THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR JUSTICE HARRADENCE
THE HONOURABLE MR JUSTICE BELZIL
THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE MR JUSTICE COTE
THE HONOURABLE MADAM JUSTICE McFADYEN

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPELLANT

and

REFORM PARTY OF CANADA, DIANE ABLONCZY
AND DIANE ABLONCZY ON BEHALF OF THE MEMBERS
OF THE REFORM PARTY OF CANADA

RESPONDENTS

APPEAL FROM THE DECISION
OF THE HONOURABLE MR JUSTICE MOSHANSKY

REASON FOR JUDGEMENT OF THE HONOURABLE MADAM JUSTICE McFADYEN
CONCURRED IN BY THE HONOURABLE MR JUSTICE BELZIL
CONCURRED IN BY THE HONOURABLE MR JUSTICE COTE

DISSENTING REASONS FOR JUDGEMENT OF
THE HONOURABLE MADAM JUSTICE CONRAD
CONCURRED IN BY THE HONOURABLE MR JUSTICE HARRADENCE

Elections *– role of media – political parties freedom to advertise – control of election expenditure – reservation of free and purchasable time – procedure and formula for allocation of reserved time.*

Background facts

The Reform Party of Canada and Diane Ablonczy (suing on her own behalf and on behalf of other members of the Reform Party) commenced an action seeking a declaration that certain sections of the Canadian Elections Act, R.S.C. 1985 were invalid, on the grounds that they infringed or were inconsistent with right under certain sections of the Charter, the Bill of Rights and an implied Bill of Rights. The impugned legislation governed advertising by political parties during federal election campaigns. The respondents to the position that regulation of political advertising and broadcasting during election campaigns was not necessary and that the scheme adopted by Parliament infringed the rights of smaller, emerging, and non-established political parties by discriminating against them and unduly favouring well-established political parties.

At the original trial, the Judge granted the declaration that section 310(1) of the Canada Elections Act was invalid in that it infringed or restricted the plaintiffs' freedom of expression guaranteed by section 2(b) of the Charter.

The Attorney General appealed. The respondents also appealed on grounds that the learned trial judge erred in deciding that other provisions of the Act which govern pre-election advertising were constitutionally valid and erred in dismissing the respondents' contention that the impugned legislation also violated their rights under sections 2(d), 3, 6, 7 and 15 of the Charter.

Held

That the provisions of sections 319(c) and 320 were invalid as being in conflict with section 2(b) of the Charter. The cross appeal was allowed to that extent, otherwise the cross appeal was dismissed.

Cases Cited in the Judgement

R v *Oaks [1986] S.C.R. 103, 26 D.L.R. (4th) 200*
Edwards Books and Art v *r (1986) 35 D.L.R.(4th) 43*
R. v *Morales (1992) 77 C.C.C. (3d) 91*
R v *Farinacci et al, (1993) 109 D.L.R. (4th) 97*
Slaight Communications v *Davidson (1989) 59 (D.L.R. (4th) 416 (S.C.C.)*
Attorney-General of Canada v *Barrette, Payette et al, (Unreported March 1994)*
Reference re Averta Legislation [1938] S.C.R. 100
Andrews v *Law Society of British Columbia [1989] 1 S.C.R. 174*
McKay v *Manitoba (1989) 61 D.L. R. (4th) 385*
Minister of Justice v *Borowski [1981] 2 S.C.R. 575; [1981] 1 W.W.R. 97*
R. v *Big M. Drug Mart, [1985] 1 S.C. R., 18 D.L.R. (4th) 321*
R. v *Seaboyer [1991] 2 S.C.R. 577, 83 D.L.R. (4th) 321*

Palmer v *The Queen [1980] 1 S.C.R. 759*
Irwin Toy Ltd v *Quebec (A.G.) [1989] 1 S.C.R. 927*
R. v *Keegstra [1990] 3 S.C.R. 697*
R. v *Zundel (No.2) [1992] 2 S.C.R. 731*
Reform Party of Canada v *Canada (Attorney-General) (1992), 7 Alta. L.R. (3d) 1*
R. v *Edwards Books and Art Ltd [1986] 2 S.C.R. 713*
Zyeberberg et al v *Sudbury Board of Education (1988) 29 O.A.C. 23*
Corporation of the Canadian Civil Liberties Association et al v *Ontario (Minister of Education) and Board of Eduction of Elguin county, (1990), 37 O.A.C. 93*
Russow v *Brotosj Columbia (Attorney-General)(1989), 62 D.L.R.(4th) 98 (B.C.S.C)*
Manitoba Assn. for Rights and Liberties In. v *Manitoba (1992),94 D.L.R.(4th) 67.8 (Q.B)*
Re Butler [1992] 1 S.C.R. 452
Epilepsy Canada v *Alberta (1994) 155 A.R. 212 (C.A.)*
Com. Commonwealth of Canada v *Canada [1991] 1 S.C.R. 139*
Re Barrett and A.G. [1994] R.J.Q. 671 (C.A.)
Dixon v *British Columbia (A.G.) [1989] 4 W.W.R. 393 (B.C.S.C.)*
Reference Re Prov. Electoral Boundaries (Sask), [1991] 2 S.C.R. 158
Smith v *Attorney-General of Ontario, [1924] S.C.R. 331*
Thorson v *Attorney-General of Canada [1975] 1 S.C.R. 138*
Canadian Council of Churches v *Canada (Minister of Employment & Immigration) [1992] 1 S.C.R. 236*
McKay v *Manitoba [1989] 2 S.C.R. 357*
R v *Danson (1990) 73 D.L.R. (4th) 686*
Strickland v *Ermel, [1994] 1 W.W.R. 417*
Canada Ltd. v *Zutphen Brothers Construction Ltd [1990] 1 S.C.R. 705*
R v *Wholesale Travel Group In. [1991] 3 S.C.R. 154*
Rocket v *Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232*
Edmonton Journal v *Alta (A.G.), [1989] 2 S.C.R. 1326*
The Queen v *Morgantaler, [1988] 1 S.C.R. 30*

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REASONS FOR JUDGEMENT OF
THE HONOURABLE MADAM JUSTICE McFADYEN

The Attorney General of Canada appeals the decision of Moshansky J (1992) 7 Alta. L.R. (3d) 1, declaring section 310(1) of the **Canada Elections Act** invalid, on grounds that it infringes or restricts the Respondents' freedom of expression guaranteed by section 2(b) of the **Charter.**

The Attorney General appeals on grounds:

(1) that the learned trial judge erred in finding that a factual basis existed for the constitutional argument,

(2) that he erred in finding that the Respondents' freedom of expression has been limited by sections 307 and 310(1) of the **Canada Elections Act,** in violation s. 2(b) of the **Charter,** and

(3) that the learned trial judge erred in finding that the limitation is not saved by s. 1 of the **Charter.**

The respondents' cross appeal on grounds that the learned trial judge erred in deciding that other provisions of the **Act** which govern pre-election advertising were constitutionally valid and erred in dismissing the respondents' contention that the impugned legislation also violated their rights under sections 2(d), 3, 6, 7, and 15 of the **Charter.**

The Reform Party of Canada and Diane Ablonczy (suing on her own behalf and on behalf of other members of the Reform Party) commenced an action seeking a declaration that sections 303, 304, 307, 311, 316, 319, and 320 of the **Canada Elections Act,** R.S.C. 1985, c. E-2 are invalid, on grounds that this legislation infringes or is inconsistent with rights under sections 2(b), 2(d), 3, 6, 7 and 15 of the **Charter,** the **Bill of Rights** and an implied Bill of Rights. The impugned legislation governs advertising by political parties during federal election campaigns. The Respondents that the position that regulation of the political advertising and broadcasting during election campaigns is not necessary and that the scheme adopted by Parliament infringes the rights of smaller, emerging, and non-established political parties by discriminating against them and unduly favouring well-established political parties.

This appeal was first argued prior to the federal election in October, 1993. The Court called for a re-hearing of the appeal before an expanded panel and these reasons for judgement deal with the argument presented on the rehearing of the appeal, subsequent to the election.

BACKGROUND

The evidence at trial consisted of an agreed statement of facts; the Reports of three Royal Commissions, the Aird Commission (1929), the Fowler Commission (1957) and the Lortie Commission (1991); the reports of two parliamentary Committees, Beaubien (1936) and Barbeau

(1966); the testimony of Diane Ablonczy; two expert witnesses called by the appellant, and one called by the respondent.

At the time of trial, this legislative scheme had operated for several years and governed two federal elections. Since the trial, a third election has been held.

At trial, the evidence disclosed the importance of political parties of advertising and other exposure on radio and television during election campaigns, and supported the finding of the learned trial judge that television broadcasting is the most effective means of reaching voters. In 1990, 1600 AM and FM radio outlet and 3700 television transmitters and cable systems operated in Canada. Approximately 1400 cable operators provided up to 60 television channels which served in excess of 8,779,000 homes. No doubt those numbers have increased since that date.

It is common ground that television advertising is also a very expensive means of reaching voters. The parties admitted that, from the time Parliament adopted this scheme to the date of trial, no political party had purchased all of its allotment of broadcasting time on any television station. The full allotment of time was purchased on a limited number of radio stations. At the time of the previous Federal election, the Reform Party had been allotted three minutes of paid advertising time and purchased none of it. It used its free time. In the 1994 election campaign, the Reform Party had 17 minutes of advertising time available for purchase from each broadcaster.

