Elections Act this principle that the listener is entitled to an equal presentation of all viewpoints has been reduced to two free minutes per party: was wealth ever *really* a concern? If the issue was to prevent domination of public discourse by wealth, why the reluctance to fund broadcasts through the public purse? There was a constant reluctance to open up a medium for communication that might result in unfairness to a party and at the same time a system put in place to do that very thing.

Interestingly, the third criterion is justified, on the basis that "new parties often have a conduct several campaigns as a general effort at political education and persuasion, before achieving a commensurate measure of national support" and the fourth on the basis that it is necessary to "take into account party continuity and tradition, an all-important element in the life of political institutions" (White Paper, p 6).

The stated purpose for the fifth criterion, however, is internally inconsistent:

It may be said that each of the parties has something to offer the electorate, and that the electorate should be given an equal opportunity of judging as between them. This consideration would enter into the formula, but only as one of several factors.

If the electorate should be given an equal opportunity to judge between the parties, it is difficult to rationalise a formula designed to ensure messages are not received equally. Interestingly, the current Elections Act has not such fifth factor. One must keep in perspective how the free time section in fact works. To place this in perspective, the vague notion of equality under the current Elections Act provides for equality only with respect to the minimum two minutes' free time. The actual result was that one party was allocated 173 minutes purchasable time while another party was allocated 5 minutes. This results in a similar imbalance in free time. Thus the fear of wealth creating an advantage is replaced by an advantage created by legislation in favour of established parties. That advantage is tremendous because not only do the established parties receive the large allocations for purchasable time, but they are awarded free time at the same disproportionate rate. They are entitled to that free time whether they actually purchase any of the allocated purchasable time. Moreover, the commercial value of the time does not need to be considered in calculating election expenses, a considerable benefit. If the established parties are also the ones with the largest financial base, the scheme exacerbates the problem of wealth domination of the airwaves.

At the very inception of the allocation criteria over fifty years ago, while there were many legitimate fears and concern, the purpose has consistently been to control and limit the use of broadcast time to protect the established parties, not the emerging parties. It was consistently designed to ensure that the established parties received the majority of the free time provided. One wonders how new parties were expected to ever established a significant base of support under such a scheme given that national political advertising was not allowed on a paid basis.

Such a system was put in place amidst copious statements about the need for the CBC to administer political broadcasting fairly:

The Corporation desires to administer it equitably and impartially, without fear or favour, to the disadvantage of none of the parties but, it is hoped, to the benefit of each and of the country as a whole. Necessarily the scheme must be considered largely as an experiment. (White Paper, p 5)

(emphasis added)

The conclusion that providing an "equitable" allocation means controlling the messages and providing the majority of the time to the mainstream parties is supported by the following unsuccessful motion found in the minutes of the Special Committee on Broadcasting, *Minutes of Proceedings*, No 13, June 16, 1955, p 808:

The Committee, while affirming the principle of freedom of expression, cannot fail to take note of the fact that the present regulations respecting political broadcasts have been used by the Communists to obtain free network time at public expense for the so-called Labour Progressive [Communist] Party by the device of nominating straw candidates in general elections. The Committee also notes that in the recent general election in the United Kingdom no free time was given by the BBC to the Communist Party. The committee recommends that consideration be given by the Board of Governors to the revision of the regulations in such a manner as to prevent their being circumvented for this purpose.

(Italics in Original)

(Exhibit 2, Binder 1, Tab 7, p. 385)

Substantial reform of the election system next occurred in 1974. Interestingly, the majority government chose not to impose an overall spending limit on parties, despite the recommendation of the Chappell Special Committee on Election Expense. Instead, restrictions on the purchase of broadcast air time during election campaigns were justified on the basis that these would function as spending limitations. This is difficult to reconcile with the position taken by the government with respect to individual candidates. During the debates leading up to the adoption of the 1974 reforms the government's rationale is made clear:

....while...there is.... guaranteed minimum access to the media in the way I have stipulated, each candidate is free to purchase media time up to the limits of his own election budget....(H)e cannot be denied any amount of time he wishes to purchase up to the ceiling imposed on his election expenses.

Hon. Allan J, MacEachen, House of Commons Debates, May 16, 1972, p 2408.

There is no suggestion in that statement that indicates the government was concerned that candidates would be unable to purchase time. Scarcity of time was not the issue historically, control was. It is also interesting that the approach was different for the parties, as opposed to the candidate. While there is no indication of why this should be different for parties, the comments of members from smaller parties give some guidance. For example, Mr Benjamin of the New Democratic Party, *supra*, at p 2414 (May 18):

Parties can spend more on many things in provinces, regions and constituencies. Money can be spread around and cannot be proven to have been spent on behalf of any one candidate. What saddens me is that in traditional fashion the Liberal government can take a good principle, bring in legislation incorporating that principle and then proceed to pervert it with the provisions in the legislation.

And from a Social Credit Member of Parliament, *supra*, at p 2435 (May 19):

...such publicity, in newspapers as well as on television and radio, should be equal for all parties or at least distributed according to a fair proportion. *When I say "fair proportion", I want to point out that I mean almost equal proportion...* As the mass media, specifically radio and television, have secured their broadcasting rights from the CRTC, it seems to me that they should provide free of charge all the political parties with the time they need to inform the public of their respective programs, and I repeat, "free of charge".

(Emphasis Added)

Also from the Social Credit Party, at p 2577 (May 25):

Outside Parliament, in my opinion, all parties are equal. We do not work looking back on the past nor on the basis of the heavy majority of the party in power, but we keep the future in mind.

.....

We are all on the same footing when it comes to telephone calls and postage. This is why in my opinion the CBC should not serve one group more than another.

We know that the broadcasts will be allotted under the supervision of the CRTC. We must remember, Mr. Speaker, that these supervisors are friends of the government, that they have been hired are paid by it.

.....

I do not trust the impartiality of this group..... the allocation.....should be done not in favour of the members who have managed to get elected at the previous election.....

And Mr. Stanfield for the Progressive Conservatives, *supra*, at 2942 (June 7):

Moreover, clearly it is useless and it is wrong to limit simply the spending of a candidate or party on publicity while leaving completely open the amount that can be spent in other categories. For instance, most of us in politics recognize that the publicity you get in the news columns or on the news shows of the networks is worth much more than advertising. Yet this bill..... does not limit in any way how much the candidate or party can spend on extravaganzas designed to create news and be reported on news shows.

....The party or the candidate who should be allowed to decide how the money should be spent; it is not for Parliament to tell candidates how to run an election. I would favour that, provided there is an over-all limit on expenditures... It is nonsense and absurd to introduce a bill which simply limits expenses on publicity but leaves the sky as the limit for all other kinds of expenses. I say this is an absurd bill, I cannot regard it seriously as a measure put forward in terms of electoral reform.

Mr MacEachen responded to this by explaining that the Barbeau Committee (Trial Ex. 2, Tab.7) had recommended controlling broadcasting as a method of controlling spending because such expenses are "obvious, knowable, provable and controllable" (*supra* p 2946). This ignores the fact that the more recent Chappell Report (Trial Exhibit 2, Tab 8) had recommended overall limits on election spending by parties and did not foresee any particular enforcement difficulties.

This was again attacked by members of smaller parties as a sham. Points were made as to how the government, through this Ministers, received vast amounts of free publicity. The point was again made that limiting broadcasting would not be an effective expense control tool. As Mr. Lewis said at p 2950 of House of Commons Debates, June 7, 1972, 'There is no reason why we cannot enforce a limit on party expenditures, unless we assume that the political parties in this country are thoroughly dishonest, will not obey the law and will find ways of evading it when they can.' Eventually in 1973, a revised bill was presented to Parliament containing limits on spending by political parties as well as candidates (Hon. Allan J. MacEachen, House of Commons Debates, July 10, 1973, Ex.2, Tab 10). These limits were incorporated into the 1974 Elections Act and are found in section 39 of the current Act.

Thus a review of the history of the reservation and allocation provisions is consistent with problems presented by the current scheme. Many of the original motivating factors were similar to the ones referred to by the trial judge, namely, the fear that wealth would create unfairness, inequality or advantage to some at the expense of others, and the desire to inform the public. The government legislation consistently ensured that the airwaves were controlled in such a fashion that parties who ranked best on the formula had the advantage, notwithstanding the many comments that indicate that the legislation of that manner defeated the legitimate objective. The

parties that received the free time were the parties that had the most established financial base. Always the stated (and arguably justifiable) purposes are twisted by the formulas employed to favour the incumbent parties. The interpretation of the objective must be tied to the formula. A review of the history makes it clear that Parliament wanted to ensure there would be free time and that all broadcast time would be controlled by a reservation and allocation system favouring the incumbents.)

Issue 2 Does either the purpose or effect of the legislation infringe any rights enumerated under the Charter?

The question in this appeal comes down to this: Is the legislative objective of regulating broadcast time during federal election campaigns in such a way as to ensure both the free time and purchasable time are distributed to parties based primarily on past political success for the purpose of ensuring certain messages reach the public constitutional? Is this legislation which infringes any of the Charter guarantees in its purpose? For reasons that follow, in my view, it does. I find that such a purpose flies directly in the face of the guarantee of freedom of expression. It is legislation aimed at creating unacceptable governmental interference in supposedly free elections. This manipulation of the freedom to speak in an election, through what is now the most effective communication tool, is the very type of freedom the Charter seeks to protect.

Section 2(b) of the Charter provides as follows:

2. Everyone has the following fundamental freedoms:
 -
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Freedom of expression has long been recognised as a cornerstone of democracy, and there can be no expression more important than electoral free speech. The suggestion that political messages are of different values, or that the platforms of those parties with a reasonable chance of forming the government are the most important messages, flies in the face of the guarantee of freedom of expression. Even more offensive is legislation designed to favour the incumbent. It is the discourse of political views that is important. "Single issue" or "fringe" parties may raise for discussion the most critical issues of a particular election. It matters not that they cannot form a government. What is important is the content of the message being communicated. Moreover, even if they are not running sufficient candidates to ever have a majority in the House of Commons, one elected representative is of consequence. Important in a free and democratic society, is the right of a party to communicate its message, and the right of the public to receive it. In the arena of elections, I am satisfied that the guarantee is not merely to protect the right of the person to speak, but the right of the public to hear. Communications is fundamental to expression of any kind. Regulation of the most effective medium of communication for the

purpose of conferring advantages on a political party in an election is the very evil at which the Charter is aimed. The guarantee is a guarantee that government will not interfere with, manipulate, or suppress electoral messages, no matter how unfavourable, extreme or unpopular.

Freedom of expression is a universally recognised core value of our society. In the case *Com. Commonwealth of Canada v Canada*, [1991] 1 S.C.R. 139, L'Heureux-Dubé J canvassed the position of the Supreme Court as to the scope of freedom of expression. She quotes from the judgement of Dickson J in *R. v Big M Drug Mart*, [1985] 1 S.C.R. 295 (at p 170):

It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is the same centrality that in my view underlies their designation in the Canadian Charter of Rights and Freedoms as "fundamental". They are the sine qua non of the political tradition underlying the Charter.

Madam Justice L'Heureux-Dubé went on to say that:

The profound role of freedom of expression, as one of the fundamental freedoms in s. 2, was underlined by this Court in several ensuring Charter cases. For instance, Cory J in *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, stated that it would be "difficult to imagine a guaranteed right more important in a democratic society than freedom of expression."

After outlining various theories advanced in support of freedom of expression, she concluded at p 172:

The alternatives are particularly frightening. History is replete with the examples of entrenched groups which have sought to maintain their elevated station by suppressing emerging and challenging new thoughts and ideas. Sniffling opponents by revoking their right to express dissent and disenchantment may have produced desired results in the short run, but ultimately all such attempts led to insurrection and rebellion.

and at p 174:

However, especially in the realm of political debate, it is the idea itself that must be encouraged, regardless of its apparent veracity. In fact, there can be no "political truth" – assertions to the contrary may be welcome in the context of campaign literature, but not as the basis for repression of political challengers.

Freedom of expression, like freedom of religion, serves to anchor the very essence of our democratic political and societal structure.

She then quotes Robert J. Sharpe (citation omitted):

Those who purport to legislate the truth invariably turn out to be tyrants. The market place of ideas argument prescribes an open process precisely because we cannot agree on what is the truth.

(Emphasis original)

The clear and fundamental purpose or aim of the scheme set out by the impugned sections of the legislation is *to interfere with the freedom of expression of political parties* during an election. It is intended to restrict, regulate and allocate the use of the most effective means of communication of political expression. I cannot conceive of a more gross interference with a fundamental right enshrined in the Charter.

Moreover, even in a narrow sense, the legislation is restrictive. It is superimposed on legislation that brings the broadcasting of all messages under government control. It is restrictive in that it restricts all parties from advertising outside of the scheme. That is its very object. It intends to so restrict. It does so far what the appellant claims is a legitimate purpose, namely, that the airwaves do not get over-saturated with unimportant messages, and that only those messages of parties which have a realistic chance of forming the next government reach the public. What possible legitimate objective can there be in a free and democratic country for the government to decide for the people which political views are important? An objective aimed at ensuring some messages are conveyed to the electorate, in preference to other messages, cannot, in my view, be a constitutionally valid objective. Unlike *Butler, supra*, *Keegstra, supra*, and *Zundel, supra*, this is not a restriction of speech for a valid purpose.

Not to be forgotten is the content of the message. We are talking about paid political commercials, designed in part for name recognition and presentation of positions popular to the electorate for the purpose of winning votes. These messages are, in the mainstream, commercials designed to win support. It is, as mentioned previously, frequently the fringe party, or the single issue party, or the emerging party that raises the real issues – the controversial issues – the ones which an established party may wish to avoid. Are their messages not equally important, or perhaps more important? The majority parties have access to the public on a regular basis as a result of news coverage, House of Commons proceedings coverage, debates and other access to the networks. They receive free press on a continuous basis as a result of their exposure to news and ability to create news. Yet this legislation is designed to favour the communication of their messages. It is legislation passed by the party in whose favour it operates.

In my view the freedom guaranteed by the constitution includes a right to be free from government inference in deciding what messages will be heard in an election. The allocation

formula central to this scheme is, in my view, interference with freedom of expression in its very purpose.

Discriminatory versus Interference

It follows that I do not accept the appellant's argument that the legislation is merely discriminatory and not an interference with freedom of expression. The AG Canada argued that Barrett and A.G. [1994] R.J.Q. 671 (C.A.) supports the proposition that legislation of this sort is merely discriminatory in that it confers advantages on one as opposed to the other. In that case, the impugned statutory provisions provided government assistance to candidates who had achieved certain levels of success in an election campaign. McCarthy J A agreed with the trial judge that sections 2(b) and (3) of the Charter placed no obligation on the government to help candidates express themselves and make their platforms known to the electorate. His Lordship then went on to find that there is no implicit Charter requirement that if the government chooses to provide such assistance, that it must do so equally to all candidates.

A key difference between the Barrett situation and the case at bar is that the effect on a party or candidate's ability to express its position to the voters is at most indirect, and after the fact, in Barrett, while it is direct and before the fact here. In terms of spending, a party or candidate can only spend the amount of money they can raise or borrow, subject to the spending controls. The fact that they may be reimbursed afterwards is incidental to their ability to communicate with the voters before the election. The case at bar involves provisions which directly, and specifically, affect the amount of expression, the place of expression, the time when such expression can be disseminated in an attempt to gain political power.

Applying a narrow approach to the Charter guarantees the scheme in place restricts the right of *all* political parties in their freedom of expression. It does so by its limiting sections (sections 303, 319 and 320) as well as its distribution of the reserved time. Time limits have been placed on the use of airwaves which use is already restricted by the Broadcasting Act. In short, the legislation restricts all parties in the place, time, and amount of time they access.

It is true that free time stands in a somewhat analogous position to the Barrett decision, and the reimbursement of expense money to candidates. However, the constitutional guarantee is, as stated earlier, much broader than mere restriction when one considers its application to electoral freedom of expression. Section 2(b) provides for protection from interference in the freedom of expression. This scheme goes beyond discriminatory legislation, and is an interference with freedom of expression of the worst kind. I do not say there was some malicious intent of Parliament when they passed this law. They may well believe that the messages of the parties who have proven track records, or the contender parties, have the most important messages for the people to hear. Even greater is the need for the constitutional guarantee. The 1993 election

is illustrative of the fact that it is the people who decide which messages are important and correct.

With respect, I disagree with McFadyen J A's decision that since the broadcast time became available for use only through the operation of the impugned legislation, a party's opportunity for political expression can only be enhanced by this scheme. First, prohibition against purchasing extra time or purchasing broadcast time outside the country cannot be seen to be an enhancement of a party's opportunity for political expression. That is particularly true when they have not had access to the same time as their opponents. It is also difficult to find an enhancement of a party's right to expression when their opponent receives considerably more free time. Moreover, the agreed statement of facts acknowledges that networks have always pre-empted previously sold advertising to allow the conveyance of political messages during provincial elections and the national referendum, despite not being compelled to do so by legislation. I also, with respect, find inconsistency in the conclusion of McFadyen J A that once the so-called enforcement provisions are removed, there is no restriction on freedom of expression because parties are free to go to the market and purchase more air time. At the same time, it is stated there would be no time available but for the reservation and allocation provisions. It cannot be both ways. Either air time is available absent the scheme, or it is not. If not, then the reservation and allocation provisions clearly restrict freedom of expression on their own. If there is time available, then the scheme would be needed. Either way, it is not an enhancement.

In my view, the argument that freedom of expression is not infringed by the scheme because parties are being granted a benefit under the scheme also breaks down at another level. The reservation and allocation sections still infringe the freedom of expression, and voting rights, of everyone else. In addition to the Reform Party having standing as the directly affected group, the respondent Diane Ablonczy has public interest standing to attack this legislation. If time is, as alleged, limited then the allotment of a substantial portion of air time to registered political parties limits the remaining amount of air time for anyone else wishing to advertise during the campaign. This obviously includes the commercial sponsors whose messages will be pre-empted, as well as non-political parties such as special interest groups and independent candidates, who wish to broadcast political viewpoints for the electorate.

Nor do I accept that the free time sections are saved by deleting sections 319 and 320. In my view, the sections relating to free time must also fail. On a technical basis, as the free time is allotted in accordance with the purchased time, if parties are allowed to purchase more time than the scheme allows, there would be no purchased *allocated time* upon which the free time could be based. Moreover, it is impossible to conclude that the sections were intended to exist absent the restrictions on paid time. As mentioned earlier, a scheme designed to confer free time in accordance with the allocation formula is more than discriminatory legislation. Electoral free speech encompasses the right to be free from a government regulatory scheme that confers benefits and creates uneven opportunity. Freedom of speech in the electoral sense must surely include freedom from governmental interference in one's access to the public. A manipulated

communication system favouring the government in power attacks the very core of the protected freedom.

In dealing with section 2(b), it is the type of message that is being conveyed that has importance. L'Heureux-Dubé J in *Commonwealth of Canada v Canada*, *supra*, makes a very telling assertion of the value of political expression at p 174 of that judgement:

However, especially in the realm of political debate, it is the idea itself that must be encouraged, regardless of its apparent veracity. In fact, there can be no "political truth" – assertions to the contrary may be welcome in the context of campaign literature, but not as a basis for repression of political challengers.

This statement starkly points out the misguided nature of the government's attempt here to define an equitable allocation of air time in terms of the importance of the message conveyed. In this case, a sitting Parliament passed legislation with the specific purpose and effect of ensuring greater access to the airwaves in future elections for certain parties based on the formula. This necessarily encourages the maintenance of the status quo to the benefit of those parties which happen to have achieved electoral success in the past.

This legislation is an interference with freedom of expression in not only its effect, but its very purpose and it cannot be justified by a section 1 analysis. There is no valid objective to support the scheme.

Right to Vote

I am also of the view that the legislative scheme infringes section 3 of the Charter of Rights and Freedoms as it has been interpreted. Section 3 guarantees the following right:

Every 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 respondents argued that this legislation infringes on the right of every citizen of Canada to vote. At trial, Moshansky J looked at the core values of the section 3 guarantee of the right to vote as articulated in *Dixon v British Columbia* (A.G.) [1989], 4 W.W.R. 393 (B.C.S.C.) by McLachlin C.J.S.C. (as she then was). She enumerated ten rights that flow from the right to vote. The trial judge recognised that three of those values, namely the right to be presented with a choice of candidates or parties; the right to sufficient information for public policies to permit an informed decision; and the right to cast one's vote in an electoral system which has not been gerrymandered (that is deliberately engineered so as to favour one political party over another) were particularly applicable to the case at bar. The respondent, Diane Ablonczy, has public

interest standing to challenge this legislation, so the distinction between her role as a voter and as a candidate discussed by Moshansky J, is not important. This case is analogous to the right to vote in an electoral system that has not been gerrymandered. Instead of boundaries being designed to favour one political party over another, the dissemination of information is deliberately engineered to accomplish the same end.

It is this question of favouring one party over another that strikes at the heart of this appeal. Until now, the key right to vote cases have dealt with the issue of fairness in electoral boundaries. In Reference *Re Prov. Electoral Boundaries*(Sask.), [1991] 2 S.C.R. 158, McLachlin J emphasised the purposive approach as opposed to the narrow legalistic approach to interpretation of Charter rights. She went on to say that practical considerations must be borne in mind in constitutional interpretation and that "(o)f final and critical importance to this appeal is the canon that in interpreting the individual rights conferred by the Charter, the Court must be guided by the ideal of a free and democratic society upon which the Charter is founded." (At p 181). She then went on to endorse the view that the guarantee of a right to vote is to guarantee "effective representation " rather than "one person – one vote."

In applying the core values enumerated in *Dixon* to the right to vote embodied in section 3 of the Charter, I am drawn inescapably to the conclusion that this right is violated by the impugned legislation. A key aspect of selecting "effective representation" flows from exposure to a wide range of views from which to select the candidate or party that best represents the views of the individual voter. The right to vote includes the right to hear the discussion of issues of concern to members of the public to enable an assessment and evaluation of all parties with that information in hand. As well, a purposive and historical approach to the right to vote in a free and democratic society leads to the conclusion that government interference to favour the dissemination of some views over others is unacceptable. This is so whether the specific concept of "gerrymandering" riding boundaries is at issue, or preferential access to the acknowledged preferred choice of dissemination of political ideas is at issue, as in the case at bar. As stated by professor Bernard Crick in *In Defense Of Politics*, London, 1962, at p 28:

The hall-mark of free government everywhere, it is an old but clear enough test, is whether public criticism is allowed in a manner conceivably effective – in other words, whether opposition is tolerated.

A government should not be able to use its power to manipulate a key form of communication in its favour.

In the *Saskatchewan Boundaries Reference* case there were practical considerations which, when combined with the historical treatment of riding boundaries, led McLachlin, J to the conclusion that the right to vote had not been infringed. No such practical considerations exist in this case. The appellant argued that the airwaves should not be over-saturated by the messages of parties who have no realistic chance of forming the government. Such over-saturation is alleged to result

in voters not receiving sufficient information, or losing interest in, the messages of parties who have a realistic chance of forming the government. To the extent that this is relevant to the voting decision, if it is a judgement to be made by the voter, not by Parliament, nor a broadcast arbitrator, nor any other government official. The availability of information to the public from all sources relevant to electoral issues is of utmost importance to the voter. Frequently, as previously mentioned, the emerging party identified, and is willing to discuss, issues of critical concern to the public. Those are often issues which they allege have not been dealt with properly by the parties in power, and issues the contenders may prefer to by pass. Presentation of those issues may force parties to deal with the substance of the complaints, the very type of information the public desires at election time. It is the wide exposure to a variety of views that allows the electorate to make an informed choice.

