

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 Act, 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 *Cincinnati 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 gage 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 a 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.969), 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. An 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