In the agreed statement of facts, the parties admitted that at certain times of the year the prime time advertising inventory of many television stations is sold out. In the past, broadcasters have voluntarily arranged for advertising time to be reassigned in some election campaigns. Such a voluntary arrangement was made prior to the October 26, 1992 constitutional referendum and operates during provincial elections. However, other than the impugned legislation, nothing compels broadcasters to provide broadcast time to political parties during election campaigns. The fact that they have done so in the past, does not mean that broadcasters will continue to provide such time in the future or that they will provide sufficient time to meet the needs of the political parties at reasonable cost. If this legislative scheme is struck down in its entirety, as the Reform Party suggests, nothing compels broadcasters to provide time at a reasonable cost.

The current legislative scheme was enacted by Parliament in 1983, in response to Royal Commission studies which recognised the importance of radio and television broadcasting during election campaigns, the necessity to assure that some time would be available to all parties, and the necessity of controlling election expenditures, especially television and radio advertising which constitute a large part of such expenditures.

The impugned legislation does not regulate advertising by individual candidates, just advertising by political parties.

LEGISLATIVE SCHEME

The impugned sections of the **Canada Elections Act** may be divided into three categories:

(1) Provisions which require broadcasters to reserve free and purchasable time;
(2) Provisions which provide a procedure and a formula for the allocation of the reserve time;
(3) Prohibition sections.

(1) The Reservation Sections

Section 307(1) of the **Canada Elections Act** requires each broadcaster in Canada to make 6.5 hours of prime time broadcasting time available for purchase by the political parties. Where a broadcaster is affiliated with a network, the network operator and the broadcaster may agree on the portion of the 6.5 hours which will be available for network broadcasts.

Section 316 of the **Canada Elections Act** requires each network operator to provide to political parties at no cost, a certain amount of broadcast time. Under this provision, each party receives two minutes of free broadcast time. The balance of free time, if any, is allocated in the same proportion as purchasable time.

Pursuant to the provisions of section 321, a broadcaster may not change a rate that is higher than the lowest rate charged by that broadcaster for an equal amount of equivalent time which the broadcaster makes available to other customers. The validity of this section has not been specifically challenged.

These provisions, in effect, expropriate broadcast and advertising time and make it available either free or for purchase to the registered political parties, in accordance with the allocation formula agreed on by the parties or imposed by the Broadcasting Arbitrator, in accordance with the legislation. These provisions impose obligations and restrictions on broadcasters, not on anyone else. I will refer to these provisions as the "reservation provisions".

(2) The Allocation Sections

The political parties have an opportunity to agree among themselves to the allocation of the reserved time (section 309(2). They are to be convened for a meeting for that purpose (section 303). If they cannot agree, then the Broadcasting Arbitrator decides on the allocation in accordance with a formula set out in section 310(1) which takes into account:

(a) the percentage of seats in the House of Commons held by each political party after the last general election;

(b) the popular vote obtained by each party in the last election; and

(c) the percentage of candidates endorsed by each party at the last general election,

with the first two factors being given double the weight of the last. The Broadcast Arbitrator is appointed by agreement of the political parties represented in the House of Commons, or, if they cannot agree, by the Chief Electoral Officer.

Section 311 requires that broadcast time be allocated to new parties who request it and sets the procedure for allocating that time.

Pursuant to section 310(2), no political party may be allocated more than 50 per cent of the reserved time.

The *Act* recognises that the formula may produce some unfairness. Section 310(4) provides that if, in the opinion of the Broadcasting Arbitrator, the allocation produced by this formula is unfair to any political party or is contrary to the public interest, the Broadcasting Arbitrator may modify the allocation as he sees fit.

The allocation is reviewed annually.

Section 315 permits a political party to agree with the broadcaster from which it wishes to purchase time as to its preference for commercial time or programme time and the time and days which it wishes. Again, the Broadcast Arbitrator is authorised to resolve any disputes in this respect between the broadcaster and the political party.

I will refer to these sections as the "allocation provisions".

(3) The Prohibition Sections

Section 319(c) provides that broadcasters who make any additional time available to any political party must offer additional time to all parties in accordance with the allocation formula. The Broadcasters may not charge any fee for such additional broadcast time. Anyone who fails to comply is guilty of an offence (section 320).

Section 303 prohibits everyone from using broadcasting stations outside Canada during an election campaign for the purpose of influencing that election.

The full text of these sections is attached hereto as Appendix A.

TRIAL JUDGEMENT

The learned trial judge found that section 307, combined with section 310(1), limits freedom of expression (i) because it has the effect of providing traditional major parties with more advertising time than less established parties; and (ii) because the parties were not free to go into the market place to purchase more broadcasting time than allotted to them.

The learned trial judge accepted that the primary purpose of the legislation was that set out by the Attorney General of Canada:

> (1) to ensure adequate supply of prime broadcasting time during federal election campaigns for use by registered political parties in communicating information useful to the public in electing a government; and
>
> (2) to provide an equitable allocation of that reserved time.

The learned trial judge rejected the evidence and submissions of the respondents that each political party should be free to negotiate with broadcasters to purchase time and that in busy periods, the parties could compensate other advertisers for their lost advertising time and thus obtain time otherwise occupied. He found that an entirely free market place would lead to domination of the broadcast time by the party who could afford to outbid the others. A party with substantial means could price other parties out of the market. At best, an undesirable escalation of costs would result.

The learned trial judge found that, although the purpose of the impugned provisions was valid, section 307, coupled with section 310(1) had the effect of limiting the freedom to expression of smaller and emerging parties. At trial, the respondents argued and learned trial judge accepted that section 307 limited the total amount of time available for political broadcasts. (A.B. pp 531–533) It appears that he made this finding without reference to the prohibition sections.

In addressing the question of section 1 justification, the learned trial judge found that legislation reserving and allocating broadcast time during election campaigns addressed a substantial and pressing concern, providing broadcast time to all parties and not just to those who could outbid others. He found a rational connection between the restriction and the pressing purpose. Further, he concluded that some imbalance in the allocation of time was necessary to ensure that the time which the broadcasters were compelled to give or sell to the political parties was used in the public interest, being the right of the public to receive information on issues and on the position of the parties who stand a realistic chance of forming the next government. The legislation assured that the limited time available would not be unduly occupied by groups who had not

interest in or chance of succeeding in the election. In this respect, he stated as follows (A.B. p 49):

> There are a number of political parties in Canada which, while having chapters nationwide, might be considered "single-issue", "fringe", or satirical in nature. The formula therefore was intended to ensure that the time allocated is to a large extent, reflective of those parties which present a viable option to the electorate, and have some chance of forming the next government. While this ensures that fringe parties are not allowed to unduly encroach upon the limited broadcasting time available to "contender" parties, its effect is to limit availability of broadcasting time to the new or emerging national parties as well."

After applying the tests enunciated in *R* v *Oakes,* [1986] 1 S.C.R. 103, 26 D.L.L.R (4th) 200, the learned trial judge concluded that the limits on freedom of expression imposed by section 307 of the **Canada Elections Act** were saved by section 1 of the **Charter.** He held, however, that the alloction formula in section 310(1) did not meet the test of proportionality as it unduly discriminated against new, emerging and less-established political parties who were not free to enter the market to negotiate for the purchase of other broadcast time. He found that section 310(1) was not saved by section 1.

POSITION OF THE PARTIES

The respondents (and cross-appellants) seek a declaration that sections 303, 304, 307 to 311, 316, 319 and 320 are invalid because they violate the provisions of sections 2(b), 2(d), 3, 6, 7, and 15 of the **Charter.**

The Reform Party submits that the whole of this legislative scheme has the effect of limiting or restricting its freedom of expression in that section 319 and section 320 limit the total advertising time which can be purchased by politcal parties and section 310(1) allocates to it, less advertising time than is allocated to the major, or established political parties. The respondents first submit that a reservation scheme is not necessary; that political parties can obtain sufficient time without such controls. The respondents further argue that the allocation formula unfairly discriminates against smaller and newly-emerging parties and unduly favours established political parties resulting in the suppression of the message and ideas which new and emerging parties wish to communicate. They suggest that if a reservation scheme exists, time must be divided equally among all political parties, irrespective of the level of their public support.

Counsel for the Attorney General submits that the legislative scheme does not conflict with the provisions of the **Charter,** and alternatively, to the extent that it does, it is saved under section 1. He argues that, to succeed, the respondents must establish that rights guaranteed to them under the **Charter** have actually been restricted or infringed by the legislation. He says that the

respondents may succeed only if they establish that the Reform Party intended to and could afford to purchase advertising in excess of that allotted to it by the Broadcast Arbitrator, and that the respondents have failed to do so.

ANALYSIS
THE APPEAL
VALIDITY OF s. 307 (1) and s. 310(1)
RESTRICTION OF FREEDOM OF EXPRESSION

I. DOES THE LEGISLATIVE SCHEME RESTRICT FREEDOM OF SPEECH OR EXPRESSION?

(A) The Reservation Provisions

I disagree with the finding of the learned trial judge that section 307(1) limits the amount of broadcast time which a political party can purchase. Section 307(1) provides:

> In the period beginning on Sunday, the twenty-ninth day before polling day at a general election and ending on the second day before polling day, every broadcaster shall, subject to the regulations made pursuant to the Broadcasting Act and the conditions of its licence, make available for purchase by all registered parties for the transmission of political announcements and other programming produced by or on behalf of the registered parties an aggregate of six and one-half hours of broadcasting time during prime time on its facilities.