The idea of legislation forcing broadcasters to provide free time other than equally to political parties attacks the information component of the right to vote. Moreover, the majority parties frequently receive extensive air time via the national news and the concentration by the press on their campaign. It is not possible to say that the messages of the emerging parties, or fringe parties, are not as important as the messages conveyed by those parties who have a chance of forming the next government. They may be crucial messages. Thus, if free time is to be provided, it must be provided equally. As mentioned earlier, if there is concern that satirical or fanatical groups will form parties simply to obtain free time to communicate information of little or no value to the electorate, that should be examined and dealt with at the point of defining the constitution of a party (if at all). If there is sufficient support for a group to meet that criterion, then why should it be treated unequally? Moreover, free time could be eliminated, limited, or allowed only after the purchase of enough time to ensure that a party was sufficiently serious to expend funds. This legislation was not designed to deal with fanatics of the world. It was designed to "gerrymander" the dissemination of information.

I acknowledge that the trial judge found that the electorate has the ability to become fully informed through other sources. While that may well be relevant to justify a section 2(b) breach, it is not the issue with respect to section 3. For one thing, such a finding suggests that this scheme is not needed. The key problem is that this is an attempt by the government to deliberately engineer a crucial element in the electoral process so as to favour one political party over another. Just as gerrymandering electoral boundaries to accomplish that end can result in a breach of section 3, I am satisfied that this legislation contravenes section 3.

In summary, I am of the view that this legislation also infringes section 3 in its very purpose. It follows that it is impossible to justify the legislation in a section 1 analysis. Assuming I am wrong in determining that the purpose of this legislation breaches section 2(1)(b) and section 3, then I agree with McFadyen J A that the effect of the legislation infringes upon that freedom. That brings me to the argument of prematurity raised by the appellant.

Did the trial judge err in finding a factual basis for the constitutional argument?

At the rehearing of this appeal, the Reform Party and Diane Ablonczy ("Reform Party and Ablonczy") sought leave to introduce fresh evidence arising from the last election. That application was in response to the earlier argument of the AG Canada that the respondents had failed to establish an evidentiary basis demonstrating that their freedom of expression had, in fact, been denied. But that argument assumes the respondents must prove they would have used more than the limited air time allotted by the impugned formula.

In my view, it is unnecessary to resolve the fresh evidence issue. Once standing to make a section 52 challenge to the constitutional validity of legislation is established, I am satisfied it is unnecessary to prove a further evidentiary basis. It is important in this analysis to understand the tests required for standing in a constitutional challenge. The first test set forth by the Supreme Court of Canada in *Smith v The Attorney General of Ontario*, [1924] S.C.R. 331 is the "...exceptionally prejudiced..." test. In that case, the Supreme Court refused standing to a plaintiff wishing to attack the temperance legislation of the day directly, rather than break the law, be criminally charged, and attack the legislation in defence. Duff J recognised the problem of forcing individuals to break the law in order to attain standing before the courts, when he stated at p 337:

Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are authorised or illegal. We think, however, that to accede to appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could maintain a similar action; and we can discover no firm ground upon which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a similar way in his business or personal life.

We think the recognition of such a principle would lead to grave inconvenience and analogy is against it. An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right *unless he is exceptionally prejudiced by the wrongful act*.

(Emphasis added)

The meaning of this test and its effect in the context of modern regulatory legislation were explained by Laskin J (as he then was) in *Thorson v Attorney General of Canada*, [1975] 1 S.C.R. 138 at p 147:

Where regulatory legislation is the object of a claim of invalidity, being legislation which puts certain persons, or certain activities therefore free of restraint, under a compulsory scheme which such persons must adhere on pain of a penalty or a prohibitory order or nullification of a transaction in breach of the scheme they may properly claim to be aggrieved or to have a tenable ground on which to challenge the validity of the legislation.

This is on all fours with the case at bar. In this case we have provisions in the *Elections Act* designed specifically to regulate the actions by political parties and broadcast networks. Obviously the Reform Party of Canada, and their candidates in a federal election, are "exceptionally prejudiced" by any unconstitutionality in the impugned legislation. As found by Moshansky J at trial (*Reform Party of Canada v Canada (Attorney General)* (1992), 7 Alta. L.R. (3d 1) at p 15:

I find on the issue of standing that the Plaintiff Reform Party of Canada is affected directly by the impugned legislation. Accordingly, it is entitled to and has standing to sue and seek a remedy on that basis, subject to the applicability of the specific Charter provisions. I further find that Diane Ablonczy, as an individual, and on behalf of all members of the Reform Party of Canada, has a genuine interest as a citizen in the validity of the legislation and is entitled to and has standing on that basis.

and at p 29:

The plaintiffs' freedom of expression has been limited by the regulatory scheme because it is limited in the amount of broadcast time it may purchase. The Reform party may not go directly to the market place to bid openly for space.

It is hard to imagine legislation more prejudicial. Therefore, as the trial judge found, it is open to the respondents in this action to challenge the validity of the legislation under section 52(1) of the Constitution Act.

Again, as found by the trial judge, even if the "exceptionally prejudiced" test in *Smith, supra*, is not met, then the respondents are eligible for what has come to be known as "public interest standing" as developed by the Supreme Court in the famous trilogy of cases culminating with *Minister of Justice v Borowski*, [1981] 2 S.C.R. 575. The test for public interest standing has recently been restated and affirmed in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236. In that case, Cory J held that there are three requirements to be met before the court should exercise its discretion to grant public interest standing. The first is that there is a serious issue as to the validity of the legislation. Secondly, the plaintiff must demonstrate a genuine interest in the subject matter of the impugned legislation.

The last part of the test is to determine whether there is another reasonable and effective way to bring the issue before the Court.

While the appellant does not dispute the respondents' standing, it does suggest that, notwithstanding a scheme that regulates the amount of broadcast time to be used by various political parties in a campaign, freedom of expression has not been infringed unless there is proof that a particular party would have used more than the limited amount of time available. I do not accept that position. There is no authority for the proposition that where Government legislation, on its face, purports to regulate and limit a freedom guaranteed by the Charter, there must be additional proof that the party would have exercised the particular freedom. The question is whether it infringes the freedom. The Reform Party and Ablonczy seek freedom from government interference in the manner they choose to express their political views to the electorate. There is nothing to prove; the simple fact is that absent government regulation, they would have such freedom.

The appellant relies on *MacKay v Manitoba*, [1989] 2 S.C.R. 357 in support of the proposition that where it is the effect of the legislation that infringes someone's Charter right, it must generally establish the infringement with admissible evidence. In that case, Cory J stated at p 361-2:

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of the facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

On the other hand, as McFadyen J A pointed out in her decision, the Supreme Court has granted the remedy without proof that the rights of the applicant had been breached in several cases. See: *Minister of Justice v Borowski*, *supra*; *R. v Big M Drug Mart*; and *R. v Seaboyer*, [1991] 2 S.C.R. 577.

It is important to examine the *MacKay* case. The applicants were a group of tax-payers challenging the constitutionality of those parts of the *Election Finance Acts*, S.M. 1982-83-84, c.45, which provides for payments out of the Consolidated Fund of the Province of Manitoba to cover a portion of the election expenses of candidates and parties receiving a fixed proportion of the popular vote in a provincial election. The taxpayers charged that this provision, in effect, forced them to support candidates whom they might not want to support and thus infringed their freedom of expression. They admitted at the outset that the appeal could not succeed if it were found that the payments made to the political parties from the Consolidated Fund could not be

traced to the funds the appellants contributed as tax-payers. In other words, it was not apparent on the fact of the legislation that the appellants' rights would be engaged. The court was faced with a situation where there was no evidence put before the court from which infringement could be inferred, yet the appellants sought to establish specific concerns as to the potential effects of the legislation based on unsubstantiated propositions. In the *MacKay* case, the effects were not readily apparent.

In *R. v Danson* (1990), 73 D.L.R. (4th) 686, Sopinka J explains the *MacKay* case. The following passage at p 696 is particularly helpful in interpreting *MacKay*:

This is not to say that such facts must be established in all Charter challenges. Each case must be considered on its own facts (or lack thereof). As Beetz J pointed out in *Manitoba (Attorney-General) v Metropolitan Stores (MTS) Ltd.* (1987), 38 D.L.R. (4th) 321 at p. 337 [1987] 1 S.C.R. 110, [1987] 3 W.W.R. 1:

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter, and might perhaps be struck down right away.....(i)t is trite to say that these cases are exceptional.

The unconstitutional purpose of Beetz J's hypothetical law is found on the fact of the legislation, and requires no extraneous evidence to flesh it out...(t)he present case is, for these purposes, indistinguishable from *MacKay*, and I would respectfully adopt and apply Cory J's comments to these circumstances. The appellant here seeks to attack the impugned rules on the basis of their alleged effects upon the legal profession in Ontario...(i)t is not necessary that the appellant prove that the impugned rules were applied against him personally (standing not being in issue); but he must present admissible evidence that the effects of the impugned rules violate provisions of the Charter.

(Emphasis added)

To me, this case is determinative of the issue in the case at bar. First, as stated previously, I am of the view that the impugned sections of the Elections Act *on their face* interfere with the guarantee under the constitution of freedom of expression; therefore there is no need to establish that "effects" of the legislation infringe freedom of expression as that term is used in *MacKay*. Secondly, because standing is not at issue, even if it is necessary to establish effects which infringe Charter rights, there is no need for the respondents to provide evidence that the impugned

rules were applied against them specifically, or that they had the resources or the intention to use more than the scheme allows. They have more than met the burden of presenting admissible evidence of the nature called for in *MacKay* to establish a violation of the Charter.

Here the attacker is a party who is directly regulated by the scheme, in a manner that on plain reading places expression under government control. If the scheme infringes freedom of expression, this party's rights are engaged. This can be distinguished from cases such as *Edwards Books* which involved defendants to a criminal prosecution attempting to strike down legislation based on the fact that someone else's Charter right had been infringed, without leading any evidence as to how this was so.

With respect, I disagree with the decision in *Strickland v Ermel*, [1994] I W.W.R. 417(Sask.C.A.). That was a very short decision which cited on authority. It was held that a constitutional challenge to a provision of the Saskatchewan Trade Union Act was premature because the challenging parties had not yet been disciplined under the Act, although an unfair labour practice application was before the Saskatchewan Labour Relations Board. It seems entirely proper to place a question of the constitutional validity of the statutory provision to a Superior Court Justice for determination before the Labour Relations Board went through their expensive adjudicative process. The trial judge in that case had a lengthy agreed statement of facts from which to work in deciding the constitutional question. I see no authority for the proposition that an action brought by persons who have standing is premature simply because they have not yet suffered any state-imposed sanction for their activity, or proved specifically that they have been affected directly. In fact, the Danson and Thorson decisions of the Supreme Court seems to say exactly the opposite. They are binding authority of this Court. Threat of, or potential for, state sanction is sufficient to ground a constitutional challenge in such circumstances. Likewise, it should be unnecessary for a political party to have to wait until an election to show the specific effect on them.

In *R. v Big M Drug Mart*, Dickson J stated at p 313:

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

Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged

in such "public interest litigation" it would have had to fulfill the status requirements laid down by this Court in the trilogy of "standing" cases (cites omitted) but that was not the reason for its appearance in Court.

and at p. 314:

A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the Charter.....

Subsequently, Supreme Court cases such as *Irwin Toy Ltd., Dywidag Systems International, Canada Ltd. v Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705, and *R. v Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, restrict from corporations the availability of certain Charter rights applicable to human beings except in circumstances of penal proceedings. However, this is not relevant to the case at bar where, instead of a corporation, actual individuals and groups of individuals are involved, and it is freedom of expression which is at issue.

In this case, the constitutionality of the legislation is in issue. By the plain words of Big M Drug Mart, the particular effect of the legislation on the challenging party is irrelevant. The case at bar is an example of a regulated group seeking to have an invalid legislative scheme struck down under section 52(1) of the *Constitution Act*, and it is appropriate for the Court to do so if the scheme is found to be invalid. The appellant in this case is confusing the issues of standing with the question of whether the respondents' rights are infringed by the impugned legislation. As discussed above, the Thorson case makes it clear that those whose previously unregulated activities are placed under government regulatory control by the coercive power of the state have a right to challenge the validity of such legislation. There is no dispute as to the fact that the respondents' activities are subject to regulation under the Elections Act.

The appellant's argument on prematurity would lead to the natural conclusion that a law passed providing that no one but the incumbent party in power could broadcast campaign information in Canada, or abroad, could not be challenged until after the next election. That conclusion is unsustainable.

If am wrong in the foregoing analysis, then I agree with McFadyen J A that the fresh evidence should be admitted and, if a factual basis is necessary, it has been established.

Issue 3 Is the legislation saved by section 1 of the Charter of Rights and Freedoms?

As I have found the overall scheme is unconstitutional in its purpose, a section 1 analysis is not possible as the purpose itself cannot justify an interference with the right. There is no valid objective against which to evaluate the legislation.

If I am wrong, and this legislation only offends the Charter in its effects, then it is necessary to determine whether the effects of the legislation can be justified pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*, which reads as follows:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

R. v Oakes, [1986] 1 S.C.R.103 establishes the proper approach to a section 1 analysis. The onus of proving that a limitation is justified under section 1 rests upon the party seeking to uphold the limitation on the preponderance of probabilities based on the following criteria: (1) the objective to be served by the measures limiting a Charter right must be sufficiently important, at least relating to societal concerns which are pressing and substantial in a free and democratic society, to warrant overriding a constitutionally protected right or freedom; and (2) the means must be reasonable and demonstrably justified, in proportion to the importance of the objective. The proportionality test involves three components:

- (i) the measures must be fair and not arbitrary, carefully designed to enhance the objective in question, and rationally connected to the objective;
- (ii) the means should impair the Charter right as little as possible; and
- (iii) there must be proportionality between the effects of the limiting measure and the objective.

Pressing and Substantial Concern

I approach the justification on the basis of the broad purpose, namely the fundamental purpose of the legislation is to ensure all broadcast air time is to be controlled and distributed unequally to parties primarily on the basis of their past performance for the purpose of ensuring that the message of those parties reach the public. Even if it cannot be said this fails the purpose test in *Big M*, it certainly fails the pressing and substantial need test. The appellant has failed to make out its onus that the importance of controlling the broadcast time to ensure that some messages reach the electorate justifies an infringement of a fundamental Charter right. The evidence is not directed at a fear of over-saturation of messages.

As mentioned earlier, the trial judge appeared to accept that the purpose of the legislation was to ensure adequate supply of broadcast time and provide an equitable allocation of that time. In dealing with the first question of whether the government has established that these legislative concerns are "pressing and substantial", the trial judge's conclusions are as follows at p 28:

I conclude that the regulations in question were indeed enacted to address a pressing and substantial concern. Based on the evidence, I am of the view that reliance on the market place would invariably lead to an unfair domination of the airwaves by those parties with the means to outbid the others. It is a legitimate concern that new and emerging parties, primarily those with a less established financial base, not be priced out of the advertising market. The Plaintiffs' other expert witness, Dr. Fletcher, also agreed that some threshold was desirable. The documentary evidence before the Court also compels this conclusion.

In my view, the trial judge did not justify the legislation on the basis of the purpose he originally accepted. He finds that there is a pressing and substantial concern to avoid unfair domination of the airwaves by those with means, such that the new and emerging parties could be heard. However, the appellant does not seek to support the legislation on that basis. In fact, it seeks to support an unfair domination of the airwaves by established parties to the detriment of the emerging parties. Interestingly, the trial judge declared section 310 unconstitutional as infringing free speech. He did so because it discriminates against the emerging parties. In essence, he is saying that there is no justification for a government regulatory plan that interferes with freedom of expression in elections in a manner unfair to other parties. With that I agree. In my view the trial judge appreciated exactly what was wrong with this legislation – namely that very object of the allocation formula was to interfere with freedom of expression in an election for an invalid purpose. It must be remembered the trial judge did not have the benefit of the argument on purpose that we requested and heard at the rehearing of this appeal.

It is essential to keep in mind the particular legal test to be met by the government in establishing a pressing and substantial concern. There must be "cogent and persuasive" evidence in order to justify a Charter breach. According to Chief Justice Dickson in *R. v Oakes*, *supra*, at p 138:

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "Commensurate with the occasion". Where the evidence is required in order to prove the constituent element of a s. 1 inquiry, and this will generally be the case, it should be *cogent and persuasive* and make clear to the court the consequences of imposing or not imposing the limit (citations omitted). A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions.

(Emphasis added)

The freedom being infringed here is among the most basic in our society. Although the type of freedom at issue may not be relevant to the determination of whether there has been a *prima facie* infringement, it is certainly at issue when we move on to the balancing process that is a section 1 analysis (see *Committee for Commonwealth of Canada*, *supra*, *Rocket v Royal College of Dental*

Surgeons of Ontario, [1990] 2 S.C.R. 232; *Edmonton Journal v Alta (A.G.)*, [1989] 2 S.C.R. 1326). It is trite to say that it is important that political parties engage in discourse on major issues at election time and that the public be exposed to such discourse. What the government needs to prove is that this would not happen without this legislation.

They need to establish that there would be insufficient time available to meet the needs of all political parties collectively, and that the object of the equitable allocation could otherwise not be met. To establish their own stated purpose, the AG Canada must prove that messages of the parties capable of forming the next government would not, without this scheme, reach the electorate, and they need to prove that there is a pressing and substantial need for their messages to have priority. There was no finding by the trial judge that these messages would not reach the electorate, and certainly no finding of a pressing and substantial need for priority of messages.

Is there a need for free time at all? Interestingly, the trial judge found that the messages of the respondents would reach the public without the impugned legislation. *A fortiori*, the messages of the established parties, who have continual exposure to the press, would reach the public. When one keeps in mind that this is a commercial-type message, as opposed to an in-depth discussion message, it is difficult to imagine any pressing and substantial need for the established parties to have free time in priority to others, or at all.

The authorities are clear that in order to justify a section 2(b) infringement it must be proven by the evidence that a pressing and substantial concern would exist absent the impugned legislation. In my view that concern has not been established. Even if it could be said that the reservation of time is needed, there is no pressing and substantial need for allocation on the basis of preserving the most time for the real contenders. Moreover, such a scheme is totally inconsistent with democratic principles. There is *no evidence* to suggest that the public is over-saturated with fringe party messages, or emerging party messages, or for that matter, any political messages. Moreover, it is inconceivable that a democratic system could justify a formula that provides for restriction of time to some parties, in favour of incumbents or leading parties. In my view, the only purpose that could be rationalised, if required, would be a reservation of time distributed equally between all parties. That is not the goal of this legislation, nor is it argued to be the goal of the legislation. In fact, quite the contrary is argued by the AG Canada. Further, the agreed statement of facts indicates that time had been made available in the past for election campaigning despite no other federal, provincial or territorial statute having similar legislation. Paragraph 1 provides, in part:

1. It is agreed by counsel to the parties that for the purpose of this action:
 - (a) in 1941 there were approximately 1200 radio stations in North American on the standard broadcasting band, about double the number experts of 1932 thought to be the maximum;

- (b) in 1956 there were more than 2800 radio stations in the United States and 182 in Canada;
- (c) In 1990 Canada alone licensed over 1600 AM and FM radio stations, with an additional 3700 television transmitters and cable systems;
- (d) Canada's 1400 licensed cable operators provided up to 60 channels in 1990 and were preparing to expand to as many as 80 channels;
- (e) the cable television industry served in excess of 8,770,00 homes in 1989;
- (f) There were 107 daily newspapers in Canada in 1988 with a total circulation of 5,993,000; and
- (g) no federal, provincial or territorial statute or regulation purports to reserve or allocate advertising time for purchase by political parties except the Canada Elections Acts, R.S.C. 1985, c. E-2.
- (h) The experience of many television broadcasters is that, during certain months of the year, their inventory of "prime time" advertising time is sold out in advance of the period in question. This is so particularly in October, November, April and May. If an election were called for a day within such a period, such broadcasts would have to pre-empt advertisers to whom they previously committed time in order to make broadcast time available to political parties.
- (i) Broadcasters have in the past preempted previously sold advertising and made alternative arrangements for the advertising campaigns of their normal advertisers in order to make time available for political broadcasting during provincial and federal elections, though sometimes they have not provided advertising time during a particular program which the political party requested. For example, in the campaign leading up to the October 26, 1992 referendum, broadcasters are making arrangements to facilitate the anticipated advertising requirements of those who will be engaged in that campaign, including the orderly arrangement of other advertising campaigns which had been planned for the relevant period.

In conclusion, the evidence does not support a finding of a pressing and substantial need that would justify the overriding of the constitutional right to freedom of expression.

Proportionality

(1) Fair, not arbitrary and rationally connected

Even if there were a pressing and substantial need, the means must be reasonably and demonstrably justified in proportion to the importance of the objective. The objective of allocating unequally in favour of the established parties is not a valid objective, nor a pressing and substantial need. It becomes difficult to proceed further with the section 1 analysis because I find the overall aim is not justified. I recognise there are arguments to be made that there are other purposes intermingled with the purpose tied to the formula. For instance, McFadyen J A broke the legislation into different sections and dealt with it in that fashion.

McFadyen J A states at p 26 that in her view the objective of Parliament in enacting the legislation reserving broadcast time addressed pressing and substantial concerns, being the availability of broadcast time to political parties during federal election campaigns and the control of costs at which such time would be made available.

She then discusses the proportionate response and states at pp 27–8:

...While other voices and interests have the right to be heard, lesser access to the free and purchasable time, which broadcasters are required by legislation to provide, is a reasonable and proportionate response to the problem. Broadcast time is limited. It must be used primarily for the purpose intended by the reservation provisions, providing information to voters to permit them to make an informed choice when they exercise their vote with the object of choosing the next government. Few political parties stand a realistic chance of forming the government. However, there can be many other parties which, if granted equal broadcast time, would greatly reduce broadcasting time available for the purpose for which it was intended. A formula granting less time to registered parties whose objects are satirical or the promotion of a single issue or regional interest is justified.

In my view, the stated needs and the responses do not relate. The pressing and substantial need relates to ‘lack of time’ and ‘potentially increasing costs’. A reservation of time could justify a need for time if, in fact, it were a pressing and substantial need. As I have already noted, the agreed statement of facts indicates that provincial elections and the national referendum did not require time reservations. Control of costs could also be a valid objective. However, when McFadyen J A discusses proportionate response she is talking, not about a general need for time, but a need for time for so-called contender messages receiving priority. She has not found a pressing and substantial need for priority of messages, merely for a reservation of time. Also the reasons do not indicate a rational connection or proportionate response to the objective of cost control.

Cost control is already in place and unchallenged. What is in issue is the allocation of the reserved time. Certainly 6.5 hours of reserved time may be adequate to meet a need if there is one. There is no magic, however, in the 6.5 hours. I disagree with McFadyen J A that the need for time can be used to justify the unequal distribution. First, the evidence is not overwhelming that time is needed, and even if more time is needed, the government can easily access more time, or allow the time that has been reserved to be distributed to all. While limited time could justify a reservation, the *unequal distribution* of that time is not justified on the basis that it is unavailable. It is not connected. Moreover, in the past there has been reserved time that was never used, yet the legislation prohibits the purchase of more time. The scheme is not responsive to the need.