This section and the other reservation sections impose an obligation on broadcasters to provide prime-time broadcasting time for purchase by the registered political parties and to provide some free time (section 316). Reserved time is limited. The cost of purchasable time is regulated. By themselves, the legislative provisions which require broadcasters to supply free and purchasable time during election campaigns do not infringe on the freedom of expression of political parties. As I read these sections, they provide for a reservation of time. The right of a political party to purchase and a broadcaster to sell additional unreserved time, is not affected by the reservation provisions. These provisions seek only to make time available which can be purchased or used by the political parties. They do not restrict or otherwise interfere with the rights of registered political parties, their members or candidates to communicate or express themselves. On the contrary, they enable political parties to have access to broadcast time at a reasonable cost which might otherwise not be available to them or which might be available only at excessive cost.

(B) The Allocation Provisions

Next, the legislation provides the means whereby this time is allocated (section 310(1)). By themselves and in conjunction with the reservation of time provisions, the allocation provisions do not interfere with or restrict any political party's right to communicate with voters or to use the electronic media for that purpose. Restriction of freedom of expression is neither the purpose nor the effect of these provisions. The allocation provisions divide the reserved time between political parties in accordance with a formula which seeks to allocate time on the basis of the public support which the parties enjoyed in the previous election. The provisions do not interfere with the right of a political party or its representatives to contract with any broadcaster for such additional time as they choose. The reservation and allocation provisions do not directly or indirectly limit or restrict speech or expression.

(C) The Prohibition Sections

Finally, I look to the prohibition sections. Sections 319 and 320 of the Act prohibit broadcasters from selling additonal broadcast time to registered political parties, and prohibit broadcasters from giving more free time to any political party unless they also offer time to all other parties in proportion to the allocation formula. While not directly restricting speech or expression by political parties, these sections could have that effect, as broadcasters are unlikely to provide much additional time when they cannot charge a fee for it.

Section 303 prohibits advertising by political parties outside the country and directly restricts speech.

The learned trial judge found that freedom of expression of smaller emerging political parties was infringed because they were allotted less time than the established parties and because they were not free to negotiate for additonal time. It is only when sections 307 and 310(1) are considered in the context of sections 319 and 320, as part of an unservable legislative scheme that the freedom of expression of a political party can be said to be affected by sections 307 and 310(1). I will deal with the question of the severability of the prohibition sections later in these reasons.

II. DID THE LEARNED TRIAL JUDGE ERR IN FINDING THAT S. 310(1) IS NOT SAVED BY SECTION 1 OF THE CHARTER?

For now, I will assume (without deciding) that the legislative scheme, as a whole, restricts freedom of speech. Did the learned trial judge err when he said that the allocation scheme, section 310(1), was not saved by section 1 because the allocation scheme unduly discriminated against smaller emerging parties and unduly favoured established political parties by not taking into account increased support since the last election?

For ease of reference, I will set out the formula accepted by the Supreme Court for analysis of the section 1 justification issue, in *Edwards Books and Art* v *R.* (1986) 35 D.L.R. (4th) at p 43:

> Two requirements must be satisfied to established that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern." Secondly, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirements, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective, they must impair the right as little as possible, and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is, nevertheless, outweighed by the abridgement of rights.

A. The Discretion of the Broadcast Arbitrator

(1) Trial Judgement

In finding that the provisions of section 310(1) had the effect of limiting freedom of expression, and were not saved by section 1, the learned trial judge relied exclusively on the wording of section 310(1) which applies a rigid formula based on popularity in the last election and has no regard to changes in the popular appeal of any political party since the last election. While considering the issue whether the impugned legislation had the effect of restricting freedom of speech, the learned trial judge had indicated that the discretionary power granted to the Broadcast Arbitrator in section 4 should be considered in the section 1 analysis. Having done so, he does not appear to have again returned to the provisions of section (4) when he decided that section 310(1) had a disproportionate discriminatory effect on new and emerging political parties and was thus not saved by section 1. In referring to this discretionary power in the other context, the learned trial judge stated: (A.B. 524)

> It is necessary when assessing the constitutionality of legislation not to do so in a vacuum. In my opinion, ss. (4) provides the necessary degree of flexibility to the determination of time allocations, and provides an appropriate balance to the specific allocation formula in ss. (1). Far from being constitutionally vague, it is a provision that ensures fairness and adherence to the public interest.

I am of the view that the learned trial judge erred in failing to take into account the existence of the broad discretion given to an independent arbitrator to relieve against any unfairness or discriminatory effects which arose from the strict application of the discriminatory effects of the application of the formula.

Section 310(4) provides:

> Where the broadcasting arbitrator considers that an allocation determined in accordance with subsection (1) would be unfair to any of the registered political parties or contrary to the public interest, he may, subject to subsections (2) and (3) modify the allocation in any manner he deems fit and the modified allocation shall constitute his allocation under section 309.

(2) **Vagueness of Discretionary Power**

However, the respondents submit that this discretion is so vague as to be constitutionally invalid and of no assistance in providing any relief in the case of unfairness. They rely on the decision of the Supreme Court of Canada in *R.* v *Morales* (1992) 77 C.C.C. (3d) 91. The Supreme Court of Canada considered the validity of section 515 (10)(b) of the Criminal Code. The section set out two grounds on which pre-trial detention of the accused was justified: (1) that detention is necessary to assure the accused's attendance in court, and (2) that "detention is necessary in the public interest or for the protection or safety of the public." The majority of the Court held that the portion of section 515(10) (b) authorising detention "in the public interest" was too vague. Lamer C J C stated at p 99:

> In view, the criterion of "public interest" as a basis for pretrial detention under s. 515(10(b) violates s. 11(e)) of the Charter because it authorizes detention in terms which are vague and imprecise.

In referring to previous authorities dealing with the doctrine of vagueness, Lamer C J C noted that all other cases had dealt with provisions which either defined an offence or prohibited certain conduct. The respondents cite no authority for applying a doctrine of vaguness to a discretion granted to an arbitrator grant relief against unfairness in the operation of a formular set out in the legislation, in a civil context.

In *R.* v *Farinacci et al* (1993) 109 D.L.R. (4th) 97, a five-judge panel of the Ontario Court of Appeal had before it an application to strike provisions of section 679 (3)(c) of the **Criminal Code** on the grounds of vagueness. Section 679 deals with bail pending appeal and provides that a judge of the court of appeal may release an appellant on bail pending appeal if the appellant establishes that (1) his appeal is not frivolous; (2) that he will surrender into custody in accordance with the terms of the order; and (3) by section (c) that his detention is not necessary in the public interest.

The Ontario Court of Appeal distinguished the **Morales** decision on grounds that, after a conviction, the presumption of innocence no longer no longer applied, and that the wording of section 679(3) differed substantially from section 515(10) (b). Because public protection and

safety were separately dealt with in section 515(10) (b), the meaning of "the public interest" became vague. Arbour J A, giving the judgement of the Ontario Court of Appeal, stated:

> The applicants submit that Chief Justice Lamer in Morales has already concluded that the term "public Interest" in section 679(3)(c) of the Criminal Code is unconstitutionally vague because he considered cases decided both under sections 515 and 679 of the Code without drawing a distinction between them. I cannot agree with that submission. The Supreme Court in Morales concluded that trial and appellate courts across Canada had failed to give sufficiently precise meaning to the term "public interest" to satisfy the constitutional requirement that pre-trial bail not be denied without just cause. I can find nothing suggesting the "public interest" will be unconstitutionally vague every time it appears in a statue conferring discretion, nor can I find anything to suggest that "public interest" has not workable meaning in the constitutional context governing s. 679 of the Criminal Code.

And at p. 114:

> The fact that judicial discretion established by statute is worded broadly does not, by itself, suggest that it is unconstitutionally vague.....

And at p. 115:

> The constitution itself provides a useful model of an acceptable statutory standard to overcome vagueness. Vagueness is avoided if discretion is guided by principle and the principles are capable of judicial definition.

In this case, when the discretionary provision is viewed in its context, there is no unconstitutional vagueness in the term 'public interest'. The discretion is guided by principle and the term 'public interest' is capable of judicial definition. Surely, the nature of the relief must be and will be structured to provide a solution to the problems which invoked the granting of the relief, that is the alleviation of the unfairness, or of a situation which is contrary to the public interest. Proof that the last election results fail to reflect increased public support for a specific party will be a factor to be considered in determining this question. This is the logical conclusion to be drawn in this case. I here refer to the decision of Lamer J (as he then was) in *Slaight Communications* v *Davidson* (1989) 59 D.L.R. (4th) 416 (S.C.C.) where he stated:

> As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the **Charter,** unless, of course that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the

legislation to be of no force or effect, unless it could be justified under s. 1. Although this court must not add anything to legislation or delete anything fro it in order to make it consistent with the **Charter,** there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the **Charter** and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the **Charter** rights to be infringed."

3 CONCLUSION

In addressing another issue, the learned trial judge considered the question of the vagueness of section 310(4), and stated at p 524 (A.B.):

> "It is necessary when assessing the constitutionality of legislation not to do so in a vacuum. In my opinion, ss.(4) provides the proper degree of flexibility to the determination of time allocations and provided an appropriate balance to the specific allocation formula provided in ss. (1). Far from being unconstitutionally vague, it is a provision that ensures fairness and adherence to the public interest."

I can do no better than to adopt the language used by the learned trial judge. While the formula in section 310(1) may unduly discriminate against parties gaining in popularity, Parliament has provided in sub-section (4), a means whereby any such unfairness or undue discrimination can be addressed and corrected. Section 310 must be considered in its entirety when the question of section 1 justification is addressed. When it is so considered, the response of Parliament becomes one that is proportionate, because sub-section (4) provides an internal mechanism by which any discriminatory effect or unfairness can be corrected. The learned trial judge erred in finding that the Appellant has not established that any limit imposed by section 310(1) on freedom of expression was saved by section 1 of the **Charter.**

III ASSUMING THAT S. 307 AND S. 301(1) RESTRICT SPEECH, ARE THEY SAVED BY S.1?

A. Purpose of the Legislation

Attorney General of Canada states that the purpose of the legislation is two-fold:

(1) to ensure adequate supply of prime broadcasting time during federal election campaigns for use by registered political parties in communicating information useful to the public in electing a government; and

(2) to provide an equitable allocation of that time among the registered parties.

The respondents do not take issue with this statement of the purpose of the legislation. At trial, they did not seek to challenge the position taken by the Attorney General as to the purpose of the legislation and do not do so before us.

B. Pressing and Substantial Concerns

The validity of this purpose has been recognised by Royal Commissions and Parliamentary Committees which have investigated and studied election advertising. They concluded that a legislative scheme controlling the use of radio and television advertising by registered parties during election campaigns was necessary. Such legislation sought to provide greater access for political parties to electronic media advertising and broadcasting, and to provide a fair allocation of the broadcast time made available, and to control costs.

Dr. Fletcher, an expert in elections and media and broadcast policy called by the respondents, testified that the legislation resulted from concerns about the cost of election advertising and a desire to ensure that adequate broadcast time was provided for the use of political parties. He further stated that cost problem has become greater than ever. There has been a proliferation of radio and television stations which has increased the available broadcast time. Dr. Fletcher testified that at the time of the trial, the need to reserve time to ensure that adequate broadcast time would be available, was not as great. He thought that with the large number of radio and television stations in most communities, political parties could purchase adequate time without legislated reservation of time. In cross-examination, he agreed that some reservation scheme coupled with an equitable allocation of time continued to be necessary. He did not suggest that there be no legislation. He recommended a different allocation system, one which would more accurately reflect current popular support.

In my view, the objective of Parliament in enacting the legislation reserving broadcast time addressed pressing and substantial concerns, being the availability of broadcast time to political parties during federal election campaigns and the control of costs at which such time would be made available. As found by the learned trial judge:

(1) Radio and television advertising and broadcast are an important means whereby political parties communicate to the public information which the public requires to make an informed choice in the selection of the next government.

(2) Broadcast time is limited. There are periods when available television advertising and broadcast time is fully committed. These often coincide with preferred election campaigns times. The learned trial judge correctly rejected suggestions that the parties be left to the market place. At

worst, time might be acquired by one party or might not be available. At best, such a plan would result in an undesirable escalation of costs. Without such legislation, broadcast time may not be available or may be available only at a greatly increased cost.

(3) The provisions assure that advertising time is available to all parties. The question of access is not left to be determined by broadcasters who may not favour the broadcast of certain messages which may not agree with their philosophy or which may be unpopular.

(4) Costs of such broadcast time are controlled to ensure that no one party is able to outbid others and thus occupy all or substantial portions of available time.

(5) The legislation assists in achieving control over total election spending.

These findings are reasonable and are supported by the evidence.

C. Proportionate Response

(1) Unequal allocation of time

I agree with the learned trial judge that equal allocation of these limited resources is not feasible and is not in the public interest which requires that the public be informed of the major issues in an election and the position being taken by political parties which stand a realistic chance of forming a government. While other voices and interests have the right to be heard, lesser access to the free and purchasable time, which broadcasters are required by legislation to provide, is a reasonable and proportionate response to the problem. Broadcast time is limited. It must be used primarily for the purpose intended by the reservation provisions, providing information to voters to permit them to make an informed choice when they exercise their vote with the object of choosing the next government. A formula granting less time to registered parties whose objects are satirical or the promotion of a single issue or regional interest is justified. If the reservation and allocation provisions restrict freedom of expression, they are saved by section 1.

(2) Unfairness to new and emerging political parties

I agree with the learned trial judge that, viewed alone, the formula in section 310(1) which is based entirely on popularity in the last election, may operate unfairly and be unduly discriminatory against political parties whose popularity has increased substantially since the last election. However, where an unfairness arises because of the operation of the formula, or where

the formula produces a result that is contrary to the public interest, the Broadcasting Arbitrator is given the power to provide appropriate relief. (section 310(4)

(3) Free time provisions

The respondents submit that the application of the allotment provisions to free time further points out the difficulty with the legislative scheme. Again, major political parties are given an advantage by the allotment of more time. However, this section does not limit speech or expression of the Reform Party or its members. The mere fact that some other party obtained more free broadcast time does not mean that the Reform Party's freedom of expression was curtailed.

Without this legislation, no political party would have free broadcast time. The unequal distribution of time, made available as a result of this legislation, does not infringe freedom of expression. This provision does not alter my view that the provisions of section 310 when viewed in their entirety, if they conflict with section 2(b), are saved by section 1 of the **Charter.**

(4) Conclusion

The Attorney General has established that any limit or restriction on freedom of expression in section 307 and 310 of the **Act** is designed to address a pressing and substantial concern and that the means chosen are a proportionate and appropriate response of these concerns.

IV. CAN DISCRIMINATING RESULT IN AN INFRINGEMENT OF FREEDOM OF EXPRESSION?

The Appellant further says that the trial judge erred in that he relied on the discriminatory effect of the legislation as evidencing a breach of freedom of expression. The appellant submits that discriminatory effect can only be considered in the context of section 15 which, the appellant says and the learned trial judge found, is inapplicable in this case.

The Attorney General of Canada relies on the decision of the Quebec Court of Appeal in *Attorney General of Canada* v *Barette, Payette et al* (unreported, Mar. 18, 1994) that section 242 of the **Canada Elections Act** did not infringe section 2(b) or section 3 of the Charter. Section 242 provides that only these candidates that obtained at least 15 per cent of the votes were entitled to recover one half of their allowable election expenses. At trial, Gomery J, relying on discriminatory effect, concluded that the provisions contravened sections 2(b) and 3 of the **Charter.** This decision was reversed on appeal. McCarthy J A stated at p 5:

> Quite properly the judge emphasizes the right of a voter to know, and of the candidate to make known, the candidate's views. Quite properly the judge on the other hand avoids saying that section 3 (or section 2(b)) of the Charter obliges the legislator to supply candidates with the means necessary to make known their views. Nor do the respondents argue that the legislator has such an obligation. What the respondents do argue, and the judge appears to accept the argument, is that if the legislator does supply such means, in whole or in part, he must supply them without discrimination in purpose or effect (subject to the possible application of section 1 of the Charter). Discrimination in this sense is supposedly something different from discrimination under section 15, which the judge, at least, concludes is not present here. However, I see nothing in the Charter to support the supposition that there are two kinds of prohibited discrimination, one explicitly prohibited and one implicitly prohibited. In other words, if the portions of the Act here in question are unconstitutional it must be because they infringe not section 3 or section 2(b) but section 15. They do not impede the right to vote or to stand for election or to express oneself freely; the question is whether they encourage with discriminatory purpose or effect the exercise of any of those rights.

The Quebec Court of Appeal concluded that candidates who run for election do not come within the class of persons protected by section 15. I agree with this conclusion.

For the purposes of these reasons, it is not necessary for me to decide whether a complaint based on the discriminatory effect of legislation can ever result in a breach of charter rights (other than section 15). In this case, the discriminatory effect is based on unequal access to broadcast time which becomes available for use by political parties only by reason of the impugned legislation. I will later deal with the complaint in the context of section 15. I now indicate that, on the facts of this case, unequal access to broadcast time does not infringe other freedoms and rights guaranteed by the *Charter*. Time becomes available only because of the legislation. The unequal access to this time does not restrict any political party's freedom of speech. I know of no principle which says that the legislature cannot provide a solution to a public problem or concern unless it gives everyone involved equal access to the resources provided. Nor do I agree that unequal access restricts or limits free speech of a person who gets less of a resource which would not be there but for the legislation. To the extent that the learned trial judge found that undue discrimination against new and emerging parties resulted in a restriction of expression, he erred.