One possible objective of this legislation is to ensure that the public has information upon which to make an informed electoral decision. If the objective is to ensure public information then in my view, the response is not rationally connected or proportional to the objective. Given that the established parties are represented in Parliament already, and have access to vast amounts of free media coverage on that fact alone, and given that they have a wider financial base, surely it is the smaller papers who require the assistance of a legislative scheme of free advertising for communicating information. In my view, there is no national connection between this scheme, viewed as a whole, and any legitimate legislative objective of providing information, because while it assists in the communication of some information it denies communication of other information. The measures are disproportionate to any valid objective of communicating information. As previously noted, if wealth domination is a legitimate concern, the scheme provides considerable free time to the established parties with potentially the greatest financial base.

If time is, in fact, limited then the granting of disproportionate free time is particularly intrusive of freedom of expression. As mentioned previously, it is frequently the regional, emerging, or single issue parties, who force the real issues of the election. Moreover, as witnessed by the last election, there is no way of predicting when those emerging and regional parties become the ones most capable of forming the next government. The two emerging parties, the Bloc Québécois and the Reform Party obtained more seats than two of the established parties, including the party in power prior to the election. This legislation is arbitrary, not fair, and it is not rationally connected to a valid objective.

Both the trial judge and my colleague McFadyen J A find that the agreed purposes have the aim of ensuring that the public is fully informed of the major issues in an election. Yet the trial judge made the following specific finding of fact at pp 19–20:

I find, therefore, that sufficient information is indeed made available to the public to permit an informed decision. Members of the public have access to a number of sources for information concerning party platforms and the policy issues before the electorate. While I would not go so far as to say that the public is at times

fully informed. I do not hesitate to conclude that the potential for becoming fully informed certainly exists at present *and is not affected by the provisions of the impugned legislation.*

(Emphasis added)

This finding was made in the context of a section 3 right to vote analysis, wherein the learned trial judge found that the impugned scheme did not interfere with the right to vote because the voters still had every possibility of becoming properly informed despite the restrictions of advertising. This finding, however, categorically refutes both the pressing and substantial nature of this concern, and the rational connection of the impugned scheme to the stated objective. This finding means that the information of the party with only two minutes of free time can still reach the public. Certainly, there can be no pressing and substantial concern that the messages of the contenders will not also reach the public.

Means

Assuming, however, that there is a rational connection between the legislative scheme and some pressing and substantial legislative object, the next question becomes: does the scheme impair the right infringed as little as possible? Obviously, given that there does not seem to be any pressing and substantial need at all for this scheme, then if the right is infringed one iota it is more of an infringement than is necessary. It is at this stage that consideration of alternatives available to the government become important. There was clear expert evidence that the election spending controls serve the legitimate purpose of the government, while leaving the parties free to decide on the most effective way to express themselves. (No argument was made that election spending controls infringed Charter rights and so I do not comment on that issue.) One can think of numerous alternatives to the one presented. In my view, if communication of information is the objective, the appropriate starting point would be an approach that involves equal treatment. If needed, more time could be set aside. There is no basis for unequal treatment in a free and democratic society. The means do not infringe as little as possible in the entrenched right. If it is a legitimate objective to prevent parties satirical or fanatical in nature from using most of the free time because they were not a serious contender (a decision I do not make), or that there is an over-saturation of messages, the free time available for all can be limited. Or the free time can only be available after expenditure of sufficient funds, or the purchase of a sufficient amount of time, to ensure that the party is a serious contender or has significant support. With respect to the paid time, if a party is willing to expend money, then surely at least they are serious, and there is no justification for different treatment. The voters will decide if their views are satirical or fanatical. I do not accept the purpose of priority of messages so it is difficult to evaluate the means.

Is there proportionality between the effects of the measures which are responsible for limiting the Charter right, and the objective sought to be accomplished? In this case, we have a legislative

scheme which purports to place a state-regulated limit on the amount of time any political party may purchase during an election campaign. Given that one justification is to ensure that the public is properly informed, it is impossible to say that the effect of restricting political broadcasting is proportional to the objective. What had been established here is a very complicated, bureaucratic scheme to regulate a fundamental freedom in favour of the political parties in power. At best, it is interference with a fundamental freedom in response to nothing more than an unsubstantiated fear that the electorate will not hear the messages of the serious contenders. There is no evidentiary basis for that fear. This scheme may use time that would otherwise be available for in-depth political debate by politicians, and non-politicians alike.

Does the Broadcast Arbitrator's Discretion Make this Scheme Justifiable?

McFadyen J A concluded that the learned trial judge erred in failing to consider the discretion granted to the broadcast arbitrator to alleviate any unfairness that may result from the original application of the allocation formula found section 310(1). With respect, I fail to see how Charter rights are infringed any less because some independent officials *may* choose to alleviate unfairness in their discretion. While Parliament granted discretion with the intent that it could be used, it can be applied only after the application of the specific formula results in unfairness, which is not defined. One thing is certain, unfairness would never be interpreted to mean "unequally" because inequality is the very starting point of the formula. A discretion would never be intended to extend to a substantial departure from that formula. Certainly, there is no assurance it would. Parliament has given a clear indication of what it thinks is 'fair' and in the 'public interest'. It has set out a scheme that recognises priorities on the basis of past performance.

In my view, it would be unreasonable to conclude that an arbitrator could depart completely from the formula to, for instance, impose equality. Rather, given the purpose of ensuring that the public be informed of established parties' policies, the type of scenario that might cause an arbitrator to intervene would be an argument suggesting that the formula was not representative of the parties with the greatest chance of forming the government. It is unrealistic to expect that an arbitrator would change the order of the parties' entitlement created by the allocation formula. While it is true an adjustment was made increasing the Reform Party's time, the Reform's allocation was still significantly below the established parties, and the order of time allocation between parties was not disturbed.

The question of vagueness as to the term 'public interest' arose. In my view, the constitutional infirmity in this scheme lies in the fact that someone other than candidates and voters are making these decisions, regardless of the criteria used to make the decision. Again I refer to this Court in *Epilepsy Canada*, where at p 219, Cote J A says: "the phrase public interest is particularly untailored and unsuitable as a restraint on free speech." He cites *R. v Zundel* (No.2), [1992] 2 S.C.R. 731, pp 770–73. The following words of McLachlin J at 773 are particularly pertinent to this case:

I, for one, find cold comfort in the assurance, that a prosecutor's perception of "overall beneficial or neutral effect" affords adequate protection against undue impingement on the free expression of facts and opinions. The whole purpose of enshrining rights in the Charter is to afford the individual protection against even the well-intentioned majority. To justify an invasion of a constitutional right on the ground that public authorities can be trusted not to violate it unduly is to undermine the very premise upon which the Charter is predicated.

Again, just because the arbitrator may change the allocation does not change either the fact that the parties are regulated, and therefore not free, or the fact that they are all limited in the amount of time they may purchase regardless of the allocation.

Issue 4 Is severance applicable to save any of the impugned sections?

Severance is not an appropriate remedy because the impugned sections constitute a comprehensive code or a single scheme. I recognise the argument put forward by the appellant that in Charter cases the striking down of an entire statute is unusual. Of course, the relief sought by the respondents is not that the entire Canada Elections Act be struck down, but rather that the portion dealing with the government reservation and allocation formula for political campaign broadcasts be struck.

Professor Hogg in *Constitutional Law of Canada*, 3rd ed., 1992, p 393 states:

Charter review is not based on the pith and substance of a law, but on the question whether either the "purpose" or the "effect" of the law abridges a Charter right. Under this test, it is usually only a single section *or a few sections* of a statute that abridge a Charter right, and it is usually beyond argument that the rest of the statute can independently survive.

(Emphasis added)

Here we have a number of provisions which combine to restrict the ability of political parties to make campaign broadcasts. The appellant takes the position that sections 303, 316, 319 and 320 are necessary to support the integrity of the scheme. These sections taken together infringe freedom of political expression. This being a comprehensive scheme, it is not the court's role to pick and choose among the various aspects so as to effectively redraft the *section*: *The Queen v Morgentaler*, [1988] 1 S.C.R. 30 at 80. It is argued that one can remove the enforcement sections, and the prohibition on foreign advertising, and still leave the reservation and allocation formula. But can the court conclude with confidence that absent the restrictions necessary to support the scheme Parliament would have legislated reservation and allocation? This is not a case like *R. v Morales*, [1992] 3 S.C.R. 711, where a few offensive words can be struck out

leaving an otherwise effective scheme in their absence. In *R. v Osborne*, [1991] 2 S.C.R. 70 at 105, Sopinka J said the following:

In the final analysis, a law that is invalid in so many of its applications, as a result of wholesale reading down, bears little resemblance to the law that Parliament passed and a strong inference arises that it is invalid as a whole. In these circumstances it is preferable to strike out the section to the extent of its inconsistency with s. 2(b). To maintain a section that is so riddled with infirmity would not uphold the values of the Charter and would constitute a greater intrusion on the role of Parliament.

In my view, it is inappropriate to strike only sections 303, 316, 319 and 320 when the appellant argues they are integral to the scheme. The AG Canada argued that the restrictions on purchase of additional time was essential to support the allocation scheme. If more time is purchased, the allocation system cannot be maintained and the airwaves will be over-saturated with the less important messages. It is improper to now uphold those sections on a different basis. It is impossible to conclude that the government would have passed this legislation without the allocation scheme. McFadyen J A found that section 303 could be saved. With respect, I disagree. Section 303 limits the right of candidates to use broadcasting stations outside of Canada for the purpose of influencing an election in Canada. I am not prepared to say this restriction is minimal. Access to American stations may be vital. Broadcasting outside of the country may well influence editorials, TV commentators and news events which will be produced within the country.

Moreover, section 303 could never pass the pressing and substantial need justification, or the proportionality means test. All candidates and parties are subject to control within the country. It is well within the powers of Parliament to pass laws asking the candidates to produce documents, and swear affidavits of expenditures and production of supporting documents, if that is necessary. It is also within their power, as they have done, to control overall spending, if spending is the objective. In my view, there is simply no pressing and substantial need for section 303 short of the one submitted by the appellant, which is to ensure that all broadcast time allocated for political messages is allocated in accordance with the formula. It prohibits messages reaching the Canadian electorate from American stations. Even if the reporting of expenditures was a valid objective, keeping in mind that total election expenses can be and are strictly controlled and limited by other provisions of the Act, section 303 does not address a pressing and substantial concern, nor is it a proportionate response justifying the limit imposed by these provisions on freedom of expression during an election. In my view, even if severable, it could not be justified.

With respect to sections 319 and 320, I disagree with McFadyen J A that those sections are severable, although I agree that they are not constitutional. Again, the AG Canada argues that they are essential to the integrity of the scheme, because they preserve the balance of time

available for "important messages". Certainly they could not logically exist without the rest of the scheme because they are inextricably tied to it in the way the scheme operates. They must be considered with all the other sections. Without the formula, I am not certain any of the provisions would be passed. As mentioned earlier, I also am of the view that it is improper to sever and strike sections 319 and 320 before evaluating the purpose of the entire scheme.

An argument could be made that section 307, which merely ensures that the broadcasters reserve air time for the parties is not unconstitutional by itself. However, it is not a safe assumption that Parliament would have passed this provision without the unconstitutional allocation and enforcement scheme and the free-time scheme. Parliament would want to weigh the potentially limiting effects which a reservation of time (without a distribution formula) would have on all political parties. Parliament would want to consider and weigh the benefits, compared to the disadvantage to the broadcasters, other political interest groups, and commercial advertisers. That obviously has not been done because that was not the scheme. As well, the government will have plenty of time to redraft constitutionally acceptable legislation before the next federal election, should they decide to do so. In addition, it is doubtful that reservation of time alone would be a pressing and substantial need in view of the admitted facts of the parties and the substantial increase in broadcast stations. Considering the reality, it is particularly inappropriate for us to enter into this legislative decision-making.

Summary

In summary, I would dismiss the appeal and allow the cross-appeal on the grounds that this legislation infringes or is inconsistent with rights under sections 2(b) and 3 of the Charter and I would strike in addition to section 310, sections 303, 307, 316, 319 and 320.

JUDGEMENT DATED at Calgary, Alberta,
this 10th day of March
A.D. 1995

CONRAD J.A.

HARRADENCE J. A.

THEME 10

PUBLIC SERVANTS AND ELECTIONS

HIGH COURT OF AUSTRALIA

MASON C J

BRENNAN, DEANE, DAWSON, TOOHEY, GAUDRON AND McHUGH JJ

IAN GRANT SYKES

PETITIONER

AND

PHILIP RONALD CLEARLY AND OTHERS
RESPONDENTS

[NO.2]

ORDER

Answer the questions reserved for the consideration of the Full Court as follows:

(a) *Was the first respondent duly elected at the election?*

Answer: No.

(b) *If no to (a), was the election absolutely void?*

Answer: Yes.

(c) *If no to (b), was any and which candidate duly elected who was not returned as elected?*

Answer: Does not arise.

(d) *Who should pay the costs of the petition?*

Answer: By consent there should be no order for costs.

25 November 1992
F.C.92/046

Solicitors for the Petitioner:	<i>Minter Ellison Morris Fletcher</i>
Solicitors for the First Respondent	<i>Maurice Blackburn & Co</i>
Solicitors for the Third Respondent	<i>Holding Redlich</i>
Solicitors for the Fifth Respondent	<i>Freehill Hollingdale & Page</i>
Solicitors for the Intervener:	<i>Australian Government Solicitor</i>

Elections – eligibility of candidate – holding any office of profit under the crown – whether candidate in state teaching service as employee on unpaid leave was disqualified – resigning from public service before declaration of poll – candidate of foreign birth – effect of failure to reasonable steps to renounce foreign nationality – the Constitution (Cth) section 44 (1)(iv).

Background facts

This was a case stated by Dawson J pursuant to section 18 of the Judiciary Act 1903 (Cth). The case was out of a by-election for the Electoral Division of Wills in the House of Representatives, as a result of which the first respondent, Philip Ronald Cleary, was declared to be elected. The case was stated in proceeding commenced by petition by Ian Grant Sykes (petitioner) invoking the jurisdiction of the Court (sitting as the Court of Disputed Returns). The petitioner disputed the poll on the ground that the first respondent held on office of the Education Department of Victoria and was therefore incapable of being elected under section 44(iv) of the Constitution. The petitioner also alleged that other candidates, the second, third and fourth respondents, were ineligible for election. The petitioner claimed that each of the second and third respondents, though a naturalised Australian citizen, was a subject or citizen or entitled to the rights or privileges of a subject or citizen of a foreign power and was therefore under acknowledgement of allegiance to a foreign power within the meaning of section 44(i) of the Constitution.

Held (by majority): that the first respondent was not duly elected at the election and the election was void.

Cases cited in the Judgement

Grealy v Commissioner of Taxation (1989) 24 F.C.R. 405
In re Wood (1988) 167 C.L.R. 145
Liechtenstein v Guatemala [1955] 1 C.J.4
Joyce v Director of Public Prosecutor [1946] A.C. 347
Openheimer v Cathermole [1976] A.C. 249
In re Webster [1975] 132 C.L.R. 270
Harford v Linkey [1899] 1 Q.B. 852

MASON C J, TOOHEY AND McHUGH J J

This is a case stated by Dawson J pursuant to section 18 of the *Judiciary Act 1903* (Cth). The case arises out of a by-election for the Electoral Division of Wills in the House of Representatives, as a result of which the first respondent, Philip Ronald Cleary, was declared to be elected. The case was stated in proceedings commenced by petition by Ian Grant Sykes ("the petitioner") invoking the jurisdiction of this Court sitting as the Court of Disputed Returns under the *Commonwealth Electoral Act 1918* (Cth) ("the Electoral Act"). The petitioner disputed the poll on the ground that the first respondent held an office of profit under the Crown by reason, *inter alia*, of his being an officer of the Education Department of Victoria ("the Education Department") and therefore was incapable of being elected under section 44 (iv) of the Constitution. The petitioner also alleged that other candidates, the second, third and fourth respondents, were ineligible for election. The petitioner claimed that each of the second and third respondents, though a naturalised Australian citizen, was a subject or citizen of a foreign power and was therefore under acknowledgment of allegiance to a foreign power within the meaning of section 44(i) of the Constitution. It is not necessary to consider the eligibility of the fourth respondent as no argument in support of ineligibility was presented to the Court.

According to the facts recited in the case stated, a writ for the by-election was issued and the following dates were specified in it for the purposes of the election:

For the CLOSE OF THE ROLLS:	16 March 1992
For NOMINATION:	20 March 1992
For TAKING THE POLL:	11 April 1992
For the RETURN OF THE WRIT:	on or before 17 June 1992

The first respondent lodged his nomination on 20 March 1992. It was accepted by the Acting Divisional Returning Officer for the Electoral Division of Wills on that day. The poll was held on 11 April 1992. The total number of first preference votes cast in favour of the candidates in the election was follows:

SAVAGE, Katheryne Jeanette	1, 660
KARDAMITSIS, Bill (the third respondent)	18,784
KUHNE, Otto Ernst August	35
PHILLIPS, Richard Frank	136
KAPPHANM Wilhelm	34
RAWSON, Geraldine Mae (the fourth respondent)	453
DELACRETAZ, John Charles (the second respondent)	17,582
POULOS, Patricia	61
DROULERS, Julien Paul	68
FRENCH, William Leonard	90
POTTER, Felicia Cecilia	30

MURRAY, John	54
VASSIS, Chrisostomos	43
CLEARY, Philip Ronald	21,391
FERRARO, Salvatore	221
GERMAINE, Stanley Arthur	280
WALKER, Angela Howard	577
MACKAY, David Ewan	1,383
LEWIS, Robert John	216
SYKES, Ian Grant	364
KYROU, Kon	81
MURGATROYD, Cecil Godfrey	<u>258</u>
TOTAL	63,801

After the distribution of the preference votes of all of the candidates except those of the first and third respondents, the first respondent had an absolute majority of votes, having a total of 41,708 votes (65.7 per cent). The third respondent had a total of 21,772 votes (34.3 per cent). Without a special count, it is not known what number of second and subsequent preference votes were cast in favour of the other candidates by voters who cast their first preference vote in favour of the first or the third respondent. Further, without a special count, it is not known what number of subsequent preference votes were cast in favour of any candidate other than the first or third respondent and their second preference vote in favour of the first or third respondent.

The questions reserved in the case stated are:

- (a) was the first respondent duly elected at the election?
- (b) If no to (a), was the election absolutely void?
- (c) If no to (b), was any and which candidate duly elected who was not returned as elected?
- (d) who should pay the costs of the petition?

Question (a): Was the first respondent duly elected at the election?

Section 44 of the Constitution relevantly provides:

"Any person who –

.....

- (iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth:

.....

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State."

Before considering the meaning of this section and its application to the first respondent, it is necessary to consider the history of his service with the Education Department.

The history of the first respondent's service with the Education Department

The first respondent was appointed to the teaching service as a teacher in the Education Department by the Teachers' Tribunal pursuant to section 46 of the *Teaching Service Act 1958* (Vict.) ("the 1958 Act") on 1 January 1975. He thereupon became entitled to a salary and conditions of work determined pursuant to that Act. The 1958 Act was replaced by the *Education Service Act 1981* (Vict.) ("the 1981 Act") which in turn was amended and renamed the *Teaching Service Act 1981* (Vict.) by the *Teaching Service Act 1983* (Vict.) ("the 1983 Act"). At all times from his appointment on 1 January 1975 until his resignation was tendered and accepted as effective on 16 April 1992, the first respondent was an officer in the teaching service. That service was known as the education service during the currency of the 1981 Act before it was amended by the 1983 Act. His appointment was as a permanent teacher. He was not appointed for a specific term; nor was he appointed on probation. He served as a secondary teacher.

Persons employed in the teaching service pursuant to section 3 of the 1981 Act in the classification held by the first respondent are not attached or appointed to any particular position. They have no entitlement to remain in any particular position.

From 1 February 1990 to 27 January 1992 inclusive, the first respondent was granted leave without pay by the Director-General of Education (1) pursuant to section 35 of the 1981 Act. On 28 and 29 January 1992, he performed the duties of a teacher in the teaching service at Hoppers Crossing Secondary College and was paid \$290.17. On 30 January 1992, he commenced leave without pay for the remainder of the school year, that is, until 24 January 1993. This leave ceased on 16 April 1992 when his resignation became effective. At no time on or after 30 January 1992 was he attached to, nor did he have any entitlement to, any particular or designated position. During this time, he was described by the employer as an "unattached" but "allocated" officer.

Some time during April 1992 but prior to 11 April 1992, he applied for long service leave with full pay for the fourth term of the school year from 5 October 1992 to 18 December 1992 pursuant to section 37 of the 1981 Act. This application was cancelled when he resigned from the teaching service. The Ministry of Education subsequently forwarded to him payment in lieu

of long service leave pursuant to section 38 of the 1981 Act. The Ministry of Education does not permit permanent teachers to take long service leave while on leave without pay. The leave without pay must first be terminated.

Interpretation of section 44 (iv)

The disqualification of a person who holds an office of profit under the Crown has its origins in the law which developed in England in relation to disqualification of the members of the House of Commons. Section 44 (iv) is modelled on a provision of the *Act of Settlement 1701* (2), which was repealed (3) and replaced by provisions of the *Succession to the Crown Act 1707* (4). It has been said that the English provisions give effect to three main considerations of policies. They are (5):

- (1) the incompatibility of certain non-ministerial offices under the Crown with membership in the House of Commons (here, membership must be taken to cover questions of a member's relations with, and duties to, his or her constituents);
- (2) the need to limit the control or influence of the executive government over the House by means of an undue proportion of office-holders being members of the House; and
- (3) the essential condition of a certain number of Ministers being members of the House for the purpose of ensuring control of the executive by Parliament.

The meaning of the expression "office of profit under the Crown" is obscure. Blackstone defined an "offence" as "a right to exercise a public or private employment" and to take the "fees and emoluments thereunto belonging" (6). Blackstone had in mind offices to which particular duties were attached and which entitled the holder charge and retain fees for the performance of the services rendered by the office-holder.

It has been accepted in England that the disqualification of the holder of an "office of profit under the Crown" excludes permanent public servants, being officers of the departments of government, from membership of the House of Commons (7). Likewise, it has been accepted in Australia that a provision for disqualification expressed in the same terms excludes public servants, who are officers of the departments of government, from membership of the legislature (8). The exclusion of public servants from membership of the House contributes to their exclusion from active and public participation in party politics (9). In this way, the disqualification played an important part in the development of the old tradition of a politically neutral public service.

The exclusion of permanent officers of the executive government from the House was a recognition of the incompatibility of a person at the one time holding such an office and being a member of the House. There are three factors that give rise to that incompatibility. First,

performance by a public servant of his or her public service duties of a member of the House. Secondly, there is a very considerable risk that a public servant would share the political opinions of the Minister of his or her department and would not bring to bear as a member of the House a free and independent judgement (10). Thirdly, membership of the House would detract from the performance of the relevant public service duty.

The first respondent contends that the objects sought to be achieved by the disqualification of the holder of an "office of profit under the Crown" would sufficiently be served by confining the category of office-holders disqualified to that consisting of those who hold important or senior positions in government. History provides no support for this interpretation which would, in any event, fail to give effect to all the considerations or policies said to underlie the disqualification. In order to give effect to those considerations, the disqualification must be understood as embracing at least those persons who are permanently employed by government.

The first respondent seeks to find support for the interpretation for which he contends in judicial decisions relating to the word "office" in the context of revenue legislation. Thus, in *Grealy v Commissioner of Taxation* (11), the Full Court of the Federal Court said the word:

"usually connotes a position of defined authority in an organisation, such as director of a company or tertiary educational body, president of a club or holder of a position with statutory powers".