Further, as I indicated earlier, I am of the view that the allocation and reservation provisions, taken separately or together, do not have the effect of restricting or limiting freedom of expression of any political party. These sections merely reserve time which might otherwise not be available and provide for a distribution or allocation scheme. Smaller and emerging parties are not treated equally with larger parties. I will address the section 15 implications of such unequal treatment, when I deal with the cross-appeal. For now, I find that inequality of treatment does not result in a restriction of freedom of expression. I would allow the appeal on this ground as well. Section

307 and section 310 do not infringe the freedom of expression of either respondent. The appeal is allowed and the declaration made by the learned trial judge that section 310(1) is of no force and effect is set aside.

THE CROSS APPEAL

The respondents (cross-appellants) cross appeal the dismissal of their application to have other provisions regulating advertising during federal election campaigns declared invalid and appeal against the findings of the learned trial judge that their rights under sections 2(d) 3, 6, 7, and 15 of the *Charter*, and the implied Bill of Rights had not been infringed.

I. Sections 2(d), 3, 6, 7 of the CHARTER

For the reasons given by him, I agree with the learned trial judge that this legislation does not come into conflict with sections 2(d), 3, 6, 7 of the *Charter*. There is no evidence to support any other finding. Nor am I convinced that obiter comments by the Supreme Court of Canada in *Reference re Alberta Legislation* [1938] S.C.R 100, suggesting the existence of an implied Bill of Rights protecting freedom of expression, adds anything to the debate in an age when rights and freedoms is expressly protected in Canada in the *Charter of Rights and Freedoms* which has been enshrined in the Constitution.

II. SECTION 15

I now turn to the question of a section 15 breach.

Section 15 provides:

> Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

First, section 15 deals with individuals and counsel for the respondents concedes that its provisions do not assist the Reform Party. However, he says that section 15 protects the rights of individual members and candidates of the Reform Party and that these individuals are disadvantaged because the legislation discriminates against the political party they support. I do not agree. The impugned provisions do not affect the right of an individual candidate to advertise or to obtain broadcast time, or otherwise communicate. The impugned provisions do not discriminate against individuals who are members of the party, either directly or indirectly. Individual members of parties are treated equally under the legislation.

Further, I do not accept that there is unfairness to or discriminating against individual members of political parties by unequal access by political parties to broadcast time. I do not accept that a political party, which enjoys limited support of a small number of individuals who wish to promote a specific interest or to ridicule the process is the equal of a political party which has the support of a far greater number of voters and genuinely strives to provide information about its programme for the governing of the country. Seen from the point of view of an individual member, such a scheme would result in discrimination against individuals in the larger group, by giving each individual in the small party greater access to broadcast time than that enjoyed by each individual of the larger party. Fairness is achieved, not by equal treatment of political parties, but by fair treatment measured by popular support with the objectives of the election process in mind.

In any event, members of political parties or candidates who run for office are not within the class of persons protected by section 15 of the *Charter*. Sections 307 and 310 do not discriminate against individuals on enumerated or analogous grounds. It may be that in some circumstances, membership in a political party could be an analogous ground. That is not the case here. The impugned legislation does not discriminate against the individuals.

In *Andrews* v *Law Society of British Columbia,* [1989] 1 S.C.R. the Supreme Court of Canada interpreted section 15 of the *Charter*; McIntyre J gave the following analysis of section 15 at p 174:

> I would say then that discrimination may be described as a distinction, whether individual or not, based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

at p. 180:

> The analysis of discriminating in this approach must take place in the context of the enumerated grounds and those analogous to them.. The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. Those words are a form qualifier built into s. 15 itself and limit those distinctions which are forbidden to those which involve prejudice or disadvantage.

and at p. 182:

> The third, or "enumerated and analogous grounds" approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above and

> leaves questions of justification to s. 1. However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discriminating and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact upon him or her in the protection or benefit accorded by the law but, in addition, must show that the legislative impact of the law is discriminatory.

The individual respondent has failed to establish that her rights under section 15 and those of other Reform Party members have been infringed by the impugned provisions of the *Canada Elections Act*.

III. CONSTITUTIONAL VALIDITY OF ss. 307, 311, and 316 OF THE CANADA ELECTIONS ACT

Regarding the question of the constitutional validity of the other provisions of the *Canada Elections Act*, nothing in the evidence or the argument convinces me that the provisions of sections 307, 311, and 316, which merely require broadcasters to set aside free and purchasable broadcast time during which political parties can convey their respective messages to the public, conflict with the rights of the respondents. On the contrary, sections 307(1), 311, and section 316 (the "reservation sections") assure access by political parties to broadcast time which might not otherwise be available or affordable. In this case, the respondents do not question the right of Parliament to control broadcasting or the broadcast industry. The constitutional attack is limited to the broadcast provisions of the *Canada Elections Act* and the effect which these provisions have on the freedom of expression or communication of a political party, the Reform Party and its members. As earlier indicated, I am also of the view that the allocation provisions do not infringe the *Charter*.

IV. CONSTITUTIONAL VALIDITY OF ss. 303, 319(1) and 320 of the CANADA ELECTIONS ACT

S. 303 limits the right of candidates and other persons to use broadcasting stations outside Canada for the purpose of influencing an election in Canada. On its face, this provision restricts speech or expression. This restriction is minimal when weighed against the extensive time which is provided by broadcasters located in Canada to political parties as a result of the provisions of the

Act. The respondents submit that the provision restricts the right of voters who reside or are visiting outside of Canada to be fully informed. There is no evidence that any political party is interested in targeting this group of people in its broadcasts or advertising. The problem which section 303 addresses is the use of broadcast facilities located outside Canada to reach voters in Canada.

As found by the learned trial judge, all witnesses, concede the efficacy and necessity of such a provision. As an example, Dr. Stanbury (a witness called by the Respondents) was of the view that control of expenditures during an election campaign is of paramount importance to the maintenance of the integrity of the electoral process. Expenditures within Canada can be verified by examination of the books of the newspapers and broadcasters. Such control would not be possible in the case of radio and television outlets operating outside the country. The purpose and effect of section 303 is to ensure that political broadcasting remains in Canada where it is subject to Canadian laws and to the scrutiny and control of Canadian election officials who have the duty of ensuring compliance with the laws of Canada. Further, the section maintains the general objective of reservation and allotment of available time is ???that no one party with sufficient resources can obtain exclusive or the bulk of advertising and broadcasting enjoys a large listening or viewing audience within Canada. While this section restricts speech, I agree with the trial judge that such legislation is a necessary, and proportionate response and therefore is saved by section 1.

Section 319(c) provides:

> "Every broadcaster or network operator who
>
> (c) makes available to a registered party or political party within the period described in s. 307(1), broadcasting time in excess of that required to be made available by it to that party under an allocation under sections 309 and 310 or an entitlement under section 311 without making available, to all other registered parties or political parties proportionate amounts of equivalent broadcasting time in excess of those required to be made available, having regard to the proportions established by the allocation of broadcasting time under sections 309 and 310 or the entitlements under s. 311, is guilty of an offence........"

By the provisions of section 320, the broadcaster is prohibited from charging any fee for this excess time. Sections 319(c) and 320 have the effect of restricting freedom of speech of political parties by expressly limiting the total amount of broadcast time which a broadcaster can sell to any political party. These provisions prevent a political party from negotiating for the purchase of advertising or broadcast time in excess of its allotted time when it has used all its allotted time

with a particular broadcaster. The only justification offered by the Attorney General for this provision is that these provisions preserve the integrity of the allocation of time in accordance with the formula provided in the *Act* and assist in the control of expenditures during political campaigns. However, the respondents point out that total election expenses are strictly controlled and limited by other provisions of the *Act*. Enforcement is assured by requirements of disclosure and verification.

The Attorney General of Canada has failed to establish that section 319(c) and 320 which have the effect of preventing a political party from negotiating for the purchase of additional broadcast time with individual broadcasters, when it has used all of its allotted time, is an essential part of the legislative scheme or that the infringement of the freedom of expression which results is justified under section 1.

The respondents submit that they should be free to determine how they may best use their limited expenditures. Keeping in mind that election expenditures are effectively controlled by other provisions expressly enacted for that purpose, the Attorney General has not established that the provisions of sections 319(c) and 320 address a pressing and substantial concern or are a proportionate response justifying the substantial limit imposed by these provisions on freedom of expression. Once all parties have some access to broadcasting time of all broadcasters on a priority basis as provided by sections 307, 311, and 316, the objective of the legislation is achieved and little justification remains for the prohibition of sale of additional advertising time to political parties who wish to negotiate their own deal with a particular broadcaster.

The respondents argue that sections 319(c) and 320 are not severable and, if the Court finds that sections 319(c) and 320 are invalid as infringing freedom of expression, then the whole legislative scheme must fail. I do not agree.

I accept the following statement in *Hogg, Constitutional Law of Canada*, 3rd ed. 1992, Vol. 1, 15–21, as to the applicable rule:

> The rule which the courts have developed is that severance is inappropriate when the remaining good part "is so inextricably bound up with the part declared invalid that what remains cannot independently survive," in that event, it may be assumed that the legislative body would not have enacted the remaining part by itself..... On the other hand where the two parts can exist independently of each other so that it is possible to regard them as two laws with two different "matters", then severance is appropriate because it could be assumed that the legislative body would have enacted one even if it had been advised that it could not enact the other.

Counsel for the respondents cites several decisions of the Supreme Court of Canada where the test referred to above was applied. In each of the cases to which he refers the Court found that either

that the legislation constituted a scheme or code which could not exist without the invalid provisions, or that the remaining provisions were ancillary to the invalid provisions. This is not to say that no legislative scheme can survive the striking of some of the provisions which make up the scheme as contrary to the Charter. The *Morales* decision referred to earlier is a good example of exercise of the severance power in that the Supreme Court of Canada struck down the offending part of a section permitted the rest to remain in force.

Here, the provisions of sections 319(c) and 320 are not essential to the functioning of the reservation and allocation provisions. In fact, the allocation and reservation provisions meet the purpose of the legislation as set out by the Attorney General without the assistance of sections 319(c) and 320. These prohibition provisions add nothing to the objective of assuring that adequate broadcast time is available during election campaigns or the equitable allocation of the time so reserved, keeping these objectives in mind. The Attorney General has not established that these two provisions were essential to the proper functioning of the reservation and the allocation scheme. Had that been established, I would have decided not to strike the entire scheme, but to find that any infringement to freedom of expression which resulted from the provisions of sections 319(c) and 320 was saved under section 1 of the *Charter.*

V. PROOF OF INFRINGEMENT OF THE RESPONDENTS' RIGHTS: THE FACTUAL BASIS

The Attorney General submits that the learned trial judge erred in striking down legislation in the absence of proof by the Reform Party that its speech or expression was in fact limited to restricted??? as a result of the legislation. To achieve this, the Attorney General submits that the respondents must prove that the Reform Party intended to and was able to purchase more time than was allotted to it under the scheme. The Attorney General says that because the Reform Party bases its claim on the effect (not the purpose of the legislation) to establish a restriction of its freedom of speech, it must establish that its rights were in *fact* restricted or breached.

The Attorney General relies on *McKay* v *Manitoba,* (1989) 61 D.L.R. (4th) 385 at 388, where the Supreme Court of Canada set out a requirement that evidence should establish a sufficient factual base for a finding of limitation of freedom or breach of a right before a remedy can be granted. At. p 388, Cory J stated:

> "Charter decisions should not be and must not be made in a factual vacuum. To attempt to do so, would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of the facts is not, as stated by the respondent a mere technicality. Rather, it is essential to a proper consideration of the Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect the court to deal with an issue such as this in a

factual void. Charter decisions cannot be based on the unsupported hypotheses of enthusiastic counsel."

Counsel for the Reform Party cites *Minister of Justice* v *Borowski,* [1981] 2 S.C.R. 575, [1981] 1 W.W.R.97, *R.* v *Big M Drug Mart,* [1985] 1 S.C.R., 18 D.L.R. (4th) 321, and in *R.* v *Seaboyer,* [1991] 2 S.C.R. 577, 83 D.L.R. (4th) where the Supreme Court of Canada granted the remedy without proof that the rights of the applicant had been breached. In these cases, the legislation directly and on its face affected rights, therefore raising an issue as to the validity of the purpose of the legislation. Here, the respondents raise only the question of the effect of the legislation. However, it is not necessary in this case to resolve this issue.

In the *McKay* case, there was no evidence of any kind. Here, at trial, there was no evidence that the respondent intended to or was able to take advantage of more broadcast time than had been allotted to it by the Broadcast Arbitrator. The Broadcast Arbitrator already exercised his discretion to allot additional time to the Reform Party because of the increase in its support since the last election. At trial, the evidence established that the potential existed that the Reform Party could be restricted in planning its advertising campaign in the manner in which it wished and in spending its permitted expenditures as it wished. While the Reform Party did not establish that it could use all the time allotted to it, it established that its ability to target a particular region or to concentrate its advertising with a particular broadcaster could be restricted at least by the provisions of sections 319 and 320 of the *Act*. Accepting that some factual basis is necessary, at trial the Reform Party provided sufficient proof of the restriction of its rights.

IV. FRESH EVIDENCE APPLICATION

The respondents seek to introduce fresh evidence at the re-hearing of this appeal. At the trial and at the first hearing of this appeal, counsel for the Attorney General of Canada argued that the respondents had failed to established a factual base for their action in that they had failed to prove that the legislation had the effect of restricting their freedom of expression. The respondents now seek to introduce evidence relating to the Reform Party's radio and television advertising and broadcasting campaign leading up to the election held in October, 1993.

In *Palmer* v *The Queen,* [1980] 1 S.C.R. 759, the Supreme Court Canada set out the following criteria for the admission of fresh evidence (at p 775):

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The evidence which the Reform Party seeks to introduce deals with its actual expenditures during the 1993 election campaign. This evidence was not available at the trial which was held before the commencement of the election campaign. Such evidence is relevant. I doubt that it is decisive or piratically conclusive. However, I need not decide the issue here as I have already dealt with the factual basis and have decided that issue in favour of the Reform Party without reference to the new evidence.

VII. CONCLUSION

As a result, the provisions of sections 319(c) and 320 are declared invalid as being in conflict with section 2(b) of the *Charter*. The cross appeal is allowed to this extent, otherwise the cross appeal is dismissed.

JUDGEMENT DATED at
CALGARY, Alberta, this
10th day of March, 1995.

McFADYEN, J. A.

BELZIL, J. A.

COTE, J. A.

1 CONCUR:

DISSENTING REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE CONRAD

This appeal raises the constitutional validity of sections 303, 304, 307-11, 316, 319 and 320 of the *Canada Elections Act*, R.S.C. 1985, c. E-2 (the "Act"). Those sections create a scheme for the reservation and allocation of broadcast time during elections. The allocation formula contained within the scheme favours the more established political parties and forbids the sale to, and purchase of, time by any political party outside the scheme. It also provides for two minutes free time to each political party, plus the allocation of further free time in accordance with the same formula.

The broad question concerns where this legislative scheme infringes sections 2(b), 2(d), 3, 6, 7, or 15(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter"), and if so, whether it, or any part thereof, can it be saved by section 1 of the Charter? The trial judge found that section 310 did infringe section 2(b) of the Charter and that the infringement could not be justified under section 1. The Attorney General for Canada ("AG Canada") appeals that decision. The trial judge upheld the balance of the impugned section, and the respondents cross-appeal the decision in that regard.

I have had the distinct advantage of reading the draft reasons for judgement of McFadyen J A, but find myself unable to agree with all aspects of her disposition of this case. For the reasons that follow, I would dismiss the appeal and allow the cross-appeal by striking, in addition to section 310, sections 303, 307, 316, 319 and 320. The legislative scheme and background facts are set out in the judgement of McFadyen J A.

Issues

In answering the broad question, the following issues arise:

(1) What is the purpose of this legislation, and is this purpose constitutional?
(2) Does either the purpose or effect of the legislation infringe any rights enumerated under the Charter?
(3) Is the legislation saved by section 1 of the Chart of Rights and Freedoms?
(4) Is severance applicable to save any of the impugned sections?

The Supreme Court of Canada, in the case of *Irwin Toy Ltd.* v *Quebec (A.G.)* [1989] 1 S.C.R. 927, sets out a systematic approach to be taken by courts when assessing the validity of a piece of legislation attacked on the basis that it infringes freedom of expression (See also *R.* v *Keegstra,*

[1990] 3 S.C.R. 697; *R.* v *Zundel* (No.2), [1992] 2 S.C.R. 731.). The first step is to determine whether the activity at issue is within the sphere of conduct protected by freedom of expression.

It is common ground that the broadcast of political messages is within the sphere of freedom of expression. It is difficult to imagine any expression more vital, or deserving of protection, than electoral free speech.

As outlined *by Irwin Toy, supra,* the second step is to determine whether the purpose or effect of the government action is to restrict freedom of expression. Since *R.* v *Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 ("Big M"), the Courts have approached Charter challenges to legislation by first examining the purpose of the legislation, and if that is found to be constitutionally sustainable, the effects of the legislation are then analysed. If the effect of the legislation infringes the freedom, then it is necessary to determine if the legislation is saved by section 1 of the Charter.

Issue One: What is the purpose of this legislation, and is this purpose constitutional?

As McFadyen J A correctly points out, this case proceeded in the court below, and at appeal, on the basis that it was the effects of the legislation, and not its purpose, that infringed the Charter. The purpose stated by AG. Canada and not challenged by the respondents, was two-fold:

(1) to ensure adequate supply of prime broadcasting time during federal election campaigns for use by registered political parties in communicating information useful of the public in electing a government; and (2) to provide an equitable allocation of that reserved time among the registered political parties. The trial judge appears to accept those dual purposes for this scheme: *see Reform Party of Canada* v *Canada (Attorney General),* (1992), 7 alta. L.R. (3d) 1 at 25.

The constitutional question raised by this appeal is incapable of resolution without examining and ascertaining the true objective of this legislation. While the adoption by all parties of the two-fold purpose is helpful, it is not complete. In the normal case, I would not embark on a path not presented by counsel. However, in this constitutional challenge, the ascertainment of purpose of the legislation, in the sense that word is employed by the Supreme Court of Canada in Big M, *supra*, is critical. In response to questions from the court on purpose, the parties acknowledge that in view of Big M, if legislation does not pass the purpose test, it is unnecessary to embark on an analysis of its effect, or section 1 justification. The parties also acknowledge that, in the final analysis, it is the court's responsibility to determine the real purpose or objective of the legislation.