In order cases, it has been held that the word signifies a subsisting permanent substantive position which exists independently of the person who fills it from time to time (12). However, the meaning of "office" turns largely on the context in which it is found and, in the light of the principal mischief which section 44(iv) and its predecessors were directed at eliminating or reducing, namely, Crown or executive influence over the House, such a restricted meaning cannot be given to "office" in section 44 (iv).

Although a teacher is not an instance of the archetypal public servant at whom the disqualification was primarily aimed, a permanent public servant who is a teacher falls within the categories of public servants whose public service duties are incompatible, or the three grounds mentioned previously, with the duties of a member of the House of Representatives or a senator. In this respect, the first respondent was a person who came within the statutory definition of "teachers", i.e. "permanent officers employed in the [teaching] service" (13). As such, a permanent officer in the teaching service, he held an "office" (14). So much may be deduced from the statutory definitions of "officer" and "employee", the latter connoting a temporary employee. Indeed, this was conceded in argument by counsel for the first respondent.

Where an office in the teaching service is abolished, the holder of the office becomes an "unattached officer" and shall be deployed by the Chief General Manager (15) to any other office which the Chief General Manager deems appropriate (16) but, because "officer" is defined as

meaning any person who holds an office, this does not mean that an "unattached" officer holds no office. And, even if the effect of the legislation is that an unattached officer ceases to hold an office within the meaning of the 1981 Act, the officer nonetheless remains a permanent employee of the Crown and is, for the purposes of section 44 (iv), the holder of an office of profit under the Crown.

The taking of leave without pay by a person who holds an office of profit under the Crown does not alter the character of the office which he or she holds. The person remains the holder of an office, notwithstanding that he or she is not in receipt of pay during the period of leave (17).

Application to office of profit under the Crown in right of a State

The reference in section 44(iv) to "*any office of profit under the Crown*" (emphasis added) is apt to include an office of profit under the Crown in right of a state. Not only are words wide enough to achieve this result but also the last paragraph of the section proceeds on the footing that, but for that paragraph, a State Minister would hold an office of profit under the Crown in right of a state and be disqualified. If such an office of profit in a state stood outside section 44 (iv), there would have been no need to exclude State Ministers from the disqualification. The Convention Debates reveal that the exclusion of State Ministers from the disqualification was put forward because it was believed that State Ministers otherwise would be disqualified because each of them was relevantly the holder of an office of profit under the Crown (18). The exclusion of State Ministers from the disqualification was designed to ensure their availability for election at the inception of the Commonwealth Parliament. The exclusion in the last paragraph of section 44 of those receiving certain payments as officers or members of the Queen's navy or army proceeded likewise on the footing that otherwise section 44 (iv) would disqualify such persons. Both the text of section 44(iv) and the reason for the inclusion of the last paragraph in the section support the opinion of the commentators that the disqualification extends to state officers (19).

Moreover, the long-standing reasons for disqualifying Commonwealth public servants from membership of the Houses of Parliament have similar force in relation to state public servants. The risk of a conflict between their obligations to their state and their duties as members of the House to which they belong is a further incident of the incompatibility of being, at the same time, a state public servant and a member of the Parliament.

It follows that the first respondent, as the holder of an office of profit under the Crown, fell within section 44 (iv) until he resigned that office on 16 April 1992.

At what time does the disqualification operate?

The case for disqualification rests on that part of section 44 which provides that any person who falls within par.(iv) "shall be incapable of being chosen.....as a..... member of the House of Representatives". The petitioner submits that the word "chosen" extends to incorporate all the procedural steps necessarily involving the candidate in the electoral process so that the disqualification precludes participation in that process, including the step of nomination. On the other hand, the first respondent and the Attorney-General submit that a member is "chosen" when the member is declared to be elected, that is, when the poll is declared. On this interpretation of the provision, a candidate is disqualified only in the event that the disqualifying characteristic is in existence when the poll is declared. If this interpretation is accepted, the first respondent was not disqualified because his resignation took effect on 16 April 1992, before the declaration of the poll on 22 April 1992.

However, this interpretation must be rejected. As a matter of language, the disqualifying characteristics set out in section 44 are related to "being chosen". Whether those words refer to the act of choice or the process of being chosen is a question to be determined. Even on the narrower of the alternatives, namely, that the words refer to the act of choice, the outcome would be unfavourable to the first respondent. The people exercise their choice by voting (2)), so that it is the polling day rather than the day on which the poll is declared that marks the time when a candidate is chosen by the people. Of course, an absentee or postal vote may be cast before the polling day and, in a situation of emergency, arrangements may be made for the casting of votes after the polling day (21). But, these characteristics of the polling do not justify the conclusion that the declaration of the poll, which is the formal announcement of the result of the poll, amounts to, or even coincides with, the choosing by the electors of the member for the relevant electoral division. The declaration of the poll is the announcement of the choice made; it is not the making of the choice.

The interpretation just rejected would, if it were upheld, enable a public servant who falls within par. (iv) in section 44 to avoid disqualification by resigning from the relevant office of profit after the polling day but before the declaration of the poll. The public servant could be nominated and stand for election and, if he or she secured a majority of votes, have an option to resign and be declared elected or not to resign and be disqualified. The adverse consequences this would have for the electoral process are an additional reason for rejecting the suggest interpretation. The inclusion in the list of candidates on polling day of candidate who may opt for disqualification may well constitute an additional and unnecessary complication in the making by the electors of their choice. Furthermore, it is hardly conducive to certainty and speed in the ascertainment of the result of the election that it should depend upon a decision to be made by a candidate on or after polling day. Speed and certainty in the ascertainment of the result of the first election to the Parliament of the Commonwealth were enhanced by the fact that in 1901, in all the Australian colonies other than Queensland and parts of Tasmania, the "first past the post" system of electoral voting prevailed in lower House elections (22).

Reflection on these considerations persuades us that the words "shall be incapable of being chosen" refer to the process of being chosen, of which nomination is an essential part (23). That interpretation is supported by section 43 of the constitution which provides:

"A Member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House".

In that context, the words "shall be incapable of being chosen" must refer to the *process* of being chosen. It can scarcely have been intended that a member of Parliament could, while holding that office, stand for election for the other House of Parliament and, after the counting of the votes but before the declaration of the poll, resign the office which he or she then held, thereby ensuring his or her eligibility to be declared elected as a member of the other House.

It is to be noted that, under the Electoral Act, if only one candidate is nominated, the Divisional Returning Officer is required by the Electoral Act to declare that candidate duly elected (24) and that declaration may be made in advance of the polling day. The fact that, in such a case, the "choice" is made by reference to the state of affairs existing on nomination day may well be a reason for concluding that, if a candidate is not qualified on nomination day, he or she is incapable of being chosen. However, as section 44 of the Constitution does not necessarily require that, in such a case, the 'choice' be made in the manner dictated by section 179(2), the question may be put to one side (25).

This interpretation of section 44 (iv), because it has the effect of discouraging public servants from standing for election to the Parliament, has been criticised. There is force in the view that the field of potential candidates for election should be as wide as possible, having due regard to the provisions of section 44. However once it is accepted, as in our view it must be, that nomination is an essential element in the process of choice that is the electoral process, the answer to the question becomes inevitable.

It follows that the first respondent was incapable of being chosen as a member of the House of Representatives.

Question (b): If no to (a), was the election absolutely void?

Counsel for the third respondent submits that the Court should order a special count to be taken so that the preference votes on the elimination of the first respondent may be distributed. The decision in *In re Wood* (26), so it is said, supports this approach. That case decided that the election and return of an unqualified candidate are wholly ineffective to fill a vacant Senate place, that the election is not completed when an unqualified candidate is returned and that the purpose of the poll is to choose preferred candidates. In particular, *In re Wood* decided that a primary vote for an unqualified candidate does not destroy the voter's indication of his or her subsequent

preference (27). Although an indication of a voter's preference for an unqualified candidate is a nullify and the indication of preference for that candidate cannot be treated as effective, the ballot paper is not informal. It was held that "[t]he vote is valid except to the extent that the want of qualification makes the particular indication of preference a nullify" (28) and that there is no reason for disregarding the other indications of the voter's preference (29). The Court likened the position to that which arises when the candidate dies. Then, pursuant to section 273 (27) of the Electoral Act, a vote indicated on the ballot paper for the deceased candidate is counted to the candidate next in the voter's indicated order of preference and the numbers indicating subsequent preferences are treated as altered accordingly. In these circumstances, the situation in *In re Wood* was such as to warrant the conclusion that the special count would reflect the voters' "true legal intent" (30). Furthermore, in the light of the group system of voting which applies in Senate elections, it was highly probable, if not virtually certain, that a person who voted for Mr. Wood would have vote for another member of his group, had the voter known that Mr Wood has ineligible. The same comment cannot be made in the present case. Here a special count could result in a distortion of the voters' real intentions because the voters' preferences were expressed within the framework of a larger field of candidates presented to the voters by reason of the inclusion of the first respondent.

As Mr Rose Q.C. for the Australian Electoral Commission points out, the Electoral Act draws a distinction between House of Representatives and Senate elections in the case of the death of a candidate. Section 180 (2) provides that, if a candidate in a House of Representatives election dies between the declaration of the nominations and polling day, the election wholly fails, whereas, in the case of the death of a candidate in a Senate election between those days, section 273 (27) provides that the votes should be counted with the preferences adjusted accordingly. The reasons which lie behind the drawing of that distinction have equal application to the drawing of a like distinction between the election to the House of Representatives and to the Senate of candidates who are disqualified under section 44.

Accordingly, we would declare the election void and refuse to order a special count.

Question (c): If no to (b), was any and which candidates duly elected who was not returned as elected?

As the second and third respondents may wish to stand for the next election for the Electoral Division of Wills, the Court should answer this question. The eligibility of the two respondents turns on that part of section 44 which provides:

"Any person who

- (i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or it is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power:.....

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives"

Second respondent: facts

The second respondent, Mr Delacretaz, was born in Switzerland on 15 December 1923 and, from the time of his birth, was a Swiss citizen. He migrated to Australia on 13 June 1951 and has lived in Australia since then. On 20 April 1960 he became naturalised as an Australian citizen pursuant to Div. 3 of Pt III of the *Nationality and Citizenship Act 1948 (Cth)*. In so doing, he renounced all allegiance to any sovereign or State of whom or of which he was a subject or citizen, and took an oath of allegiance to Her Majesty the Queen, by which he swore to "be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors according to Law" and "faithfully [to] observe the laws of Australia and fulfill [his] duties as an Australian citizen".

However, he did not at any time make application to the Government of Switzerland to renounce or otherwise terminate his Swiss citizenship. He has held an Australian passport since 1960 and it is still current. He holds no other passport.

Under the law of Switzerland, a Swiss citizen will be released from his or her citizenship upon his or her demand if he or she has no residence in Switzerland and has acquired another nationality. The second respondent has made no such demand and is and was at all material times under the law of Switzerland a Swiss citizen and entitled to a Swiss passport to enter Switzerland without restriction and to reside in that country.

Third respondent: facts

The third respondent, Mr Kardamitsis, was born in Greece on 2 July 1952 and, from the time of his birth, was a Greek citizen. He came to Australia in 1969 as a migrant sponsored by his brother and has lived in Australia since then.

On 12 March 1975, he became an Australian citizen pursuant to Div.2 of Pt III of the *Australian Citizenship Act 1948 (Cth)*. In so doing, he renounced all other allegiance and swore the oath of allegiance in a form similar to, but not identical with, that sworn by the second respondent. He did not at any time make application to the Government of Greece to discharge his Greek nationality.

When he became an Australian citizen, he surrendered a Greek passport which he then held. It had expired one or two years after he had migrated to Australia. Between 1969 and 1978, he did not travel out of Australia. He was issued with an Australian passport on 24 April 1978, which

was valid for five years, and a further Australian passport on 21 May 1987, which was valid for ten years and is still current. He entered Greece on his Australian passport for a holiday in 1978 and in 1987, and for the funeral of his mother in 1979 and of his father in 1990.

He has never received any social security or other like benefits from the Government of Greece. He has never stood for office in Greece or voted or been recorded as a voter in an election in Greece.

Since leaving Greece, he has not, to his knowledge, done any act, made any statement or acted in any manner which would place him under any acknowledgement of allegiance, obedience or adherence to Greece or any other foreign power. In becoming an Australian citizen, he took a conscious and serious step which he believed involved his breaking his bond of allegiance with Greece and his establishing a new bond of allegiance with Australia. He has habitually resided in Australia since leaving Greece. The centre of his interests is Australia, not Greece. His principal family ties are with Australia, not Greece. He has participated in public life in Australia and seeks further such participation. He has had no such participation in Greece and seeks none. He has a bond of attachment with Australia and not with Greece (except that Greece is part of his personal history), and he has inculcated the same bond in his children. Save that he has visited Greece on several occasions and that he has some family and friends in Greece, he has severed his links with Greece to the extent that any citizen of Greece can without applying to discharge his or her Greek citizenship.

Under the law of Greece, a Greek national will have his or her Greek nationality discharged if (a) he or she has acquired the nationality of another country with the permission of the appropriate Greek Minister; or (b) he or she has acquired the nationality of another country and later obtains the approval of the appropriate Greek Minister for the discharge of his or her Greek nationality. In the latter case, the discharge of Greek nationality becomes effective as from the date of the Greek Minister's approval and not from the date of the acquisition of foreign nationality. The third respondent had not sought to have his Greek nationality discharged and, accordingly, under the law of Greece, he is and was at all material times a Greek national. As a result, he is and was at all material times entitled to apply for a Greek passport and, using that passport, to enter Greece and stay in Greece without time restrictions and without permission.

It was first brought to the attention of the third respondent that he might not be qualified to be a member of the House of Representatives by reason of section 44(i) of the Constitution after he was nominated. Until then, he did not know that he might not be so qualified, despite being an Australian citizen, and that he might, according to the laws of Greece, still be a citizen of that country. He did not know that there were procedures available in Greece by which Greek nationals can terminate their Greek nationality until he was so informed after the petition was issued.

In 1972, he and his wife, a naturalised Australian citizen, were married in Melbourne. They have three children, who were born in Australia and are Australian citizens.

He was elected a councillor for the Coburg City Council in 1989 and 1991 pursuant to Pt 3 of the *Local Government Act* 1989 (Vict.). Following each of these elections, he took an oath of allegiance as a councillor pursuant to section 63 of the *Local Government Act*. He resigned from his position as a councillor effective as from 18 March 1992.

On or about 5 July 1990, he was appointed as a Justice of the Peace for the State of Victoria pursuant to P III of the *Magistrates Courts Act* 1971 (Vict.). On July 1990, he swore an oath of office and an oath of allegiance pursuant to section 12 and Sched. 2 of the *Magistrates' Courts Act*. By virtue of Div. 1 of Pt 6 of that Act, he continues to be a Justice of the Peace for the State of Victoria.

Interpretation of section 44(i)

The petitioner submits that each of the second and third respondents is "a subject or citizen or is entitled to the privileges of a subject or citizen of a foreign power" within the meaning of section 44(i). In support of this submission, the petitioner argues that the respondents' assumption of Australian citizenship did not entail a renunciation of their antecedent citizenship or nationality and that, in order to achieve such a renunciation, it was necessary for them to comply with the requirements with respect to renunciation of citizenship or nationality of the law of Switzerland or Greece, as the case may be.

The common law recognises the concept of dual nationality, so that, for example, it may regard a person as being at the same time a citizen or national of both Australia and Germany (31). At common law, the question of whether a person is a citizen or national of a particular foreign State is determined according to the law of that foreign State (32). This latter principle is, in part, a recognition of the principle of international law, restated in the *Nottebohm Case* (33), that:

"It is for every sovereign State..... to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted its own organs in accordance with that legislation".

This rule finds expression in Art. 2 of the Hague Convention of 1930 (34), to which Australia is a party:

"Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."

And Art.3 of that Convention acknowledges that a person having two or more nationalities may be regarded as its national by each of the States whose nationality he or she possess.

In the *Nottebohm Case*, Liechtenstein sought to exercise its right of diplomatic protection (35) in respect of acts of Guatemala with respect to the person and property of Nottebohm, a naturalised Liechtenstein citizen. The question considered was whether the naturalisation conferred on Nottebohm by and under the law of Liechtenstein could successfully be invoked against Guatemala. The International Court of Justice pointed out that, where the question had arisen with regard to the exercise of diplomatic protection, international arbitrators had recognised the "real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved" as that which gave rise to a right to exercise diplomatic protection. The majority went on to say that, in determining the real and effective nationality (36):

"[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred either directly by the law or upon whom it is conferred, either directly by the or as result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than that with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national."

However, the critical words in section 44 (i) do not permit this court to adopt the approach which has been taken by international law. Here the question is different: is the candidate a subject or citizen or entitled to the rights or privileges of a subject or citizen of a foreign power? And, as already stated, at common law, as in international law, that question is to be determined according to the law of the foreign State concerned.

But, there is no reason why section 44(i) should be read as if it were intended to give unqualified effect to that rule of international law. To do so might well result in the disqualification of Australian citizens on whom there was imposed involuntarily by operation of foreign law a continuing foreign nationality, notwithstanding that they had taken reasonable steps to renounce that foreign nationality. It would be wrong to interpret the constitutional provision in such a way as to disbar an Australian citizen who had taken all reasonable steps to divest himself or herself of any conflicting allegiance. It has been said (38) the provision was designed to ensure:

"that members of Parliament did not have a split allegiance and were, not, as far as possible, subject to any improper influence from foreign governments".

What is more, section 44 (i) finds its place in a Constitution which was enacted at a time, like the present, when a high proportion of Australians, though born overseas, had adopted this country as their home. In that setting, it could scarcely have been intended to disqualify an Australian citizen for election to Parliament on account of his or her continuing to possess a foreign nationality, notwithstanding that he or she had taken reasonable steps to renounce that nationality. In this respect, it is significant that section 42 of the Constitution requires a member of Parliament to take an oath or affirmation of allegiance in the form set out in the schedule to the Constitution.

What amounts to the taking of reasonable steps to renounce foreign nationality must depend upon the circumstances of the particular case. What is reasonable will turn on the situation of the individual, the requirements of the foreign law and the extent of the connection between the individual and the foreign State of which he or she is alleged to be a subject or citizen. And it is relevant to bear in mind that a person who has participated in an Australian naturalisation ceremony in which he or she has expressly renounced his or her foreign allegiance may well believe that, by becoming an Australian citizen, he or she has effectively renounced any foreign nationality.

Application of section 44(i) to the second respondent

The second respondent omitted to make a demand for release from Swiss citizenship which would have been granted automatically as he has no residence in Switzerland and has been an Australian citizen for thirty-two years. Because he has failed to make such a demand, it cannot be said that he has taken reasonable steps to divest himself of Swiss citizenship and the rights and privileges of such a citizen.

Application of section 44(i) to the third respondent

The third respondent has omitted to seek the approval of the appropriate Greek Minister for the discharge of his Greek nationality. Whether the grant of that approval is a matter of discretion or is automatic is not altogether clear. Presumably it is the former. But, in the absence of an application for the exercise of the discretion in favour of releasing the third respondent from his Greek citizenship, it cannot be said that he has taken reasonable steps to divest himself of Greek citizenship and the rights and privileges of such a citizen.

We would answer the questions reserved for the consideration of the full Court as follows:

- (a) No.
- (b) Yes.
- (c) Does not arise.
- (d) By consent there should be no order for costs.

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We would answer the questions reserved for the consideration of the full Court as follows:

- (a) No.
- (b) Yes.
- (c) Does not arise.
- (d) By consent there should be no order for costs.

BRENNAN J For the reasons stated by Mason C J, Toohey and McHugh JJ, I agree that section 44 (iv) of the Constitution rendered the first respondent incapable of being chosen as a member of the House of Representatives. Accordingly, I agree that he was not duly elected. I agree also with their Honours' reasons for concluding that the election was void and that a special count should not be ordered.

There remains the challenge based on section 44 (i) of the Constitution to the respective capacities of the second and the third respondents to be chosen as a member of the House of Representatives. Section 44 (i) reads as follows:

"Any person who –

(i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power.....

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."

The purpose of this sub-section is to ensure that no candidate, senator or member of the House of Representatives owes allegiance or obedience to a foreign power or adheres to a foreign power. Putting acknowledgement of adherence to a foreign power to one side, the sub-section contains three categories of disqualification, each of them being descriptive of a source of a duty of allegiance or obedience to a foreign power. The first category covers the case where such a duty arises from an acknowledgement of the duty by the candidate senator or member. The second category covers the case where the duty is reciprocal to the status conferred by the law of a foreign power. The third category covers the case where the duty is reciprocal to the rights or privileges conferred by the law of a foreign power.

The second category refers to subjects or citizens of a foreign power – subject being a term appropriate when the foreign power is a monarch of feudal origin; citizen when the foreign power is a republic (39). In the United Kingdom, by the common law, allegiance is owed to the Sovereign "by ... natural born subjects [and] by those who, being aliens, become.... subjects by denization or naturalization", as Lord Jowitt L.C. said in *Joyce v Director of Public Prosecutions* (40). At common law, the status of a subject was coincident with the owing of allegiance (41). A similar rule is adopted by other legal systems with respect to their nationals. In the *Nottebohm Case* (42), the judgement of the International Court of Justice noted that:

"Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights *and is bound by the obligations* which the law of the State in question grants to or imposes on its nationals." (Emphasis added.)

Nationality has sometimes been regarded as an international law attribute of subjects or citizens (43) but, for the purposes of construing section 44(i), it is not necessary to draw any distinction between a person who is a national of a foreign power and a person who is a subject or citizen of a foreign power (44). The second category covers persons who, by reason of their status as subjects or citizens (or nationals) of a foreign power, owe a duty of allegiance or obedience to the foreign power according to the law of the foreign power.

The third category mentioned in section 44(i) covers those who, though not foreign nationals, are under the protection of a foreign power as though they were subjects or citizens of the foreign power. Where non-nationals are under the protection of a foreign power, they may owe a duty of allegiance or obedience to the foreign power by the Law of that power. Thus, in *Joyce v Director of Public Prosecutions*, it was held that a non-subject owed allegiance to the Sovereign by reason of the protection afforded him by the issue of a British passport.

The first category applies when, as a matter of fact, the person has acknowledged allegiance, obedience or adherence to a foreign power. The second and the third categories apply when, under the law of a foreign power, the person owes allegiance or obedience to the foreign power by reason of his or her status, rights or privileges. Although section 44 (i) is part of the municipal law of Australia, the status, rights or privileges mentioned in the second and third categories are generally ascertained by reference to the municipal law of the foreign power. Lord Cross of Chelsea in *Oppenheimer v Cattermole* (45) stated the law in these terms:

"Our law is, of course, familiar with the concept of dual nationality... and the English law which is to be applied in deciding whether or not Mr. Oppenheimer was a German national at the relevant time is not simply our municipal law but includes the rule which refers the question whether a man is a German national to the municipal law of Germany."

Our law runs parallel with the law of England in this respect (46). *Nottebohm's* case, though it was invoked to avoid this conclusion, in truth confirms it. The International Court of Justice had to determine whether Guatemala was obliged by international law to recognise that Liechtenstein had conferred nationality on Nottebohm so as to entitle Liechtenstein to assert the right of diplomatic protection of Nottebohm by taking international judicial proceedings against Guatemala (47). The Court acknowledged that nationality is to be settled for the purposes of each State by its own municipal law (48). However, the Court was not determining an issue under municipal law. Liechtenstein's entitlement to exercise protection had to be determined by international law. In that context, the Court observed that international tribunals, when confronted with competing claims made under the respective municipal laws of two States –

"have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors

are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc."(49)

The doctrine of "real and effective nationality" is a doctoring of international law, not municipal law, though it may be imported into municipal law when an issue in the municipal courts makes it necessary to choose between the competing claims of two *other* States asserting the nationality of an individual (50). The opinion of the International Court in *Nottebohm's case* accords with the provisions of the Convention on Certain Questions Relating to the Conflict of Nationality Laws (51), which read relevantly as follows:

Article 1.

"

It is for each State to determine under its own law who are its nationals. this law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

Article 2.

Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

Article 3.

Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."

When the issue in an Australian court is simply whether an individual is a national of a foreign power, that issue is ordinarily determined by reference to the municipal law of the foreign power (52). The general rule, however, is subject to qualifications, one of which is stated by Lord Cross in *Oppenheimer v Cattermole* (53):

"If a foreign country purported to confer the benefit of its protection on and to exact a duty of allegiance from persons who had no connection or only a very slender connection with it our courts would be entitled to pay no regard to such legislation on the ground that the country in question was acting beyond the bounds of any jurisdiction in matters of nationality which international law would recognise. In this respect I think that our law is the same as that of the United

States as stated by the circuit Court of Appeals, Second Circuit, in *United States ex rel. Schwarzkopf v Uhl* (54)."

That qualification has no application either to the second or to the third respondent. Each was born and grew up as a citizen of a foreign power before coming to live in Australia. Each, by the respective laws of those foreign powers, remains a citizen of that power. Each, by those respective laws, owes allegiance to a foreign power. True, it is that each purported to renounce his citizenship of, and allegiance to, his native country when he became an Australian citizen but that renunciation was ineffective to alter his status and obligations under the law of his native country. There is no reason to hold that the application of the laws of the second and third respondents' respective native countries exceeds the jurisdiction in matters of nationality which international law would recognise.

However, recognition by our municipal law of the effect of foreign law on status and allegiance is subject to a further qualifications. In times of war, common law courts have refused to recognise changes in the status either of British subject (55) or of enemy aliens (56) under the law of the foreign hostile power. In these cases, non-recognition has been justified on the ground of public policy (57). But there is no reason why the doctrine of public status, rights or privileges under foreign law would extend the operation of section 44(i) of the Constitution to cases which it was not intended to cover, that section should be construed as requiring recognition of foreign law only in those situations where recognition fulfils the purpose of section 44(1). To take an extreme example, if a foreign power were mischievously to confer its nationality on members of the Parliament so as to disqualify them all, it would be absurd to recognise the foreign law conferring foreign nationality. Section 44 (i) is concerned to ensure that foreign powers command no allegiance from or obedience by candidates, senators and members of the House of Representatives; it is not concerned with the operation of foreign law that is incapable in fact of creating any sense of duty, or of enforcing any duty, of allegiance or obedience to a foreign power. It accords both with public policy and with the proper construction of section 44(i) to deny recognition to foreign law in these situations. If foreign law were recognised in these situations, some Australian citizens would be needlessly deprived of the capacity to seek election to the Parliament and other Australians would be needlessly deprived of the right to choose the disqualified citizens to represent them. However, there are few situations in which a foreign law, conferring foreign nationality or the rights and privileges of a foreign national, is incapable in fact of creating a sense of duty, or is incapable of enforcing a duty, of allegiance or obedience to a foreign power. One such situation does occur when the foreign law, purporting to affect nationality of persons who have had no connection or only a very slender connection with the foreign power, exceeds the jurisdiction recognised by international law. That is the situation described by Lord Cross (58) in which international law does not recognise the jurisdiction of the foreign power. A second situation occurs when an Australian citizen has done all that lies reasonably within his or her power (i) to renounce the status or the rights or privileges conferred by the foreign law carrying a reciprocal duty of allegiance or obedience to the foreign power and (ii) to obtain a release from any such duty. It is not sufficient, in the second situation, for a

person holding dual citizenship to make a unilateral declaration renouncing foreign citizenship when some further step can reasonably be taken which will be effective under the relevant foreign law to release that person from the duty of allegiance or obedience. So long as that duty remains under the foreign law, its enforcement – perhaps extending to foreign military service – is a threatened impediment to the giving of unqualified allegiance to Australia. It is only after all reasonable steps have been taken under the relevant foreign law to renounce the status, rights and privileges carrying the duty of allegiance or obedience and to obtain a release from that duty that it is possible to say that the purpose of section 44(i) would not be fulfilled by recognition of the foreign law.

The second and third respondents each failed to take steps reasonably open under the relevant laws of his native country – Switzerland in one case, Greece in the other – to renounce his status as a citizen of that country and to obtain his release from the duties of allegiance and obedience imposed on citizens by the laws of that country. Accordingly, neither the second nor the third respondent was capable of being chosen as a member of the House of Representatives.

I agree with the answers proposed by Mason C J, Toohey and McHugh J J to the questions in the stated case.

DEANE J This is a case stated in proceedings instituted in the court as the Court of Disputed Returns under the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"). The petitioner, Mr Sykes, challenges the validity of the declaration on 23 April 1992 of the poll for a by-election held to elect the member of the Commonwealth House of Representatives for the Electoral Division of Wills in the State of Victoria ("the by-election"). The first respondent, Mr Cleary, is the person who was declared to be the successful candidate in that by-election. There were twenty-one unsuccessful candidates. They included the petitioner, the second respondent (Mr Delacretaz), the third respondent (Mr Kardamitsis) and the fourth respondent (Ms Rawson). The fifth respondent, the Australian Electoral Commission, was given leave to appear and is deemed to be a respondent under section 359 of the Electoral Act.

In the petition, the petitioner challenged the validity of the declaration of the poll on the ground that he and the first four respondents had each been "incapable of being chosen" as a member of the House of Representatives. The substantive questions raised for the opinion of the Full Court are:

- "(a) Was the First Respondent duly elected at the [by-election]?
- (b) If no to (a), was the [by-election] absolutely void?
- (c) If no to (b), was any and which candidate duly elected who was not returned as elected?"

The argument of those questions has been confined to the status of Mr Cleary, Mr Delacretaz and Mr. Kardamitsis. It has been argued, on behalf of the petitioner, that those three candidates had each been disqualified from being chosen as a member of the House of Representatives by the provisions of section 44 of the Constitution and that, since they were the three candidates who had obtained the highest number of first preference votes (more than ninety per cent between them), the appropriate order to be made is that the by-election was absolutely void.

The Constitution

Section 44 of the Constitution provides:

"Any person who –

- (i) Is under any acknowledgment of allegiance, obedience or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or
- (ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer:

or

- (iii) Is an undischarged bankrupt or insolvent: or
- (iv) Holds any office of profit under the Crown or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or
- (v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth."

Section 44 should be read in the context of section 46 which provides:

"Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction."

That constitutional provision, which has now been effectively replaced by a similar but less harsh statutory provision (59), added penal consequences to disregard of section 44's declaration that a person is "incapable of sitting". In *In re Webster* (60), Barwick C J, speaking of par. (v) of section 44, said that the effect of those penal consequences was that "the paragraph should receive a strict construction". I respectfully agree with that comment. It is true that those penal consequences only attach if the person concerned purports to sit as a member of the Parliament. As the present case demonstrates, however, the question whether the person is "incapable of ... sitting" will commonly depend upon whether he or she was "incapable of being chosen" by reason of the provisions of section 44.

The Status of Mr. Cleary

The basis of the argument that Mr. Cleary was disqualified is the fact that, up until 16 April 1992, he held a permanent appointment as a teacher with the Education Department of Victoria. The petitioner contends that, by reason of that appointment, Mr. Cleary was, at relevant times, the holder of an "office of profit under the Crown" for the purposes of section 44(iv) and was accordingly "incapable of being chosen" as a member of the House of Representatives. Counsel for Mr. Cleary sought to meet that argument at three distinct levels. First, it was submitted that, in all the circumstances of the case, Mr. Cleary had not held an office of profit under the Crown at any relevant time. Next, it was submitted that, even if Mr. Cleary had held an office of profit under the Crown, section 44 (iv) of the Constitution should be construed as referring only to an office of profit held under the Crown in right of the Commonwealth whereas any office of profit held by Mr. Cleary had been under the Crown in right of the State of Victoria. Finally, it was submitted that any office of profit under the Crown held by Mr. Cleary had been relinquished by the time that he was, for the purposes of section 44 (iv), "chosen.....as... a member of the House of Representatives". It is convenient to consider those submissions in the order in which I have mentioned them.

Was Mr. Cleary's appointment as a teacher an office of profit under the Crown?

It is not disputed that Mr. Cleary held a permanent appointment as a teacher with the Education Department of Victoria for a number of years prior to his resignation with effect from 16 April 1992. He had, however, been "on leave without pay" from 30 January 1992, which was before the issue of the writ for the by-election. During that period of leave without pay, Mr. Cleary received no salary or allowances and, while formally allocated to Hoppers Crossing Secondary College, did not hold any particular or designated position in the Department. Nor was that period of leave without pay counted as service for the purposes of calculating long service leave, sick leave or recreation leave. During it, neither Mr. Cleary nor the Department made any contributions to the relevant superannuation fund for his benefit.

Mr. Cleary's permanent appointment as a teacher existed under the provisions of the *Teaching Service Act* 1981 (Vict.) ("the 1981 Act"). An examination of those provisions makes clear that the appointment continued while Mr. Cleary was on leave without pay and that it was and remained, for so long as it subsisted, an office of profit under the Crown. Section 2 defines "[t]eachers" as "permanent *officers* employed in the teaching service for teaching in State schools"(61). Section 3 provides that "there shall be *employed by Her Majesty in the teaching service* teachers and principals and such other persons as are necessary for the purposes of this Act" (62). The 1981 Act refers, on a number of occasions (63), to persons in the position of Mr. Cleary (i.e. without any particular or designated position) as "*unattached officer[s]*" (64). It also expressly refers to "[f]orfeiture of office in certain cases" none of which was applicable to him (65). Clearly, the permanent appointment as a teacher under the 1981 Act which Mr. Cleary

continued to hold while on leave without pay was "an office ... under the Crown". Equally clearly, in a context where the conditions applying generally to the office of teacher included entitlement to remuneration (66), the fact that the holder of such an office is temporarily on leave without pay or other emoluments does not deprive the office itself of its character as an office of profit (67).

It follows that the submission that Mr. Cleary did not, while he was on leave without pay, hold an office of profit under the Crown must be rejected.

Does section 44(iv) of the Constitution refer only to an office of profit under the Crown in right of the Commonwealth?

At the time of the adoption of the Constitution, the British Crown was generally perceived to be one and indivisible (68). This perception was reflected in section 2 of the *Commonwealth of Australia Constitution Act* 1900 (Imp.) which expressly provided that the "provisions of this Act" – which included a section (69) setting out the Constitution – "shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom." In the context of that perception of the unity and indivisibility of the British Crown, the phrase "office of profit under the Crown" in section 44 (iv) of the Constitution would have been understood, at the time of the establishment of the Commonwealth, as referring to any office of profit under the British Crown regardless of geographical location or distinctions between different governments within the then British Empire.

The words of par. (iv) of section 44 and of the final qualifying paragraph of the section (which relates to par. 44 (iv)) confirmed that the reference to "the Crown" was intended to be understood in that broad general sense. If, for example, the reference to "the Crown" in section 44 (iv) was intended to be read as a reference to the Crown in right of the Commonwealth only, the words "out of any of the revenues of the Commonwealth" in the sub-section would be surplusage. More important, the express provision in the final paragraph that par. (iv) "does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State" makes plain that the relevant words of par. (iv) were intended to be construed as *prima facie* applicable to an office of profit under the Crown regardless of whether the office in question related to the government of the Commonwealth or to the government of a State.

The development of the full independence and sovereignty of nations such as Australia, Canada and New Zealand which maintained their allegiance to the personal embodiment of the Crown of the United Kingdom made it inevitable that the common law recognise that the British Crown has a "distinct and independent" capacity in each of its relationships with the different polities which make up the Commonwealth (70). That development also compels the adjustment of the content of operation of some of the provisions of the Constitution so that they accord with the realities

of contemporary national sovereignty and international relationships (71). It is, however, unnecessary to pursue that subject for the purposes of the present case since it is apparent that no such adjustment could legitimately transform section 44 (iv) from a provision which was clearly intended to encompass the holding of an office of profit under the Crown in right of either the Commonwealth or a State into one which applied only to the holding of an office of profit under the Crown in right of the Commonwealth.

Accordingly, the second submission advanced on behalf of Mr Cleary fails.

Did Mr. Cleary hold an office of profit at the relevant time?

The writ for the by-election was issued by the Speaker of the House of Representatives (72) of 9 March 1992. Its command was addressed to Brian Field Cox, the Electoral Commission (73), and specified the following dates:

For the CLOSE OF THE ROLLS:	16 March 1992
For NOMINATION:	20 March 1992
For TAKING THE POLL:	11 April 1992
For the RETURN OF THE WRIT:	on or before 17 June 1992

In the event, those dates were all observed. The scrutiny and counting of votes commenced after the close of the poll on 11 April 1992. The counting of votes was completed on 22 April 1992 with the distribution of preferences to the stage where all candidates other than Mr. Cleary and Mr. Kardamitsis had been excluded (74). At that stage, Mr. Cleary had a total of 41,708 votes which represented 65.7% of the total number of unrejected or valid ballot-papers. On 23 April 1992, the Acting Divisional Returning Officer declared Mr. Cleary to be elected as the member of the House of Representatives for the Division of Wills (75). On the same day, the Acting Electoral Commissioner certified in writing on the writ the name of Mr. Cleary as the elected candidate and returned the writ to the Speaker (76).

As has been mentioned, Mr. Cleary resigned from the Victorian Education Department effective as from 16 April 1992. That means that he held an office of profit under the Crown at the time the writ for the by-election was issued, at the time he was nominated as a candidate and at the times when voting in the by-election took place, when the poll closed and when the scrutiny and counting of votes commenced. On the other hand, he had relinquished any office of profit under the Crown a week before counting was completed by the distribution of preferences. The question arises whether, in those circumstances, section 44 (iv)'s provision that a person who holds an office of profit under the Crown "shall be incapable of being chosen" as a member of the House of Representatives precluded Mr. Cleary from being validly declared to be elected as such a member.

It is argued on behalf of the petitioner that the process of "being chosen" to which section 44 (iv) refers is an on-going one which when all votes have been cast on the day the poll is held or when the result of an election is declared and the writ is returned. Disqualification is incurred, so the argument proceeds, if a person holds an office of profit under the Crown at any time during the course of that process. In contrast, it is argued on behalf of Mr. Cleary that the words "being chosen" are, in their context in section 44, synonymous with "being elected" and that, for the purposes of the section, a person is chosen or elected as a member of the House of Representatives only when counting is completed, the poll declared and the writ returned. Obviously, there is considerable force in each of those contending arguments. Ultimately, I have come to the conclusion that the words "incapable of being chose" in section 44 should be construed as meaning not capable of becoming the chosen member by being declared elected at the termination of the election process. I turn to explain my reasons for that conclusion.

As a matter of mere language, the words "being chosen" are clearly capable of referring to the whole process of election commencing with nomination and finishing with either the declaration of the poll or the return of the writ ("the wide construction"). They are, however, also capable of being construed as referring to the declaration of the poll which represents the final step in the procedure for choosing the particular member of the Parliament ("the narrow construction"). Until that stage is reached and that final step is taken, events can intervene which preclude the candidate who will, when counting is completed and preferences are (to the extent necessary) distributed, have an absolute majority of votes from ever being actually elected as a member of the House of Representatives. Most obviously, he or she can die. Alternatively, if a disqualifying event under section 44 of the Constitution intervenes, the disqualified person cannot be validly declared duly elected at a time when he or she is disqualified (77).

Considerations of content and of context seem to me to favour the narrow construction. The provisions of section 44 do not represent a code determining which citizens are and which citizens are not qualified to be elected to the Parliament. Legislative power to determine the qualifications of members of the Parliament is conferred upon the Parliament itself by virtue of the combined operation of sections 34, 51 (xxxvi) and 16 of the Constitution. what section 44 does is to impose an overruling disqualification of any person who comes within its terms regardless of whether the Parliament thinks (or seeks to enact), in the context of contemporary circumstances and standards, that disqualification is unjustified. Such an overriding disqualification provision should, in my view, be construed as depriving a citizen of the democratic right to seek to participate directly in the deliberations and decisions of the national parliament only to the extent that its words clearly and unambiguously require.

Moreover, in the construction of a constitutional provision such as section 44, "the purpose it seeks to attain must always be kept in mind" (78). That purpose is essentially to ensure that the composition of the Parliament is appropriate for the discharge in the national interest of its functions as the legislature of a free and independent nation under a constitution which adopts the Cabinet or Westminster system of parliamentary democracy but is otherwise structured upon the

doctoring of a separation of legislative, executive and judicial powers. As one would expect in the Constitution of a country whose population consisted (by 1900) largely of immigrants or the descendants of immigrants, the disqualification provisions of section 44 look solely to present allegiance, status and interests. Subject to one exception, the verbs of the section are all in the present tense: "is", "holds", "has", "does not". The exception is the critical verbal phrase which is in the future tense: "shall be incapable". Clearly, the section is directed to the imposition of minimum requirements which, regardless of the views of the Parliament, a citizen must satisfy during the period in which he or she is actually a senator or a member of the House of Representatives.

The rationale of the disqualification of a person from membership of the Commonwealth Parliament by reason of the holding of an office of profit under the Crown itself supports the narrow construction of the relevant words of section 44(iv). That rationale is that, subject to the important qualifications flowing from the adoption of the Cabinet system of government (79)???, it is undesirable that a person be subjected to the possible conflicting responsibilities and loyalties and the potential for abuse of power or opportunity which may be involved in, or flow from, concurrent membership of the national Parliament and the holding of an office of profit under the Crown. Implicit in it is a perception of the need to preserve the freedom and independence of the Parliament and to limit the control or influence of the executive government (80). None of those potential disadvantages or dangers arises until a person actually holds both positions, that is to say, until after he or she is declared elected as a member of the Parliament.

There are, of course, practical considerations which favour the preclusion of a person who is disqualified from becoming or sitting as a member of the Parliament from nominating as a candidate or having his or her name included on the ballot paper. It is however, arguable in relation to some of the disqualifying provisions of section 44, that the preferable approach would be to permit nomination or even participation in the poll at least in circumstances where it is plain, or where it lies within the competence of the particular person to ensure, that a candidate will not be disqualified from being chosen as a member of the Parliament at the time when he or she will, if successful on the poll, be declared to be elected. Thus, as regards disqualification under section 44 by reason of the holding of an office of profit under the Crown, it has long been recognised that it would be against the national interest and unfair if the comparatively large percentage of the total employed population employed in the Commonwealth or State Public Services⁸¹ were able to stand as candidates for election to the national Parliament only if they completely forfeit the security and seniority of their respective appointments. According, one finds provision in both Commonwealth and State legislation aimed at enabling a public servant to resign his or her office to stand for Parliament while being assured that, in the event of not being elected, he or she will be entitled to⁸², or entitled to seek⁸³, full reinstatement. There is surely much to be said for the view that a procedure such as the taking of leave without pay or other emoluments followed by resignation when it is apparent that the person concerned will ultimately be elected is a preferable one to the rather devious procedure of an ostensible termination of appointment in the context of a persisting relationship and entitlement to resume

the appointment if unsuccessful at the poll⁸⁴. Certainly, it appears to me that, within the context of section 44's disqualification of a person actually becoming, or sitting as, a member of the Parliament while holding an office of profit under the Crown, it should be competent for the Parliament to determine whether, and if so on what terms, a person holding such an office should be allowed to participate at all as a candidate in the electoral process. In that regard, it is relevant to note that the first Parliament of the Commonwealth considered it to be its function to address and determine the question whether a candidate should, at the time of nomination, be qualified under the Constitution to be actually elected as a member of the Parliament. Sections 94 and 95 of the *Commonwealth Electoral Act* of 1902 provided:

"94. No person shall be capable of being elected as a Senator or a Member of the House of Representatives unless duly nominated.

95. To enable a person to be nominated as a Senator or a member of the House of Representatives he must be qualified under the Constitution to be elected as a Senator or a Member of the House of Representatives."

Section 162 of the current Electoral Act reproduces the old section 94. The old section 95 is not reproduced in the current legislation.

It should be mentioned that counsel for the petitioner placed considerable reliance upon the decision of the Queen's Bench Division (Wright and Bruce JJ) in *Harford v Linskey*⁸⁵. That case concerned a local election under the *Municipal Corporations Act* 1882 (UK) which provided in section 12 that a person interested in a contract with the corporation of borough "shall be disqualified for being elected and for being a councillor". After the candidates had been nominated, and before the polling day, an objection was lodged to the petitioner's nomination on the grounds that he was interested in such a contract. Notwithstanding the fact that the petitioner could have assigned his interest in the contract to a third party before polling day, the court upheld the objection and subsequent disqualification, declaring that it was "safest to hold" that "a person, who at the time of nomination is disqualified for election is disqualified also for nomination"⁸⁶.

The decision in *Harford v Linskey* seems to me, however, to be remote from, and quite persuasive in relation to, the question of the proper construction of section 44 of the Australian Constitution. For one thing, the relevant words of section 44(iv) differ from those which were in issue in the English case. For another, the wording of section 44 was settled by the framers of the Constitution before the decision of the English Divisional Court and was adopted by the people of five of the six Australian Colonies before any report of that decision would have been available in this country. More important, "no real analogy"⁸⁷ can be drawn between the purpose and intended operation of a provision such as section 44 of the Australian Constitution and a statutory provision, such as that involved in *Harford v Linskey*, intended to regulate the conduct of a local government election. As Sedgwick pointed out in his classic text on constitutional construction⁸⁸:

"Another consideration will impress itself still more forcibly on the minds of those who are called to consider questions connected with the interpretation of constitutional law. Statutes can and do enter into the details of our daily transactions; they can and do prescribe minute directions for the control of those affected by them. Constitutions, on the other hand, from the nature and necessity of the case, in many instances go little beyond the mere enunciation of general principles; and it is impossible, and would lead to endless absurdity, to endeavour to apply to a declaration of principles the same rules of construction that are proper in regard to an enactment of details. In regard to a statute, the general duty of the judge is that of a subordinate power, to ascertain and to obey the will of superior; in regard to a Constitution, his functions are those of a co-ordinate authority, to ascertain the spirit of the fundamental law, and so to carry it out as to avoid a sacrifice of those interests which it is designed to protect."

A local government provision such as that involved in *Harford v Linskey* performs the function of prescribing the detailed procedures to be followed in respect of the local elections to which it applies. In contrast, section 44 is, as has been mentioned, an overriding disqualification provision in a national Constitution which envisages and empowers the future enactment by the Parliament of legislation and empowers the future enactment by the Parliament of legislation settling such detailed procedures⁸⁹. The considerations of practical convenience and of what is "safest" which influenced the English Divisional Court in *Harford v Linskey* are appropriate to be taken into account by the Parliament in enacting, and by the courts in construing, such legislation. They do not, however, provide any basis whatever for an expansive construction of an overriding constitutional provision whose operation is effectively to confine the democratic rights of many citizens and to restrict the legislative powers of the Parliament.