Without determining the exact legislative purpose, it is impossible to determine whether that purpose infringes the Charter. The stated two-fold purpose of 'reservation' and 'equitable allocation' is inadequate for determining the true legislative aim without clothing the words 'equitable allocation' with meaning. The true objective of Parliament is not ascertainable, nor is

it capable of evaluation in terms of the section 1 analysis. For instance, if the words 'equitable allocation' were intended to mean 'equal or fair' distribution, that objective is quite different from an objective where the words 'equitable allocation' were intended to mean a distribution favouring the granting of significantly more air time to established parties who have performed well in past elections. Moreover, it is impossible to evaluate the conclusions reached by the trial judge in justifying, or striking, the legislation without first ascertaining the true purpose of that legislation.

Trial Judgement

While the trial judge states his acceptance of the of the two-fold, he uses different, and sometimes inconsistent, objectives of the legislation as the basis for his section 1 analysis. At times, he seems to use the aim of "fairness to emerging parties" as the purpose of the legislation, for instance, at p 28:

> I conclude that the regulations in question were indeed enacted to address a pressing and substantial concern. Based on the evidence, I am of the view that reliance on the marketplace would invariably lead *to an unfair domination of the airwaves by those parties with the means to outbid the others. It is legitimate concern that new and emerging parties, primarily those with a less established financial base, not be priced out of the advertising market.* The Plaintiffs' other expert witness, Dr. Fletcher, also agreed that some threshold was desirable. The documentary evidence before the Court also compels this conclusion.
>
> (emphasis added)

Thus, in finding a pressing and substantial concern he indicates that the legislative objective is to ensure that wealth does not dominate the airwaves such that the new and emerging parties, or those with a less-established financial base, are disadvantaged. The use of an objective of fairness to emerging parties resulting from wealth domination is quite a different objective than that of reservation and equitable allocation suggested by the formula and agreed upon by the parties. These two objectives are internally inconsistent. The use of 'unfairness created by wealth domination' to support the challenged sections would indicate that the purpose of the legislation is to ensure fairness to emerging or less financially secure parties by ensuring that the established parties, or wealthy parties, could not have an advantage because of their established financial base. Such an objective is aimed at ensuring parties are on a more or less equal, or at least fair, playing field.

In my view, the twin purposes of 'reservation' and 'equitable allocation' as set out in the legislation are not capable of being interpreted as having an objective of fairness for emerging or less financially secure parties. The formula is totally inconsistent with being aimed at ensuring *fairness* to new and emerging parties. The allocation formula has nothing to do with wealth and, in fact, adds another dimension by which emerging parties are treated unequally, and unfairly, in

relation to established parties. They are restricted in the time they can purchase, whether they have funds. They are prohibited from ever having equal time until they are successful in an election. The allocation formula confers an advantage on the established parties of both *free time* and overall *quantity of air time.*

The trial judge, in part, justified the legislation on the basis of an objective of fairness to emerging parties when that is not what he stated to be the purpose of the scheme designed by the impugned sections, nor can it reasonably be interpreted as being the purpose.

There seemed to be a shift in the reasoning of the trial judge as to the purpose throughout the judgement. When dealing with the formula for allocation of the reserved time, the trial judge states at p 31 of *Reform Part of Canada, supra*:

> While the primary purpose of the regulatory scheme has been discussed elsewhere, the evidence has disclosed that the adoption of an allocation formula such as that articulated in s. 310(1) was necessary to ensure that those parties with the greatest national appeal receive proportionally more are time.

He goes on again at p 31 and states:

> There are a number of political parties in Canada which, while having chapters nationwide, might be considered "single-issue", "fringe", or satirical in nature. The formula, therefore, *was intended to ensure that the time allocated is, to a large extent, reflective of those parties which present a viable option to the electorate, and have some chance of forming the next government. While this ensures that fringe parties are not allowed to unduly encroach upon the limited broadcasting time available to "contender" parties, its effect is to limit availability of broadcasting time to the new or emerging national parties as well.*
>
> (emphasis added)

Here the trial judge refers to a different purpose and one closer to that submitted by the A.G. Canada. At no time, however, does the trial judge ever evaluate whether there is a pressing and substantial need not ensure that contender parties receive more time, There is no finding, nor any basis for a finding, that it is a pressing and substantial concern that time for parties should be allocated in accordance with a formula designed to favour past performance or national appeal. In fact, the trial judge recognises the allocation formula cannot stand and that the advantages created by it are not justified. He continues in his reasons to revert to the " emerging parties' " needs when he strikes s. 310) (1). He states at p 32:

> I find that the means chosen by Parliament for allocating the reserved time between the parties are not proportionate or appropriate to the ends. The allocation formula has a discriminatory effect which tends, in my opinion, to

> favour the existing parties at the expense of new or emerging parties. The infringement of the Plaintiffs' s. 2(b) rights is thus not saved by s. 1.............

The trial judgement lacks a consistent definition of the purpose of the legislative scheme, and a section 1 analysis of the legislation in accordance with that purpose. In my view, the inconsistencies arise because the argument is advanced without reference to purpose and on the basis of an agreed purpose. Yet the trial judge recognised the inherent problem in the distribution scheme. It is unfortunate he did not have the purpose argued because his judgement recognises the numerous alternatives. Throughout the trial judge's analysis, a variety of purposes or justifications were mentioned with respect to the legislation. These include ensuring that voters are properly informed, ensuring that wealth is not permitted to dominate the airwaves, ensuring that smaller parties are not priced out of the market to air time, ensuring that "single issue" or "fringe" parties do not unduly encroach on "contender" parties' air time, ensuring that established parties receive proportionately more air time, etc. Evidence was led on the various problems encountered in an election. The *Canada Elections Act* deals with many issues. In particular, it restricts campaign expenditures and prohibits the broadcasters from raising their prices during an election campaign. The Reform Party does not challenge those sections. They acknowledge the problem that may be created by wealth, and the inequities that may result if there is no control. The Reform Party does not challenge those sections. They acknowledge the problem that may be created by wealth, and the inequities that may result if there is no control. The Reform Party acknowledges that, standing alone, section 307, which provides for the reservation of prime time, would be unobjectionable to them, although they say that it is impossible to ascertain if this section would have been passed absent the free time and the formula. The objection, they say, is to the challenged sections which, taken together, constitute a scheme favouring the established parties in the limitation and distribution of air time.

For all the above reasons, I revisit the "purpose" of the legislation. The most difficult issue of this constitutional challenge is to identify the aim of Parliament, yet it is critical that the true objective be ascertained. It is only then that the court can determine whether it is a constitutional purpose that can be saved, and whether it can be saved by a proper section 1 analysis, and whether severance of some of the sections is proper in view of the overall objective.

Big M Drug Mart

In dealing with the purpose and effect of legislation in a constitutional context, the necessary starting point in the judgement of the Supreme Court of Canada in Big M because it is necessary to determine the meaning to be attributed to the word "purpose". There the court was faced with legislation (the federal Lords Day Act) with was found to offend the constitutional guarantee of freedom of conscience and religion found in section 2(a) of the Charter. Dickson J (as he then was) (for the majority) stated the following at p 331–2:

> In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity.
>
> Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact.

He went on at p 334 to say the following:

> (T)he legislation's purposes is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid....(T)he effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

Finally at p 353:

> The characterization of the purpose of the Act as one which compels religious observance *renders it unnecessary to decide the question of whether s. 1 could validate such legislation* whose purpose was otherwise or whether the evidence would be sufficient to discharge the onus upon the appellant to demonstrate the justification advanced. (Emphasis added)

Thus, where legislation with an otherwise proper purpose infringes *Charter* rights because of its effects, it may be saved by section 1 of the *Charter* if the infringement is a reasonable limit imposed by law that is justifiable in a free and democratic society. However, when legislation

infringes Charter rights *in its very purpose* there is no need to enter into section 1 analysis because unconstitutional effects can never be justified by an unconstitutional purpose.

The following year Dickson C J rendered another freedom of religion decision in *R.* v *Edwards Books and Art Limited,* [1986] 2 S.C.R. 713 ("Edwards Books").

In that case, the court was assessing Ontario labour legislation known as the *Retail Business Holidays Act.* The court found that the legislation was enacted with the intent of providing uniform holidays to retail workers and was not a "surreptitious attempt to encourage religious worship" (at p 744). At p 752 Dickson C J stated:

> (t)he Act has a secular purpose which is not offensive to the Charter guarantee of freedom of conscience and religion.

The key difference between Big M and Edwards Books was the court's characterisation of the legislative purpose of the Act in question.

It is notable that there is no other case where government legislation has been struck down at the Supreme Court of Canada on the basis of purpose. Two Ontario Court of Appeal cases have struck down legislation on the basis of invalid purpose: *Zylberberg et al* v *Sudbury Board of Education* (1988), 29 O.A.C. 23 and *Corporation of the Canadian Civil Liberties Association et al* v *Ontario (Minister of Education) and Board of Education of Elgin County* (1990), 37 O.A.C. 93. These cases were not appealed to the Supreme Court, and Zylberberg has been explicitly followed on at least two occasions by lower courts in other provinces: *Russow* v *British Columbia (Attorney General)* (1989), 62 D.L.R. (4th) 98 (B.C.S.C.); and *Manitoba Assn. for Rights and Liberties Inc.* v *Manitoba* (1992), 94 D.L.R. (4th) 678 (Q.B.).