It follows from what has been said above that section 44 (iv)'s provision that a person who holds an office of profit under the Crown shall be incapable of being chosen as a member of the House of Representatives should be construed as applicable only to the case where a person holds such an office at the time when he or she becomes elected by the declaration of the poll. Otherwise, the extent, if at all, to which the holding of an office of profit under the Crown should preclude a citizen from being nominated or participating as a candidate in the electoral process is a matter for the Parliament. That being so, Mr. Cleary was not disqualified by the operation of section 44 of the Constitution.

The Electoral Act, sections 162 and 170 (1)

No direct reference was made in the argument of the present case to the provisions of either sections 162 or 170(1) of the Electoral Act. It appears to me, however, that the question whether Mr. Cleary was "duly elected" cannot be answered without reference to them. Relevantly, they provide:

"162. No person shall be capable of being elected as a Senator or a Member of the House of Representatives unless duly nominated.

...

170. (1) A nomination is not valid unless, in the nomination paper, the person nominated:

...

(b) declares that:

(1) the person is qualified under the Constitution... to be elected as....a member of the House of Representatives".

(Emphasis added)

The case stated does not set out the details of what appear in Mr. Cleary's nomination paper. Presumably, at the time of nomination, he believed that he was qualified under the Constitution to be elected as a member of the House of Representatives and declared to that effect in the nomination paper. The effect of what has been written above, however, is that he was not so qualified until he resigned his permanent appointment with the Education Department. In these circumstances, a question obviously arises whether he was "duly nominated" for the purposes of section 162. The answer to that question would seem to depend upon whether the provisions of section 170(1) are formal only, in the sense that their requirements will be satisfied and a person will be "duly nominated" for the purposes of section 162 if the nomination papers contain the necessary declaration notwithstanding that, by reason of innocent mistake, the declaration is erroneous.

If the outcome of the case depended upon my conclusion about whether Mr. Cleary's election was invalidated by the combined operation of sections 162 and 170(1) of the Electoral Act, I should have thought it necessary to extend to the parties the opportunity of making submissions about the effect of those provisions in the circumstances of this case. A majority of the Court is, however, of the view that Mr. Cleary was disqualified by the direct operation of section 44(iv) of the Constitution in any event. In these circumstances, it would obviously be a waste of time and money to invite such submissions. It would, however, be appropriate for me to express a conclusion about the effect of sections 162 and 170(1) in circumstances where that particular question was not addressed in the argument of the case.

The Status of Mr. Delacretaz and Mr. Kardamitsis

The question whether Mr. Delacretaz and Mr. Kardamitsis were disqualified by section 44 of the Constitution only arises if the question whether Mr. Cleary was disqualified is answered in the affirmative. If Mr. Cleary was not disqualified, the fact that either or both of Mr. Delacretaz and Mr. Kardamitsis were would not have the effect that Mr. Cleary's election was invalidated. However, in a context where my conclusion that Mr. Cleary was not disqualified is subject to the possible effect of sections 162 and 170(1) of the Electoral Act and is, in any event, a dissenting

one, it is appropriate that I indicate my views in relation to the status of Mr. Delacretaz and Mr. Kardamitsis.

The petitioner contends that Mr. Delacretaz and Mr. Kardamitsis each came, at relevant times, within section 44(i)'s disqualification of any person who "is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power." Obviously, and this was not disputed, those words must be read down to some extent. Otherwise, to take an extreme hypothetical example, it would lie within the power of a foreign nation to disqualify the whole of the Australian Parliament by unilaterally conferring upon all of its members the rights and privileges of a citizen of that nation. The reason why that is so is that section 44(i) refers only to being "entitled" to the rights or privileges of a subject or a citizen of a foreign power and not to the assertion of acceptance of those rights. The real question on this aspect of the case is how the words of the sub-election should be read down to avoid such obviously objectionable and unintended consequences.

Section 44 (i)'s whole purpose is to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament. The first limb of the sub-section (i.e. "is under any acknowledgement of allegiance, obedience, or adherence to a foreign power") involves an element of acceptance or at least acquiescence on the part of the relevant person (90). In conformity with the purpose of the sub-section, the second limb (i.e. "is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power") should, in my view, be construed as impliedly containing a similar mental element with the result that it applies only to cases where the relevant status, rights or privileges have been sought, accepted, asserted or acquiesced in by the person concerned. The effect of that construction of the sub-section is that an Australian-born citizen is not disqualified by reason of the second limb of section 44(i) unless he or she has established, asserted, accepted, or acquiesced in, the relevant relationship with the foreign power. The position is more difficult in a case such as the present where the relationship with the foreign power existed before the acquisition (or re-acquisition) of Australian citizenship. In such a case, what will be involved is not the acquisition or establishment, for the purposes of section 44, of the relevant relationship with the foreign power but the relinquishment or extinguishment of it. It does, however, seem to me that the purpose which section 44 seeks to attain and which "must always be kept in mind" (91) would not have included the permanent exclusion from participation at the highest level in the political life of the nation of any Australian citizen whose origins lay in, or who has had some past association with, some foreign country which asserts an entitlement to refuse to allow or recognise his or her genuine and unconditional renunciation of past allegiance or citizenship.

Accordingly, and notwithstanding that citizenship of a country is ordinarily a matter determined by the law of that country (92), the qualifying element which must be read into the second limb of section 44(i) extends not only to the acquisition of the disqualifying relationship by a person who is already an Australian citizen but also to the retention of that relationship by a person who has subsequently become an Australian citizen. A person who becomes an Australian citizen will

not be within the second limb of section 44(i) if he or she has done all that can reasonably be expected of him or her to extinguish any former relationship with a foreign country to the extent that it involves the status, rights or privileges referred to in the sub-section.

Mr. Kardamitsis has been an Australian citizen since 12 March 1975 upon which day he surrendered his Greek passport to the Australian Government and took an oath of allegiance that included the words "renouncing all other allegiance". Since then, he has taken three further oaths of allegiance of this country, twice as a councillor and once as a Justice of the Peace. Nonetheless, he remains a Greek national under the law of Greece. Under that law, his Greek nationality will only be discharged if, in the words of the case stated, "he obtains the approval of the appropriate Greek Minister". The case has been argued on the basis that, apart from applying for that "approval", Mr. Kardamitsis had, at relevant times, done all that he could do to relinquish and extinguish his Greek nationality and allegiance and the rights and privileges flowing from such nationality and allegiance.

The formal ceremony which culminated in the grant of Australian citizenship of Mr. Kardamitsis included, as has been indicated, a public renunciation of allegiance to any country other than Australia and an oath of allegiance to the Sovereign of this country. Involved in it was a clear representation by the Australian Government and people that, provided it was made genuinely and without reservation, that public renunciation and oath of allegiance constituted, for the purposes of the Constitution and other laws of this country, the final severing of formal national ties and the compliance with whatever requirements were necessary to become a full and equal member of this nation. In the context of that clear representation and of Mr. Kardamitsis' subsequent years of Australian Citizenship, it would not be reasonable to expect him now to make an application to a Greek Minister for the exercise of what would appear to be a discretionary power to approve or disapprove the discharge of the Greek nationality which he had unreservedly renounced in the manner specified by this country at the time he became an Australian citizen. Implicit in such an application would be an assertion of the continued existence of that Greek nationality and, more importantly, an acknowledgement of, and submission to, the discretionary authority of the relevant Greek Minister to decide whether it should or should not be discharged. In my view, Mr. Kardamitsis had, on the material before the Court, done all that he could reasonably be expected to do for the purposes of the Constitution and laws of this country to renounce and extinguish his Greek nationality and any rights or privileges flowing from it. Accordingly, on that material, he had, for the purposes of section 44(i) of the Constitution, relinquished and extinguished his relationship with Greece to the extent that it would represent a cause of disqualification.

The status of Mr. Delacretaz is more difficult. If the matter had been for me alone, I would have preferred to refrain from expressing a concluded view about it in circumstances where the material before the Court is somewhat sketchy and where Mr. Delacretaz was not represented at the hearing. Since the other members of the Court have dealt with the question, however, it is desirable that I indicate that, in a context where the onus of establishing that an Australian citizen

is disqualified by section 44(i) from full participation in the national government clearly rests on the person who asserts it, I do not think that the material before the Court is adequate to found a conclusion that Mr. Delacretaz has taken all reasonable steps to extinguish his Swiss citizenship and allegiance and to renounce any rights and privileges flowing from that citizenship.

Mr. Delacretaz was now been a Australian citizen for more than thirty years. It is not suggested that, in all that time, he has done anything which constituted in assertion or acknowledgement of Swiss citizenship or allegiance or that he has been otherwise than completely and solely loyal to Australia. Nor, subject to the qualification mentioned below, is it suggested that he has not done all that he could reasonably be expected to do to extinguish Swiss citizenship and allegiance and to renounce any rights or privileges flowing therefrom. The qualification is that, under Swiss law, Mr. Delacretaz remains a Swiss citizen. He must make a formal demand or request to the Swiss Government before his citizenship will be released or terminated under that law. This he has failed to do.

The case of Mr. Delacretaz differs from that of Mr. Kardamitsis in that the material before the Court indicates that Mr. Delacretaz is, under Swiss law, entitled to be released from Swiss citizenship if, as is the case, he has not had residence in Switzerland and has acquired another nationality. There is no ministerial discretion involved. That material does not, however, disclose the precise procedure to be followed in making the relevant demand or request for extinguishment of Swiss citizenship or whether that demand or request involves, as one would expect it to, an at least implicit assertion or acknowledgement of the continued existence of the obligations of that citizenship. Such an assertion or acknowledgement would, in my view, be inconsistent with the public and unqualified renunciation of allegiance to any country other than Australia which Mr. Delacretaz made as part of the formal ceremony pursuant to which he became an Australian citizen.

It must be stressed that the question whether Mr. Delacretaz has taken all reasonable steps to terminate Swiss citizenship and allegiance is not being asked for the purposes of Swiss law. It is being asked for the purposes of the Australian Constitution. Nonetheless, if Mr. Delacretaz had become an Australian citizen only yesterday, I would have been of the view that it was reasonable to expect that he take the formal steps necessary to terminate his Swiss citizenship under Swiss law. However, in a context where more than thirty years of Australian citizenship have followed a public renunciation of allegiance to any country other than Australia and the swearing of an unqualified oath of allegiance to the Sovereign of this country in full compliance with the procedures required by the Australian authorities, it appears to me that it would be quite wrong to conclude that, for the purposes of our law, Mr. Delacretaz should now be expected to assert or acknowledge the existence of Swiss citizenship so that it can be terminated for the purposes of Swiss law. On the material before the Court, Mr. Delacretaz had, by the time of the by-election, done all that could reasonably be expected of him, for the purposes of the law of this country, to terminate any ties with any country other than Australia. Accordingly, he was not disqualified by section 44(i) of the Constitution.

Conclusion

I would answer question (a) of the case stated as follows:

Subject to the possible effect of ss.162 and 170(1) of the *Commonwealth Electoral Act* 1918 (Cth), the first respondent was duly elected at the by-election.

In view of the answer which I would give to question (a), it is agreed that inappropriate that I answer questions (b) and (c). The parties are agreed that question (d), which relates to costs, should not be answered.

DAWSON J I agree with Mason, C J, Toohey and McHugh J J, for the reasons which they give, that the first respondent was, until he resigned his position as a teacher in the Victorian teaching service, the holder of an office of profit under the Crown within the meaning of section 44(iv) of the Constitution and that he was, therefore, incapable of being chosen as a member of the House of Representatives in the by-election for the Electoral Division of Wills. I also agree with Mason C J, Toohey and McHugh J J, for the reasons which they give, that, as a result, the by-election should be declared absolutely void under section 360(1) (vii) of the *Commonwealth Electoral Act* 1918 (Cth).

I desire only to add some comments on the position of the second and third respondents.

At common law, whether or not a person is a subject or citizen of a foreign state is a question that is generally to be determined by reference to the municipal law of that foreign state (93). The International Court of Justice held in the *Nottebohm Case* (94) that where there are competing claims made under different municipal laws, the nationality to be attributed to a person as a matter of international law is his "real and effective nationality", this being determined by the "stronger factual ties between the person concerned and one of the States whose nationality is involved" (95). The test under international law does not, however, assist in the present case which involves the proper construction of section 44 (i) of the Constitution. I agree with Mason C J, Toohey and McHugh J J, and with Brennan J, that section 44(i) should not be given a construction that would unreasonably result in some Australian citizens being irremediably incapable of being elected to either House of the Commonwealth Parliament.

Putting to one side extreme examples of foreign nationality or citizenship being foisted upon persons against their will, a person who is a subject or citizen of a foreign state by virtue of the municipal law of that state will not be incapable of being chosen or of sitting as a senator or a member of the House of Representatives if he has taken all steps that could reasonably be taken to renounce that foreign nationality or citizenship. What is reasonable will depend upon the circumstances of the case. It will depend upon such matters as the requirements of the foreign law for the renunciation of the foreign nationality, the person's knowledge of his foreign nationality and the circumstances in which the foreign authority to exercise a discretion to allow a person to relinquish his foreign nationality need not necessarily preclude the person from being capable of being chosen or of sitting as a senator or a member of the House of Representatives. Further, if the foreign law does not permit a person to relinquish his foreign nationality then there are obviously no steps, save for unilateral renunciation, which that person can reasonably take to do so and, therefore, that person will not be precluded by reason only of that foreign nationality from being capable of being chosen or of sitting as a member of either House of the Commonwealth Parliament.

There is no dispute that, under Swiss law, the second respondent was at all relevant times a citizen of Switzerland or that, under Greek law, the third respondent was at all relevant times a Greek national. When the second and third respondents became Australian citizens they renounced their

allegiance to their former countries but this did not result in their foreign nationality being relinquished under the law of those countries. There were steps which both the second and third respondents could reasonably have taken under the laws of those countries in order to relinquish their foreign nationality in accordance with those laws. I agree, therefore, that the second and third respondents were incapable of being chosen as members of the House of Representatives in the Wills by-election.

For these reasons I would answer the questions reserved in the manner proposed by Mason C J, Toohey and McHugh J J.

GAUDRON J I agree with Mason C J, Toohey and McHugh J J, for the reasons that their Honours give, that the first respondent was incapable of being chosen as a member of the House of Representatives in the 1992 Wills by-election and that that by-election should be declared absolutely void. Accordingly, I would answer the questions reserved in the case stated in the manner proposed by their Honours.

It is appropriate that I stated my views as to section 44(i) of the Constitution in its application to the second and third respondents. That sub-section prevents the election to either House of the Parliament of "[a]ny person who[i]s under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power". It is said that the second and third respondents are, respectively, citizens of Switzerland and of Greece or entitled to the rights and privileges of citizens of those countries because their laws recognise them as their citizens.

The facts concerning the second and third respondents are set out in the joint judgement of Mason C J, Toohey and McHugh J J. It is necessary only to observe that they are Australian citizens, each having been naturalised after migrating from the country of his birth: the second respondent, Mr. Delacretaz, was naturalised on 20 April 1960 pursuant to the *Nationality and Citizenship Act* 1948 (Cth) ("the 1948 Act") as it then stood; Mr. Kardamitsis, the third respondent, was naturalised on 12 March 1975 pursuant to the *Australian Citizenship Act* 1948 (Cth) ("the Citizenship Act") as the 1948 Act had then become.

It is convenient to turn first to the position of Mr. Kardamitsis. In 1975, when he was naturalised, the citizenship Act provided for the acquisition of Australian citizenship by naturalisation, taking effect, in the case of those who were required to take an oath or make an affirmation of allegiance, from the taking of that oath or the making of that affirmation and, in other cases, from the date on which the Minister granted a certificate of Australian citizenship (96). Mr. Kardamitsis fell into the first category and he swore or affirmed his allegiance – it is not clear which – as then required by the Citizenship Act.

When Mr. Kardamitsis was naturalised, the oath of allegiance was to be sworn or the affirmation made "in the manner provided.....and in accordance with the form contained in Schedule 2" (97). Nothing presently turns on the requirements as to the manner of taking the oath or making the affirmation. The oath and affirmation set out in Sched.2 (98), commenced with these words:

"I, A.B., renouncing all other allegiance, swear/solemnly and sincerely promise and declare.....".

The form of oath and affirmation required by the Citizenship Act, as it stood in 1975, was introduced in 1966 when section 11 of the *Nationality and Citizenship Act* 1966 (Cth) ("the 1966 Act") amended the Second Schedule to the 1948 Act "by inserting after the letters 'A.B.'... the words 'renouncing all other allegiance'". At the same time, section 12 of the 1966 Act introduced

the Third Schedule containing the form of oath and affirmation required in the case of women wishing to be registered as British subjects without citizenship (99). That also involved the renunciation of all other allegiance. The second and Third Schedules which were then enacted were substantially re-enacted as Sched.2 and Sched.3 in 1973 when extensive amendments resulted in the transformation of the 1948 Act into the Citizenship Act. Schedule 3 was repealed in 1984 (100). The renunciation of all other allegiance remained part of the oath and affirmation required for naturalisation until 1986 (101).

As at 1975 – indeed, from the enactment of the 1948 Act – the Citizenship Act made provision for the renunciation of Australian citizenship (102). However, apart from the forms of oath and affirmation introduced in 1966 and substantially re-enacted in 1973, it was silent, as it had been since 1948, with respect to the renunciation by an Australian citizen of his or her allegiance to a foreign country.

One other feature should be observed with respect to the Citizenship Act as it stood in 1975. It provided, in section 17, that:

"An Australian citizen of full capacity, who, whilst outside Australia and New Guinea, by some voluntary and formal act, other than marriage, acquires the nationality or citizenship of a country other than Australia, shall thereupon cease to be an Australian citizen."

The current position is much as it was in 1975, although it is not restricted to acts done outside Australia (103). And there has been provision to the same general effect at least since 1920 when the *Nationality Act* 1920 (Cth) provided, in section 21, that:

"A British subject who, in any foreign state and not under disability, by obtaining a certificate of naturalization or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject."

It is generally accepted that, at common law, a person could have dual citizenship or allegiance (104). Of course, the common law has been modified to the extent that statute law now provides and, at least since 1920, has provided for the loss of Australian citizenship (in which I include the status of British subject which we had prior to citizenship) by the acquisition of foreign citizenship.

It is also generally accepted that, at common law, the question whether, for the purposes of municipal law, a person is a citizen or subject of a foreign country (more precisely, whether he or she is to be treated as such) is, as a general rule, to be answered by reference to the law of the country concerned (105). That approach is understandable if foreign citizenship has no consequences for citizenship of the country whose courts are considering the matter or for the

rights ordinarily attaching to citizenship of that country. But our legal system is not of that kind. As has been seen, it has been the case, at least since 1920, that Australian citizenship can be lost by the acquisition of foreign citizenship. And as appears from this case, it has been the position since 1901 that an Australian citizen (including a British subject as we used to be) has been incapable of being chosen or of sitting as a member of either House of the Parliament if he or she is citizen of a foreign country or otherwise comes within section 44(i) of the Constitution.

There is nothing novel in the proposition that a municipal court may, on grounds of public policy, refuse to apply the law of another country, even in cases where, according to the municipal law, the matter in issue is governed by the law of that other country (106). Thus, it has been said, for example, that a court will not apply a foreign citizenship law which does not conform with established international norms (107) or which involves gross violation of human rights (108). And if the question be whether Australian citizenship has been lost or the rights ordinarily attaching to Australian citizenship have been excluded, every consideration of public policy and commonsense tells against the automatic recognition and application of foreign law as the sole determinant of that matter. However, that need not be considered in the case of Mr. Kardamitsis. His position, in my view, is governed by the Citizenship Act, as it stood in 1975.

It cannot be supposed that, in enacting the form of oath and affirmation introduced in 1966 and in substantially re-enacting it in 1973, the Parliament intended that the formal renunciation of all other allegiance, notwithstanding that it was solemnly sworn or affirmed, should be entirely devoid of legal effect. Particularly is that so in a statutory context in which real limits were imposed on dual citizenship and a right to renounce Australian citizenship – albeit one that was circumscribed (109) – was expressly recognised.

Of course, an Australian naturalisation law providing for the renunciation of foreign citizenship could not, of itself, affect the position of a naturalised Australian under the law of the country whose citizenship he or she renounced. And a section 44 (i) of the constitution may impose limits on the power to legislate with respect of foreign citizenship. But putting the constitutional question aside for the moment, the Parliament could enact a law to the effect that foreign law should not be decisive of the question whether, for the purposes of Australian law, a naturalised Australian should be treated as a citizen of another country.

In a context in which the Citizenship Act, as it stood in 1975, made provision for the automatic loss of Australian citizenship on the acquisition of foreign citizenship in the circumstances set out in section 17 and for the effective renunciation of Australian citizenship, the requirement that an oath be sworn or an affirmation made renouncing all other allegiance necessarily carried, in my view, the implication that foreign law was not to be decisive of the question whether a naturalised Australian who had renounced foreign citizenship was to be treated as a citizen or as entitled to the rights and privileges of a citizen of the country then renounced. And, in my view, that same context disclosed, also as a matter of necessary implication, the extent to which regard was to be had to the law of that country if that question should arise.

Section 17 of the Citizenship Act, as it stood in 1975, placed real limits on, but by no means constituted a complete bar to, dual citizenship. It did not, for example, operate by reference to citizenship acquired by birth. There was, thus, nothing to preclude Mr. Kardamitsis from being a Greek citizen by birth and an Australian citizen by naturalisation. In that context and on the basis that the renunciation of his allegiance to Greece was intended to have some legal effect, the effect of the Citizenship Act, as it then stood, could only have been that the question of his Greek citizenship or his entitlement to the rights and privileges of a Greek citizen, if it arose under Australian law, was to be determined by reference to Greek law if, after renouncing that allegiance, he, in some way, reasserted citizenship of Greece, but otherwise was to be answered on the basis that it had been effectively renounced. Unless approached in that way, the oath and affirmation required by the Citizenship Act in 1975 (indeed, from 1966 to 1986) and which operated to confer Australian citizenship, was, to the extent that it involved renunciation of all other allegiance, but an empty gesture.

It is necessary to deal with two matters to which some reference has already been made. The first is the question whether, in the light of section 44(i) of the Constitution, Parliament may validly legislate to the effect that I have said is necessarily to be implied from the terms of the Citizenship Act, as it stood in 1975. It cannot be the case that, for the purpose of section 44 (i), the question of foreign citizenship or entitlement to the rights and privileges of foreign citizenship is one that is invariably to be answered by the application of foreign law for, as Deane J points out in that event a foreign power would disable the Parliament by conferring citizenship on all its members. But, in my view, the solution is not to be found in reading down section 44 (i), rather, it lies in examination of the circumstances in which foreign law should be applied to determine questions arising under the sub-section. And, on the same basis, the question of legislative power is one which requires identification of the circumstances in which foreign law may be disregarded. Whatever limits on legislative power are imported by section 44(i), it does not, in my view, limit the power of Parliament to provide to the effect that, if prior foreign citizenship has been renounced in compliance with Australian law, the law of the country concerned should not be applied for any purpose connected with Australian law, including the determination of any question arising under section 44(i) itself, unless that prior citizenship has been reasserted.

The second matter concerns the amendment of Sched. 2 in 1986 (110), removing the renunciation of other allegiance from the oath and affirmation of allegiance required for naturalisation. Once it is accepted that the Citizenship Act, as it stood in 1975, involved in the directive to the effect already indicated, it follows that, for all purposes of Australian law, Mr. Kardamitsis had a right to have any question of his Greek citizenship or his entitlement to the rights and privileges of a Greek citizen determined on the basis that that citizenship was effectively renounced and that, only if he reasserted it in some way, would the question be answered by reference to Greek law. By virtue of section 8(c) (III) of the *Acts Interpretation Act* 1901 (Cth) that right was not affected by the amendment of Sched. 2 in 1986.

The material does not reveal anything which suggests that Mr. Kardamitsis has, in any way, reasserted citizenship of Greece. Given that what is at stake is the right to participate in the democratic process as a member of Parliament – a right ordinarily attaching to citizenship – the onus of establishing that he did anything of that kind must lie on the party asserting it ¹¹². That being so, for the purpose of section 44(i) of the Constitution, Mr. Kardamitsis is neither a Greek citizen nor a person entitled to the rights and privileges of a Greek citizen.

The provisions of the 1948 Act under which Mr. Delacretaz was naturalised were different in a number of respects from those in the Citizenship Act, as it stood in 1975. Importantly, and as already indicated, the oath or affirmation of allegiance required by the 1948 Act, as it stood in 1960, did not involve the renunciation of prior allegiance. Despite this, Mr. Delacretaz, in fact, formally renounced all other allegiance as preliminary to taking the oath which resulted in his naturalisation¹¹³.

It appears from the second reading speech for the *Nationality and Citizenship Act* 1966 (Cth) (which introduced the form of oath and affirmation involving renunciation of all other allegiance) that, for some time past, there had been a "practice of requiring applicants ... to renounce allegiance to their former countries" in "a prominent and separate part of the naturalisation ceremony"⁽¹¹⁴⁾. It is clear from Mr. Delacretaz' naturalisation certificate that that is what happened in his case.

As already indicated, the issue that arises with respect to section 44(i) is, in my view, whether and to what extent foreign law should determine its effect in any particular situation. Given its terms and purpose, regard must, I think, be had to foreign law in any case where nothing has been done to renounce foreign citizenship or if renounced, it has, in some way, been reasserted. But, again because of its terms and purpose, regard should not be had to foreign law if reasonable steps have been taken to renounce other allegiance, save, of course, where reasserted. Leaving reassertion aside, where reasonable steps have been taken to renounce foreign allegiance, questions arising under section 44(i) should, in my view, be answered on the basis that those steps achieved their purpose. That approach involves no reading down of section 44(i), although it may have the same result: rather, it is to spell out the process involved in determining its effect in a particular case.

Whether section 44(i) be read down or whether it be approached in the way that I favour, the question whether reasonable steps have been taken is a question for Australian law. It may involve some consideration of the content of the law of the country whose citizenship is in question, but the main consideration must be the circumstances of the person concerned.

As has already been mentioned, Mr. Delacretaz formally renounced all other allegiance, having been required to do so as a condition of naturalisation. Whether that condition was authorized by the 1948 Act, as it stood in 1960, need not be considered; it must be presumed that, in complying with that condition, Mr. Delacretaz thought he was engaging in a meaningful act in the sense that, at least for the purposes of Australian law, that act would achieve its object. What

he might have thought with respect to his position under Swiss law is not material, for this case is concerned only with his position under Australian law.

The material reveals that, under Swiss law, Mr. Delacretaz will be released from Swiss citizenship if he so demands and if, as is the case, he has no residence in Switzerland and has acquired another nationality. The materials do not disclose whether that has always been the position. Nor do they reveal what, if anything, Mr. Declaretaz knew or believed the position to be. But, even assuming that he could at any stage obtain an automatic release from his Swiss citizenship and that he knew that to be the case, it does not seem to me to be reasonable to expect him to seek release from his Swiss citizenship and that he knew that to be the case, it does not seem to me to be reasonable to expect him to seek release when it necessarily involves acknowledgement of citizenship that has already been formally renounced. That being so, Mr. Delacretaz, by formally renouncing all their allegiance as a preliminary to naturalisation and as part of the naturalisation ceremony, must be held to have taken reasonable steps to renounce his Swiss citizenship.

There is nothing to suggest that Mr. Delacretaz has done anything to reassert Swiss citizenship. That being so and having regard to what was said in relation to Mr. Kardamatsis with respect to the onus of proof, Mr. Delacretaz is neither a Swiss citizen nor entitled to the rights and privileges of a Swiss citizen for the purposes of section 44 (i) of the Constitution.

Footnotes

- (1) *From 26 November 1991, the Chief Manager, Department of School Education: see Teaching Service (Further Amendment) Act 1991 (Vict.) ("the 1991 Act"), s. 6 (1)(b)*
- (2) *12 & 13 Wm. III c.2*
- (3) *4 & 5 Anne c. 20, s. 28*
- (4) *6 Anne c. 41, ss. 24 and 25*
- (5) *Report from the Select Committee on Office or Places of Profit under the Crown, House of Commons, (1941), par. 19, pp. xiii–xiv; Erskine May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 16th ed. (1957), p 200*
- (6) *Commentaries, 1st ed. (1966), vol.2, p 36*
- (7) *Maitland, The Constitutional History of England, (1955), p 369; Report from the Select Committee, op. cit., par.29, p.xx; Erskine May, op. cit.,p. 206*
- (8) *Inquiry into the conduct of the 1987 Federal Election and 1988 Referendums, Report No. 3 of the Joint Standing Committee on Electoral Matters, (May 1989), par. 3. 53; cf Cleydesdale v Hughes (1934) 36 W.A.L.R. 73*
- (9) *Erskine May, op. cit., p 206*
- (10) *ibid*
- (11) *(1989) 24 F.C.R. 405, at p. 411*
- (12) *Great Western Railway Co. v Bater [1922] 2 A.C. 1. At first instance, Rowlatt J distinguished occupancy of an office from the case of a person engaged to do any duties which may be assigned to him or her: Great Western Railway Co. v Bater [1920] 3 K.B. 266, at p 274. See also Mitchell and Edon v Ross [1960] Ch. 498, at pp 522–523, 532*
- (13) *The 1981 Act, s. 2*
- (14) *"officer" means any person holding an office in the teaching service: see the 1981 Act, s.2 and the 1983 Act, ss. 6(1), 7 (3) and 7(4). By an instrument dated 22 February 1984, the Minister of Education determined, in accordance with s. 6(1) of the 1983 Act, that the office of teacher in the education service was to be an office in the teaching service. On the commencement of s. 7 of the 1983 Act, this determination took effect (s.7(3) (a) of the 1983 Act) and all persons who, immediately before that time, had held the office of teacher in the education service were deemed to be officers in the teaching service (s.7 (4) of the 1983 Act)*
- (15) *Formerly the Director-General: see the 1991 Act, s. 6 (1) (b)*
- (16) *The 1981 Act, s. 4 (4)*
- (17) *Erskine May, op. cit., pp 214–215; Harvey's Case House of Commons Parliamentary Debates (Hansard), 15 February 1839, cols 446–466; ibid., 21 February 1839, cols 715–720*

Footnotes

- (18) *Official Report of the National Australian Convention Debates*, Adelaide, 22 April 1897, p. 1198; Melbourne, 7 March 1898, pp 1941–1942
- (19) *Quick and Garran, Annotated Constitution of the Australian Commonwealth*, (1901), pp 492–493; *Harrison Moore, The Constitution of the Commonwealth of Australia*, 2nd ed. (1910), p 128
- (20) So much is implied from s. 24 of the Constitution, read in conjunction with ss. 7, 30 and 41
- (21) *The Electoral Act*, s. 241
- (22) See Constitution, s. 31, which provided for the application of state laws in relation to the election of members of the House of Representatives
- (23) See *Harford v Linskey* [1899] 1 Q.B. 852, at p 858
- (24) s. 179 (2)
- (25) However, a provisions corresponding to s. 179 (2) of the Electoral Act was in force in England and in each of the Australian colonies prior to federation – England: *Ballot Act 1872* (35 & 36 Vict. c. 33), s. 1; New South Wales: *Parliamentary Electorates and Elections Act 1893* (56 Vict. No. 38), s. 66; Queensland: *Elections Act 1885* (49 Vict. No. 13), s. 52; South Australia: *Electoral Code 1896* (59 & 60 Vict.No.667), s. 97; Tasmania: *Electoral Act 1896* (60 Vict. No. 49), s. 91; Victoria: *Constitution Act Amendment Act 1890* (54 Vict.No. 1075), s. 224 (re-enacting *Electoral Act 1865* (29 Vict. No. 279), s. 86); Western Australia: *Electoral Act 1899* (63 Vict.No.20), s. 83 – and was present in the *Commonwealth Electoral Act 1902* (Cth), s. 106
- (26) (1988) 167 C.L.R. 145
- (27) *ibid.*, at pp 165–166
- (28) *ibid.*, at p 166
- (29) *ibid.*, at pp 165–166
- (30) *ibid*
- (31) *Oppenheimer v Cattermole* [1975] A.C. 249, at pp 263–264, 278
- (32) *R. v Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, per Latham C J at p 673
- (33) (*Liechtenstein v Guatemala*) [1955] I.C.J. 4, at p 20
- (34) *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, 12 April 1930, 179 *League of Nations Treaty Series* 89
- (35) That is, the right of a State, a national of which has suffered a wrong at the hands of another state, to bring a claim before an international tribunal in respect of that wrong: see Brownlie, *Principles of Public International Law*, 4th ed. (1990), pp 480–494, and see generally pp 381–420
- (36) [1955] I.C.J., at p 22
- (37) *ibid.*, at p 23

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- (38) *The Constitutional Qualifications of Members of Parliament, Report by the Senate Standing Committee on Constitutional and Legal Affairs, (1981), par. 2. 14*
 - (39) *Quick and Garran, The Annotated Constitution of the Australian Commonwealth, (1901), par. 144, pp 491–492*
 - (40) *[1946] . A.C. 347, at p 366*
 - (41) *Reg. v Immigration Officer; Ex parte Thakrar [1974] Q.B. 684, at pp 709–710*
 - (42) *[1955] I.C.J. 4, at p 20*
 - (43) *See Iran-United States Claims Tribunal: Decision in Case No. A/18 (6 April 1984) 23 I.L.M. 489, at p 494*
 - (44) *See per Latham C J in R. v Burgess; Ex parte Henry (1936) 55 C.L.R. 608, at pp 648, 649*
 - (45) *[1976] A.C. 249, at pp 278–279; see also pp 261, 263–264, 267*
 - (46) *R. v Burgess; Ex parte Henry (1936) 55 C.L.R., at pp 649, 673*
 - (47) *[1955] I.C. J., at pp 13, 17*
 - (48) *ibid, at p 20*
 - (49) *ibid, at p 22*
 - (50) *ibid*
 - (51) *Signed at The Hague, 12 April 1930, 179 League of Nations Treaty Series 89, at pp 99, 101*
 - (52) *R. v Burgess; Ex parte Henry (1936) 55 C.L.R., p 649*
 - (53) *[1976] A.C., at p 277*
 - (54) *(1943) 137 F. 2d. 898*
 - (55) *See R. v Lynch [1903] 1 K.B. 444*
 - (56) *R. v The Home Secretary; Ex parte L. [1945] K.B. 7; Lowenthal v Attorney-General [1948] 1 All E.R. 295*
 - (57) *Oppenheimer v Cattermole [1976] A.C., at p 275*
 - (58) *supra, fn. (53)*
 - (59) *See Common Informers (Parliamentary Disqualifications) Act 1975 (Cth), ss.3, 4*
 - (60) *(1975) 132 C.L.R. 270, at p 279*
 - (61) *Emphasis added*
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Footnotes

- (62) *Emphasis added*
- (63) *See, e.g. ss. 4(4), 8 A (3) (b), 12, 36(2), 62A(3)*
- (64) *Emphasis added*
- (65) *See the heading to s. 75 which is made part of the Act by s. 36(1) of the Interpretation of Legislation Act 1984 (Vict.)*
- (66) *See Teachers (Government Teaching Service) Award (No.1 of 1990), Pt. 2, Div. 1 and Sched. 1, as amended by Teachers (Government Teaching Service) Award (No. 2 of 1991)*
- (67) *See, e.g. In re The Warrego Election Petition (Bowman v. Hood) (1899) 9 Q.L.J. 272, at p. 278; Delane v Hillcoat (1829) 9 B. & C. 310, at p 313 [109 E.R. 115, at p 116]; Erskine May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 16th ed. (1957), p 214*
- (68) *See, e.g. Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd. ("the Engineers' Case") (1920) 28 C.L.R. 129, at p 152*
- (69) *s. 9*
- (70) *See, e.g. R. v Foreign Secretary; Ex parte Indian Association of Alberta [1982] Q.B. 892, at pp. 928–935*
- (71) *See, e.g. Nolan v Minister for Immigration and Ethnic Affairs (1988) 165 C.L.R.178, at pp 185–186; Street v Queensland Bar Association (1989) 168 C.L.R. 461, at pp 505, 525, 541, 554, 572*
- (72) *See Constitution, s. 33.*
- (73) *See the Electoral Act, ss. 18, 21*
- (74) *See, generally, ibid, s. 274 (7)*
- (75) *ibid, s. 284*
- (76) *See ibid, s. 284 (4)*
- (77) *See, e.g. Quick and Garran, The Annotated Constitution of the Australian Commonwealth, (1901), at p 491*
- (78) *In re Webster (1975) 132 C.L.R., per Barwick C J at p 278*
- (79) *See Constitution, s. 64*
- (80) *See, e.g. Erskine May, op.cit., pp 200–202*
- (81) *Currently, more than 10%: See Australian Bureau of Statistics, Canberra, March quarter 1992, ABS Catalogue Nos 3101.0, 6248.0*
- (82) *See, e.g. Public Service Act 1922 (Cth), ss. 47C, 82B*
- (83) *See, e.g. The Constitution Act Amendment Act 1958 (Vict.), s .49*

- (84) *A procedure such as the latter one is arguably more objectionable in a case where the entitlement to resume the appointment is, as in the case of the Victorian legislation, subject to a government discretion.*
- (85) [1899] 1 Q.B. 852
- (86) *ibid.*, at p 858
- (87) *See In re Webster* (1975) 132 C.L.R., per Barwick C J at pp 278–279
- (88) *The Interpretation and Construction of Statutory and Constitutional Law*, 2nd ed. (1980), p 417
- (89) *See, e.g. Constitution*, ss. 29, 30, 31, 34
- (90) *See Nive v Wood* (1988) 167 C.L.R. 133, at p 140
- (91) *In re Webster* (1975) 132 C.L.R., at p 278
- (92) *See, e.g. R. v Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, at pp 649, 673
- (93) *See R. v Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, per Latham C J at p 649, Dixon J. at p 673; *Oppenheimer v Cattermole* [1976] A.c. 249, per Lord Hailsham of St. Marylebone at pp 261–262, Lord Pearson at p 265, Lord Cross of Chelsea at p 267, Lord Salmon at p 282, *Stoeck v Public Trustee* [1921] 2 Ch. 67, per Russell J at p 82. *See also the Nottebohm Case (Liechtenstein v Guatemala)* [1955] I.C.J., 4, at pp 20, 23; Art.2 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930, 179 League of Nations Treaty Series 89
- (94) [1955] I.C.J., at pp 22–24
- (95) *ibid.*, at p 22
- (96) Section 15(1). *The persons who were not required to take an oath or make an affirmation comprised children included on the certificate naturalisation of a parent or guardian, persons who were under sixteen years of age and those falling within s. 14(2), namely persons whose parents were Australian citizens*
- (97) s. 15(1) of the Citizenship Act
- (98) *Note that, by s. 13(2) of the Acts Interpretation Act 1901 (Cth), the Schedule is deemed to form part of the Act*
- (99) *Section 9 of that Act introduced s. 26A which provided for the registration as a British subject without citizenship of the wife of such a subject*
- (100) S. 37 of the Australian Citizenship Amendment Act 1984 (Cth)
- (101) S. 11 of the Australian Citizenship Amendment Act 1986 (Cth)
- (102) *Section 18 provided for declarations renouncing Australian citizenship to be made in the following situations: where the person was a foreign national and that nationality was acquired at birth, before a particular age or by marriage (s.18(1)); where the person became an Australian citizen by reason of the inclusion of his or her name in the certificate of Australian citizenship of his or her parents or guardian (s.18(2)); where a woman acquired the foreign nationality of her husband after he had ceased to be an Australian citizen (s.18(3)); where a person was born or ordinarily resident in a foreign country*

and was not entitled under the law of that country to its citizenship by reason of his or her Australian citizenship (s.18 (3A)). Subject to exceptions during wartime and to prevent statelessness (s.18(5), (6), the Minister had to register a declaration and thereupon the person making it ceased to be an Australian citizen (s.18(4)). Section 18 of the 1948 Act was to similar effect. Section 18 of the Citizenship Act as it currently stands provides for a declaration of renunciation of citizenship where an Australian citizen over the age of 18 is also a foreign national or was born or is ordinarily resident in a foreign country and is not entitled under the law of that country to acquire its citizenship by reason of his or her Australian citizenship (s.18(1)). The Minister must, subject to sub-sections (5), (5A) and (6), register the declaration (s. 18(4)). Sub-section 5A provides that the Minister shall not register the declaration if she or he considers that it would not be in the best interests of Australia to do so.

- (103) See s. 17 of the Citizenship Act as it currently stands
- (104) See, with respect to the common law of England, *Oppenheimer v Cattermole* [1976] A.C. 249, at pp 263–264, 278–279; *Kramer v Attorney-General* (1923) A.C. 528, at p 537
- (105) See, as to the position in Australia, *R. v Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, at pp 649, 673; *Ex parte Korten* (1941) 59 W.N. (N.S.W.)b 29, at p 30. See, as to the position in the United Kingdom, *Oppenheimer v Cattermole* [1976] A.C., at pp 261–262, 266–267, 282; *Stoeck v Public Trustee* [1921] 2 Ch. 67, at p 82
- (106) See, generally, *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty. Ltd.* (1988) 165 C.L.R. 30, at pp 49–50; *Vervaeke v Smith* [1983] 1 A.C. 145, at p 164; *Settebello Ltd. v Banco Totta and Acores* [1985] 1 W.L.R. 1050, at pp 1056–1057; *Williams & Humbert Ltd. v W. & H. Trade Marks (Jersey) Ltd.* [1986] A.C. 368, at p 434
- (107) *Oppenheimer v Cattermole* [1976] A.C., at p. 277
- (108) *ibid*, at pp 278, 282–283. See also, as to the circumstances in which a municipal court may refuse to apply a foreign citizenship law during wartime on the grounds of public policy, *T. v The Home Secretary; Ex parte L* [1945] K.B. 7, at p 10; *Lowenthal v Attorney-General* [1948] 1 All E.R. 295, at p 299
- (109) See, *supra*, fn. (102)
- (110) See, *supra*, fn. (101)
- (111) Section 8 (c) provides that "[w]here an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not.... affect any right, privilege, obligation or liability acquired accrued or incurred under any Act so repealed". Also note that by s. 13 (2) the Schedule is deemed to be part of the Act
- (112) See, with respect to the onus and standard of proof in United States denaturalisation proceedings, *Schneideman v United States* (1943) 320 U.S. 118; *Klapprott v United States* (1949) 335 U.S. 601; *Kungys v United States* (1988) 485 U.S. 759
- (113) Under s. 16 (1) of the 1948 Act, as it stood in 1960, naturalisation took place as from the date of taking the oath or affirmation in the case of persons over the age of sixteen, unless they had been included on the naturalisation certificate of a parent or guardian
- (114) *House of Representatives, Parliamentary Debates (Hansard)*, 31 March 1966, p 833

SUPREME COURT OF CANADA

The Public Service Commission

v

William James Millar

and

The Attorney General of Quebec
The Attorney General for Saskatchewan
The Attorney General of Newfoundland

The Public Service Commission

v

Bryan Osborne

and

The Attorney General of Quebec
The Attorney General for Saskatchewan
The Attorney General of Newfoundland

The Public Service Commission

v

Randy Barnhart, Linda Componi, Michael Cassidy,
Ken Clavette and Heather Stevens

and

The Attorney General of Quebec
The Attorney General for Saskatchewan
The Attorney General of Newfoundland

CORAM:

The Hon. Madam Justice Wilson
The Hon. Mr. Justice La Forest

The Hon. Madam Justice L'Heureux-Dubé
The Hon. Mr. Justice Sopinka
The Hon. Mr. Justice Cory
The Hon. Madam Justice Stevenson

Appeal heard:
October 11, 1990

Judgement rendered:
June 6, 1991

Reasons for judgement by:
The Hon. Mr. Justice Sopinka

Concurred in by:
The Hon. Mr. Justice Cory
The Hon. Madame Justice McLachlin

Concurring reasons by:
The Hon. Madam Justice Wilson

Concurred in by:
The Hon. Madam Justice L'Heureux-Dubé

Concurring reasons by:
The Hon. Mr. Justice La Forest

Dissenting reasons by:
The Hon. Mr. Justice Stevenson

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Citation

F.C.T.D.: 3 F. C. 206, 30 D. L. R.
(4TH) 662, 5 F. T. R. 29, 25 C.R.R. 229, 14 C.C.E.L. 230

F.C. A.: [1988] 3 F.C.219, 52 D.L.R. (4th) 241, 87 N.R.376,
43 C.R.R.351, 22 C.C.E.L. 98

Osborne v Canada (treasury board)

The Public Service Commission

Appellant

v

William James Millar

Respondent

and

The Attorney General of Quebec
The Attorney General of Saskatchewan
The Attorney General of Newfoundland

Intervenors

and between

The Public Service Commission

Appellant

v

Bryan Osborne

Respondent

and

The Attorney General of Quebec
The Attorney General for Saskatchewan
The Attorney General of Newfoundland

Intervenors

and between

The Public Service Commission

Appellant

v

Randy Barnhart, Linda Camponi,
Michael Cassidy, Ken Clavette and
Heather Stevens

Respondents

and

The Attorney General of Quebec
The Attorney General for Saskatchewan
The Attorney General of Newfoundland

Intervenors

indexed as: osborne v canada (treasury board)

File Nos: 21201, 21202 and 21203

1990: October 11; 1991: June 6.

Present: Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin and Stevenson JJ.
on appeal from the federal court of appeal.

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

Constitutional law – Charter of Rights – freedom of expression – Public Service – political partisanship – federal legislation prohibiting public servants from engaging in work for or against a political party or candidate – Whether legislation infringes section 2(b) of Charter – if so, whether legislation justifiable under section 1 of Charter – Canadian Charter of Rights and Freedoms, sections 1, 2(b) – Public Service Employment Act, R.S.C., 1985, c. P-33, section 33.

Constitutional law – Charter of Rights – reasonable limits – vagueness – federal legislation prohibiting public servants from engaging in work for or against a political party or candidate – whether legislation too vague to constitute a limit prescribed by law – Canadian Charter of Rights and Freedoms, section 1 – Public Service Employment Act, R.S.C., c. P-33, section 33.

Constitutional law – Charter of Rights – remedies – relationship between section 24(1) of Canadian Charter of Rights and Freedoms and section 52(1) of Constitution Act, 1982.

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

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

(1) Constitutional Convention

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

(2) Freedom of Expression

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

(3) Reasonable Limit

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

Per Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory and McLachlin J J: Section 33 of the Act is not saved by section 1 of the Charter. While the legislative objective of maintaining the neutrality of the public service is of sufficient importance to justify a limitation on freedom of expression, the impugned legislation fails to meet the proportionality test. The restriction of

partisan political activity is rationally connected to the objective but section 33 does not constitute a measure carefully designed to impair freedom of expression as little as reasonably possible. The section bans all partisan-related work by all public servants, without distinction either as to the type of work, or as to their relative role, level or importance in the public service hierarchy. The result of the broad general language of section 33 is that the restrictions apply to a great number of public servants who in modern government are completely divorced from the exercise of any discretion that could be in any manner affected by political considerations. The need for impartiality and indeed for the appearance thereof does not remain constant throughout the civil service hierarchy. Section 33, therefore, is over-inclusive and, in many of its applications, goes beyond what is necessary to achieve the objective of an impartial and loyal civil service.

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

(4) Remedy

Per Sopinka, Cory and McLachlin JJ: In selecting an appropriate remedy under section 24(1) of the Charter, a court's primary concern must be to apply the measures that will best vindicate the values expressed in the Charter and to provide the form of remedy to those whose rights have been violated that best achieves that objective. The Court, while it is given an express mandate to declare a law to be of no force or effect to the extent of its inconsistency with the Charter under section 53(1) of the Constitution Act, 1982, must be sensitive to its proper role in the constitutional framework and refrain from intruding into the legislative sphere beyond what is necessary to give full effect to the Charter's provisions. In exercising its broad discretion to fashion an appropriate remedy in a Charter case, the court need not resolve the question as to whether there is a presumption of constitutionality. By reason of the diverse and novel problems which it will be called upon to redress, the court must maintain at its disposition a variety of remedies as part of its arsenal. "Reading down" legislation may, in some cases, be an appropriate remedy. The same result may on occasion be obtained by resort to the constitutional exemption.

However, it is not necessary in this case to determine whether the Court has the power to apply such remedies in a Charter case since it is preferable to strike out section 33(1) to the extent of its inconsistency with section 2(b). To maintain a section that is riddled with infirmity would not uphold the values of the Charter and would constitute a greater intrusion on Parliament's role. Parliament should determine how the section should be redrafted, not the Court. The Federal Court of Appeal's order, which declared section 33 (1)(a) of no force or effect except as it applies to a "deputy head", must stand since the respondents did not cross-appeal or seek a variation of the order.

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

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

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By Sopinka J

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

By Wilson J

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

By Stevenson J (dissenting)

Fraser v Public Service Staff Relations Board, [1985] 455; *OPSEU v Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *United States of America v Cotroni*, [1989] 1 S.C.R. 1469; *Canada (Human Rights Commission) v Taylor*, [1990] 3 S.C.R. 892; *Committee for the Commonwealth of Canada v Canada* (1990), 120 N.R. 241, *United States Civil Service Commission v National Association of Letter Carriers*, AFL-CIO, 413 U.S. 548 (1973); *R. v Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Soffman v Vancouver General Hospital*, [1990] 3 S.C.R. 483.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), (d)
Constitution Act, 1982, s. 52(1)
Public Service Employment Act, R.S.C., 1985, c. P-33, s. 33
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APPEALS from judgements of the Federal Court of Appeal, [1988] 3 F.C.219, 52 D.L.R. (4th) 241, 87 N. R. 376, 43 C.R.R. 351, 22 C. C. E.L. 98, setting aside judgements of the Trial Division, [1986] 3 F.C. 206, 30 D.L.R. (4th) 662, 5 F.T.R. 29, C.R.R. 229, 14 C.C.E.L. 230. Appeals dismissed, Stevenson J dissenting

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SUPREME COURT OF CANADA

The Public Service Commission

v

William James Millar

and

The Attorney General of Quebec

The Attorney General for Saskatchewan

The Attorney General of Newfoundland

The Public Service Commission

v

Bryan Osborne

and

The Attorney General of Quebec

The Attorney General for Saskatchewan

The Attorney General of Newfoundland

The Public Service Commission

v

Randy Barnhart, Linda Camponi, Micheal Cassidy,
Ken Clavette and Heather Stevens

and

The Attorney General of Quebec

The Attorney General for Saskatchewan

The Attorney General of Newfoundland

CORAM:

Wilson, La Forest, L'Heureux-Dube, Sopinka, Cory, McLachlin and Stevenson JJ.

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

Facts

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

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

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

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

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

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

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

The respondent Millar is a commerce officer in the Indian and Inuit Affairs Branch of the Department of Indian and Northern Affairs. Following his election as a delegate to the leadership convention, he was given written permission to attend. However, this permission was subsequently revoked by the Regional Director General of Indian and Inuit Affairs who gave Millar twenty-four hours' notice to resign.

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

Judgements of Courts Below

The three actions and the ensuing appeals were heard together.

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

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

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

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

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

Walsh J then set out the permissible activities of the other respondents. In the case of the respondent Barnhart, Walsh J found that, as section 33 specifically permitted the attending of political meetings and contribution of money for candidates, it implicitly allows participation in discussion relating to the development of policies. However, this permission does not extend to any statements of a partisan political nature. He concluded that Barnhart should not act as a scrutineer at a polling station. With respect to the respondent Camponi, Walsh J noted that in publicly stating her opinion as to which political party has the best policy on women's issues, she would undoubtedly be engaging in work on behalf of a political party. While her freedom to express her personal views is unrestricted, she should not identify herself as supporting them on behalf of any political party. Similarly, Walsh J noted that the respondent Clavette is free to express his views on issues of interest to him but would violate section 33 of the Act if he were to publicly support a political party which he feels expresses his views and to work for it in election campaigns in such a manner as to identify himself publicly as a member of that party. In the case of the respondent Stevens, he was of the view that it would be giving too wide an interpretation to section 33 to find that the stuffing of envelopes and the addressing of correspondence would be prohibited as she would not be directing public attention to herself as working on behalf of a given political party.

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

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

The Federal Court of Appeal overturned the judgement of Walsh J on the basis that the impugned provision is vague and wide open to discretionary application and, as such, fails to meet the test

of "reasonable limit" as set out in *Luscher, supra*. Mahoney J A considered the evidence showing that the Commission itself had difficulty in interpreting the expression "engage in work" to be determinate in this regard.

Accordingly, he was of the view that the trial judge erred in limiting the remedy to a declaration as to which of the activities engaged in by the respondents was permissible under the Act.

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

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

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

Relevant Legislation

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

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

- (a) engage in work for or against a candidate;
- (b) engage in work for or against a political party; or
- (c) be a candidate.

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

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

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

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

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

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

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

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

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

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

Canadian Charter of Rights and Freedoms

1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Issues

The issues raised by these appeals are the following:

- (1) Can statutory provision, such as section 33 of the Act, that implements a constitutional convention be considered to be inconsistent with the Constitution?
- (2) If the response to the first question is in the affirmative, are the provisions of section 33 of the Act inconsistent with sections 2(b) or 2(d) of the Charter?
- (3) If the response to the second question is in the affirmative, does section 33 of the Act establish such reasonable limits as can be demonstrably justified in a free and democratic society?

1. The Effect of the Constitutional Convention of Political Neutrality

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

In the *Patriation Reference*, this Court explored the nature of constitutional conventions and recognised that in contra-distinction to the variety of statutes and common law rules which make up the "law of the constitution", conventions are not enforceable by the courts unless they are

crystallised into laws by way of statutory adoption. Underlying this distinction between constitutional law and constitutional conventions is the contrast between legal and political constitutionalism. The Court stated:

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

That is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence. But the words "constitutional" and "unconstitutional" may also be used in a strict legal sense, for instance with respect to a statute which is found *ultra vires* or unconstitutional. The foregoing may perhaps be summarised in an equation: constitutional conventions plus constitutional law equal the total constitution of the country. [At pp 883–84]

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

In support of its argument, the appellant also draws attention to the decision of Beetz J in OPSEU, *supra*. That case, which was argued and decided on the basis of the division of powers, dealt with the validity of provisions in the Ontario *Public Service Act*, R.S.O. 1970, c. 386, similar to those in the present case. Beetz J found the provisions to be constitutional in nature, but I believe he made it clear that the term "constitutional" in that context was not to be equated with constitutional law:

It is clear to me that those provisions are constitutional in nature *in the sense that they bear on the operation of an organ of government in Ontario and that they impose duties on the members of a branch of government in order to implement a principle of government*. [Emphasis added.] [At p 41.]

Beetz J thus recognised that the constitution of Ontario is composed of ordinary statutes which are susceptible to being amended or repealed by ordinary statutes.

In my opinion, the impugned provisions constitute an ordinary legislative amendment of the constitution of Ontario, within the meaning of s. 92(1) of the *Constitution Act, 1867*. [At p 46]

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

2. Is section 33 of the Act inconsistent with sections 2(b) or 2(d) of the Charter?

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

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

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

has been explicitly rejected by this Court. For example, see McLachlin J, in *R. v Hebert*, [1990] 2 S.C.R. 151, at p 163, and in *Reference re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, at p 359. Therefore, while the historical origins of the concept are to be taken into account in ascertaining the scope of a charter right, the "traditional" meaning ascribed to such rights is not conclusive for the purposes of the Charter.

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

... the political activities contemplated by the impugned provisions are not made unlawful. These provisions are in the nature of detailed regulations. Failure to comply with them is a ground for dismissal. No other sanction is prescribed. The public servant who is not prepared to accept them can resign.

Nor do I think that such a public servant is thereby deprived of any "right" unless it be thought that he has a right to his office. But at common law, and apart from statute, a civil servant holds office during pleasure. [At p 51]

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

I should perhaps add that issues like the last will in the future ordinarily arise for consideration in relation to the political rights guaranteed under the *Canadian Charter of Rights and Freedoms*, which, of course, gives broader protection to these rights and freedoms than is called for by the structural demands of the Constitution. [At p 57]

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

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

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

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

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

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

On the other side, however, it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one. Thus, for example, we have laws dealing with libel and slander, sedition and blasphemy. We also have laws imposing restrictions on the press in the interests of, for example, ensuring a fair trial or protecting the privacy of minors or victims of sexual assaults. [At pp 466–68]

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

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

Apart from rare cases where expression is communicated in a physically violent form, the Court thus viewed the fundamental nature of the freedom of expression as ensuring that "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee" (p 969). In other words, the term "expression" as used in section 2(b) of the Charter embraces all content of expression irrespective of the particular meaning or message sought to be conveyed (*Reference re sections 193 and 195 (1)(c) of the Criminal Code (Man.)*, *supra*, at p 1181, *per* Lamer J).

The second step in the analysis outlined in *Irwin Toy* is to determine whether the purpose of the impugned government action is to restrict freedom of expression. The guarantee of freedom of expression will necessarily be infringed by government action having such a purpose. [At p 729]

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

At the same time, the Court has affirmed that freedom of speech is not absolute. It may properly be limited. There are several ways in which it can be limited. First, there are forms of expression which can be distinguished from content and which may be excluded from the scope of s. 2(b) of the *Charter*. In *Dolphin Delivery* it was suggested, in obiter dicta, that violence and threats of violence would be excluded from the protection offered by s. 2(b). And in *Irwin Toy*, at p 970, this Court stated that "a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen". [At p 827]

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

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

this question separately on another occasion, having the benefit of the full submissions of the parties.

3. Section 1 Analysis

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

(a) *Limit Prescribed by Law*

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

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

This Court has shown a reluctance to disentitle a law to section 1 scrutiny on the basis of vagueness which results in the granting of wide discretionary powers. Much of the activity of government is carried on under the aegis of laws which of necessity leave a broad discretion to government officials. See *R. v Jones*, [1986] 2 S.C.R. 284, *United States of America v Cotroni*, [1989] 1 S.C.R. 1469, and *R. v Beare*, [1988] 2 S.C.R. 387. Since it may very well be reasonable in the circumstances to confer a wide discretion, it is preferable in the vast majority of cases to deal with vagueness in the context of a section 1 analysis rather than disqualifying the law *in limine*. In this regard, I adopt the language of McLachlin J in *Canada (Human Rights Commission) v Taylor*, [1990] 3 S.C.R. 892:

That is not to say that the alleged vagueness of the standard set by the provision is irrelevant to the s. 1 analysis. For reasons discussed below, I am of the opinion that the difficulty in ascribing a constant and universal meaning to the terms used is a factor to be taken into account in assessing whether the law is "demonstrably justified in a free and democratic society". But I would be reluctant to circumvent the entire balancing analysis of the s. 1 test by finding that the words used were so vague as not to constitute a "limit prescribed by law", unless the provision could truly be described as failing to offer an intelligible standard. That is not the case here. [At p 956.]

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

Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instance in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law". [At p 983]

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

Applying the foregoing to this case, I cannot conclude that section 33 is couched in such vague or general language that it does not contain an intelligible standard. The words "engaged in work", while capable of very wide import, are ordinary simple words in the English language that are capable of interpretation. The same is true of the French version which refers to "travailler". They undoubtedly present considerable difficulty in application to a specific situation, as the Report of the Commission attests, but difficulty of interpretation cannot be equated with the

absence of any intelligible standard. See *R. v Rowley* (1986), 31 C.C.C. (3d) 183, and *City of Montréal v Arcade Amusements Inc.*, [1985] 1 S.C.R. 368. The language of section 33 does not create a standard which leaves it to the Commission to ban whatever activity they please, to paraphrase the words used in *Irwin Toy, supra*. I therefore conclude that section 33 does constitute a limit prescribed by law and it is necessary to proceed to a section 1 analysis.

In *R. v Oakes supra*, at p 138, Dickson C J explained that to establish a reasonable limit two central criteria must be satisfied: first, the government objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" and second, the means chosen must be reasonable and demonstrably justifiable in a free and democratic society. It is necessary to test section 33 against these basic criteria of constitutional validity.

(b) Governmental Objective

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

(c) Proportionality

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

(i) Rational Connection

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

(ii) Minimal Impairment

The respondents' main submission is that the provisions of section 33 are over-inclusive both as to the range of activity that is prohibited and the level of public servant to whom the restrictions

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

The result of this broad general language is that the restrictions apply to a great number of public servants who in modern government are employed in carrying out clerical, technical or industrial duties that are completely divorced from the exercise of any discretion that could be in any manner affected by political considerations. The need for impartiality and indeed the appearance thereof does not remain constant through the civil service hierarchy. As stated by Dickson C J in *Fraser, supra*: "It is implicit throughout the Adjudicator's reasons that the degree of restraint which must be exercised is relative to the position and visibility of the civil servant" (p 466). To apply the same standard to a deputy minister and a cafeteria worker appears to me to involve considerable overkill and does not meet the test of constituting a measure that is carefully designed to impair freedom of expression as little as reasonably possible.

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

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

the normal process of interpretation but, rather, as he candidly acknowledges, was interpreting the section to conform with the Charter which is in essence a form of remedy referred to as "reading down".

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

Thirdly, common sense comes into play here. An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit. [At p 467].

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

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

Remedy

This is a case in which I have concluded that section 33 in many of its applications exceeds what is necessary to achieve the admittedly valid government objective of maintaining the neutrality of the civil service. In a number of cases to which the section applies the restriction is a justifiable limit on freedom of expression and, had it been limited to these, would have been unassailable. In these circumstances, where there exists a less restrictive alternative, the question arises as to whether the overbreadth should be cured by the legislature or by the court. In this case Walsh J. chose to cure the defect rather than leaving it to Parliament. He dealt with the

respondents on a case-by-case basis and tailored the legislation to conform with a result that would not involve an unreasonable limit on the freedom of expression. I characterise this approach as "reading down". On the other hand, the Court of Appeal struck out the offending parts of the section leaving it to Parliament to cure the defect by adopting an alternative that will conform to the Charter in its various applications. In these circumstances, assuming that the Court has the power to "read down" legislation, it is necessary to decide which is the appropriate remedy in this case. This Court has not decided whether the remedies of "reading down" and its companion "the constitutional exemption" are remedies which it can apply in a Charter case. I have concluded that, assuming the Court has the power to "read down", it should not be exercised in this case. It is not therefore necessary to decide whether the Court has the power. My discussion of the remedy of "read down" proceeds on this basis.

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

Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. [Emphasis added] [At p 1078]

It is to avoid the result of the underlined words in that passage that this interpretative tool is employed. Or, as Walsh J put it, what was required was a "judicial interpretation" as to "whether the proposed activities of the plaintiffs constitute activities which are permissible under the Charter but which were restricted by the interpretation given by the Commission to s. 32 [now s. 33]" (p 237). In this respect, I agree with the following comment made by Carol Rogerson in her article "The Judicial Search for Appropriate Remedies Under the Charter: The examples of Overbreadth and Vagueness" contained in R. J. Share, ed., *Charter Litigation* (1987):

While the Courts continue to describe reading down as a technique of interpretation rather than of invalidation, as a practical matter reading down is difficult to distinguish from a remedy which would operate to declare particular

applications of a law unconstitutional. Reading down does require an initial determination by the court that particular applications of the statute would be unconstitutional. [At p 248]

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

On the other hand, in *Slaight*, Lamer J (as he then was, dissenting in part), although not expressly adopting a presumption of constitutionality, interpreted a general provision down in order to avoid a result that violated the *Charter*.

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

to the constitutional exemption. This remedy was adopted by the Ontario Court of Appeal in *R. v Seaboyer* (1987), 35 C.R.R. 300, a case which is pending in this Court. In such circumstances, I see no particular virtue in resorting to the language of presumptions in order to disguise what is to all intents and purposes a remedy. When the values of the Charter are not sacrificed thereby, it is preferable to express deference to the legislature as a factor in fashioning the remedy rather than engaging in a fictitious analysis that attributes to the legislature an intention that it did not have.

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

Disposition

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

THE SUPREME COURT OF CANADA

The Public Service Commission

v

William James Millar

and

The Attorney General of Quebec

The Attorney General for Saskatchewan

The Attorney General of Newfoundland

and between

The Public Service Commission

and

Bryan Osborne

and

The Attorney General of Quebec

The Attorney General of Saskatchewan

The Attorney General of Newfoundland

and between

The Public Service Commission

and

Randy Barnhart, Linda Camponi, Michael Cassidy,

Ken Clavette and Heather Stevens

and

The Attorney General of Quebec

The Attorney General of Saskatchewan

The Attorney General of Newfoundland

Coram:

Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin and Stevenson JJ.

WILSON J Subject to the comments which follow, I agree with the reasons for judgement of my colleague Justice Sopinka and would dispose of these appeals as he proposes. I do not share his views, however, as to the recourse open to the Court once it has found that the impugned legislation *on its proper interpretation* is over-inclusive, infringes on a Charter right, and cannot be justified as a reasonable limit under section 1. Once these findings have been made, I believe that the Court has not alternative but to strike the legislation down or, if the unconstitutional aspects are severable, to strike it down to the extent of its inconsistency with the Constitution. I do not believe that it is open to the Court in these circumstances to create exemptions to the legislation (which, in my view, pre-supposes its constitutional validity) and grant individual remedies under section 24(1). In other words, it is not, in my opinion, open to the Court to cure over-inclusiveness on a case-by-case basis leaving the legislation in its pristine over-inclusive form outstanding on the books.

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

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

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

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

I turn now to the issue of the remedy to which the appellants are entitled. Sections 24(1) of the *Charter* and 52(1) of the *Constitution Act, 1982* both apply. Section 52(1) requires a declaration that s. 71(1) of the *Immigration Act, 1976* is of no force and effect to the extent it is inconsistent with s. 7. The appellants who

have suffered as a result of the application of an unconstitutional law to them are entitled under s. 24(1) to apply to a court of competent jurisdiction for "such remedy as the court considers appropriate and just in the circumstances".

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

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

SUPREME COURT OF CANADA

The Public Service Commission

v

William James Millar

and

The Attorney General of Quebec

The Attorney General for Saskatchewan

The Attorney General of Newfoundland

and

The Public Service Commission

v

Bryan Osborne

and

The Attorney General of Quebec

The Attorney General for Saskatchewan

The Attorney General of Newfoundland

and

The Public Service Commission

v

Randy Barnhart, Linda Camponi, Michael Cassidy,
Ken Clavette and Heather Stevens

and

The Attorney General of Quebec

The Attorney General for Saskatchewan

The Attorney General of Newfoundland

Coram:

Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin and Stevenson J J.

LA FOREST J I am in general agreement with the reasons of my colleague, Sopinka J, except as they relate to his discussion of section 24(1) of the *Canadian Charter of Rights and Freedoms* and its interplay with section 52(1) of the *Constitution Act*, 1952. I suspect my colleague, Wilson J, may well be right on this issue, but since the point does not really arise in this case, I prefer to leave it for consideration when it does arise and its implications can be more fully assessed.

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The Attorney General for Saskatchewan
The Attorney General of Newfoundland

Coram

Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin and Stevenson JJ.

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

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

The trial judgement commands careful consideration. The parties offered considerable evidence on the question of the reasonableness of this limitation on freedom of expression. The trial judge thus enjoyed an important advantage in having the opportunity to hear and assess that evidence. He found the evidence relating to the effectiveness of public service employment limitations in other jurisdictions to be inconclusive. He carefully reviewed the authorities considering section 1 and found "minimal impairment". I do not see grounds for disturbing his findings.

In my view, he was perfectly correct in concluding that less restrictive provisions in other jurisdictions were shown to be effective in meeting the objectives of the legislation. In this conclusion he apparently agreed with the witness Kernaghan who pointed out the difficulty in assessing the efficacy of rules applied in other jurisdictions. For example, of Manitoba's procedures, the witness Kernaghan opined that "the jury is still out".

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

The impugned provision forbids partisan political activity in pursuit of several goals. If the state's sole objective is to control the political activities of those government employees who exercise

discretion in dealing with the public, then the section is over-reaching. That control, however, is not the sole objective of placing restraints on the political activities of public servants.

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

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

The legislation could distinguish between various levels of employees, but, in my view, the case against partisan activities at all levels is a strong one. No civil servant must owe, or be seen to owe, appointment or promotion to partisan activities. Activities tend to be overt and they are likely to be known or become known to those within and without the public service. Once allegiances are known, the principles of neutrality, impartiality and integrity are endangered. There is a danger within the service that those seeking appointments or promotions will feel some incentive to cut their cloth to the known partisan interests of those who have influence over appointments and promotions. Visible partisanship by civil servants displays a lack of neutrality, and a betrayal of that convention of neutrality. The public perception of neutrality is thus severely impaired, if not destroyed.

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

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

The means must, of course, be assessed in the light of the objective, which I take to be to secure civil service neutrality in all of its elements. I must say that to permit overt partisan political activity is to come perilously close to abandoning the principle of neutrality. The government

may, of course, decide to abandon or modify that principle, but this legislation is directed towards its preservation and our task is to decide if this means of preservation is justifiable.

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

I also agree with the observation of McLachlin J in *Committee for the Commonwealth of Canada v Canada* (1990), 120 N.R. 241 (S.C.C.), at p 367, where she points out that the courts must not strike out legislation merely because they can conceive of an alternative which seems to be less restrictive, recognising that governments must develop rules and policies to apply to many cases.

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

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

In discussing the prohibition of partisan political conduct, the majority of the Supreme Court of the United States (White J for himself, Burger C J and Stewart, Blackmun, Powell and Rehnquist J J) in *United States Civil Service Commission v National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973), at p 557, referred to and confirmed the judgement of a long history "... that is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited". In discussing that history, the majority discussed various factors militating in favour of restrictions protecting the neutrality of the civil service, and, at p 566, described a concern, "as important as any other" that

employment and advancement in the service should not depend on political performance and that employees be freed from pressure and express or tacit invitations to perform political chores.

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

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

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

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

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

Finally, I am not persuaded that Walsh J was engaged in reading down the legislation. He upheld it. He gave it a "judicial interpretation" which he described as "liberal" in that it restricted no more activities than necessary to preserve the tradition of neutrality. To interpret legislation in accordance with *Charter* concepts is not to condemn it as violative of those concepts.

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



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