The freedom of expression cases that followed *Irwin Toy* also appear at first blush, to narrow and conflict with the approach taken in Big M, as they moved to a section 1 analysis of the legislation to determine if it passes constitutional muster, even if it is recognised that the legislation was designed to infringe freedom of expression. The reason for this is that following the earlier pronouncements in *Irwin Toy,* the Supreme Court of Canada decided that the content of the expression has not bearing on whether the Charter right is engaged. Freedom of expression is absolute and in order to allow any restriction at all, based on the content, a section 1 analysis was necessary. However, it is important to note that in the subsequent cases, the legislation, while designed to restrict freedom of expression, had a valid legislative aim or objective. For instance, the legislative aim or objective was to prevent harm to women (*Butler,* [1992] 1 S.C.R. 452) or promotion of hatred against minorities (*Keegstra and Zundel).* In such cases there was a competing Charter right, such as equality under section 15, which overruled the freedom of expression in the context of harmful expression. Thus, while it appears that even if the legislation is designed to curb expression, if it has a valid aim or objective based on another *Charter* right, it moves to a section 1 analysis. However, if the aim or objective of the legislation is the very

evil for which the guarantee was put in place, Big M governs and a section 1 analysis is unnecessarily.

The meaning attributed to the word "purpose", as that word is used in Big M, is crucial. It is not merely that the legislation was designed to offend the *Charter,* it is the reason or objective for which it was so designed. It is the *legislative objective* that is referred to when legislation is said to offend the *Charter* in its very purpose. In Big M, the legislative objective was found to be the enforced observance of a certain religion. When the innocuous "aim" of providing a common day of rest for working people became the core objective of the legislation, as in *Edwards Books,* it became possible to move on to a section 1 analysis of the legislation because the very purpose of the legislation no longer offended the Charter.

The apparent conflict can be resolved by defining the word "purpose" as it used in Big M. Côté J A, of this Court, emphasised the difference between legislation designed to restrict a freedom, for some valid objective, and legislation where the very aim or objective is the restriction of the freedom. He discusses this difference in *Epilepsy Canada* v *Alberta* (1994), 155 A.R. 212 (C.A.), where he states at p 214:

> Despite what the respondent argued, this legislation directly and expressly affects speech or expression; it does not merely do so indirectly or have that effect. It was passed (among other reasons) to prevent fraud. But the means which it uses, the express provisions of the statue, directly and expressly bar certain speech. They say that one cannot ask or advertise (without a license). That is what *Charter* case mean when they speak of legislation "intended" to impair a Charter right: *Irwin Toy* v *A. G. Quebec, supra* at 974–76, 978–79 (S.C.R.); *R.* v *Zunkel* (No. 2.), [1992] 2 S.C.R. 731; 759 cf. *Osborne* v *R.,* [1991] 2 S.C.R. 69, esp. at 92–3. For example, the *Irwin Toy* case says that a ban on T.V. ads or on handing out pamphlets is an attempt to restrict expression, even if the *aim* is to protect children or prevent littering. And *Zundel* says the "false news" prohibition has as its "purpose" restricting expression, even if the *aim* is to prevent harmful consequences. When the cases speak of legislation which merely has the effect of impairing a *Charter* right, they mean legislation whose words do not mention any activity protected by the *Charter.* That is not the case here.

In *Epilepsy Canada, supra,* the purpose of the legislation was not the very evil the Charter guarantee was meant to prevent, so Côté J A moved on to a section 1 analysis.

What then is the objective or aim of the impugned legislative scheme? What is the evil it attacks, or the good it hopes to ensure?

Purpose

The starting point for the ascertainment of purpose is an examination of the scheme as a whole. If there were other unchallenged sections that impacted on the determination of the objective I would look at them as well. With respect, I disagree with the approach taken by McFadyen J A of dividing the challenged scheme into three groups with individual purposes without first examining the scheme to determine an overall objective. Only then is it proper to move on to ascertain if severance is applicable and consistent with the overall legislative objective. It is, in my view, dangerous to examine individual sections of the scheme, and attribute to those sections individual purposes which, on their face, appear justifiable or valid, because when viewed with the remaining sections it may be obvious that such was not the aim. That appears to be what occurred, in part, with the trial judgement. Such an approach can result in the individual sections having purposes inconsistent with the scheme as a whole. Would Parliament have intended both?

In fact, the appellant's first argued position was that the scheme should be examined as a whole, and that the sections restricting sale of additional time (sections 319 and 320), and prohibiting the use of broadcasting stations outside Canada during an election (section 303), were necessary to the integrity of the legislative scheme. If that is so, then the analysis breaks down when the sections are justified individually unless severance is possible, because the aims are different.

The Scheme

The legislative scheme in question regarding the use of broadcast time provides for the following:

(1) There is a reservation of prime time available for use by registered political parties (section 307).

(2) Prime time was to be distributed in accordance with the following formula set out in s. 310(1) which takes into account:
    (a) the percentage of seats in the House of Commons held by each political party after the last general election;
    (b) the popular vote obtained by each party in the last election; and
    (c) the percentage of candidates endorsed by each party at the last general election.

The first two factors are given double the weight of the last.

(3) An arbitrator has the right to vary the results if he thought those results created unfairness. There is no guideline for the exercise of his discretion as to what he considers fair. However, it is clear there is no suggestion within the scheme that fair meant equal. There is nothing in the legislation to suggest that equality was a desirable object, nor was there anything in the legislation to suggest that emerging parties should have equal time.

(4) There is a provision for free time (s 316). Each major network shall make available at least as much free time as they did in the previous elections. Each registered party is guaranteed a minimum of two minutes' free time. The balance of free time is allocated in the same proportion as purchasable time. No commercial value is attributed to the free time for the purposes of calculating the election expenses of the party. (See Appendix "A" Canada Elections Act, *supra*) Political Broadcasts – sections 303 to 322.)

(5) There is an absolute prohibition against using broadcasting stations outside Canada during an election campaign for the purpose of influencing an election (section 303), and an absolute prohibition against broadcasters providing additional time to any political party without offering it to all of them in accordance with the allocation formula (section 319). Moreover, they cannot charge for any extra time. And if they do they are subject to being charged (section 320). It is fair to conclude that the effect of sections 319 and 320 is that no additional time will be granted.

In arriving at the purpose of this legislation, two facts must be kept in mind. First, these sections place a restriction on the total amount of time which all parties may purchase. Secondly, the sections prohibit parties having equal time (either purchased or free time), because equal time would be totally inconsistent with the aim of the allocation formula. Those two facts go a long way to eliminating some of the suggested objectives of this legislation, as well as negating the possibility of severance. I, therefore, propose to examine the various aims referred to by the trial judge for consistency with the entire scheme.

Possible Purposes

(1) Communication of information

While the reservation of time, and the provisions for free time, could arguably be to ensure that information will be made available to the public, the prohibition against the purchase of time outside the parameter of the scheme is totally inconsistent with that aim.

It is true that the reservation of 6.5 hours of prime time for political broadcasts is inconsistent with an aim that time will be made available for political advertising. While an objective of "providing information" might well result in legislation ensuring minimum time, such an objective would not place a ceiling on the total amount of time in which that information could be communicated. That section does not stand alone and must be read in the context of all of its supporting sections in the first instance. The extremely disproportionate allocation of free time is indicative of an objective that goes well beyond more communication of information. It belies an objective to communicate some information in preference to other information. In an election, all information is valuable and legislation aimed at ensuring the public is aware of the issues would not prohibit the purchase of additional time.

It must be recognised that the government already controls the broadcast air time by virtue of the *Broadcasting Act,* S.C. 1991, c. Bw–901. In fact, the restrictions on use of the airwaves for broadcast purposes occur, in the first instance, as a result of the *Broadcasting Act* (which is not challenged in this case). As the government controls all broadcast time in Canada, it could make available more time if needed to allow all parties the opportunity to communicate. Moreover, the evidence indicated much of the reserved time was not used by the party entitled, yet there were restrictions on its purchase. The AG Canada agrees, and in fact argues, that it is necessary to keep sections 303 and 320 because they preserve the integrity of the scheme by restricting the purchase of time outside the scheme. Thus, communication of information to the public is not the real purpose of this scheme. The allocation formula, and prohibiting sections are part of the scheme and are inextricably involved in its purpose.

(2) Unfairness to new and emerging parties created by wealth

As mentioned previously, all parties recognised that the potential inequality created by wealth domination was one objective that was addressed by the *Canada Elections Act.* With respect to political advertising, that objective is supported by a section prohibiting broadcasters from raising prices during an election, as are the sections limiting expenditures. No issue is taken with those sections. The respondents accept that wealth domination was an objective of some sections in the *Canada Elections Act*, but it is not the objective of the sections composing this scheme. If wealth domination is the evil objected to, then the real fear is the disproportionate broadcast time the wealthy could obtain. The objective would be to create a more level playing field. It creates the very inequity which it is feared wealth would create; favouritism and free time to the established parties. Moreover, that free time does not need to be accounted for in election expenses. Thus it cannot be the lack of equality, or fairness, created by wealth that is the objective of this particular legislation, because the allocation formula is inconsistent with such a goal.

(3) Availability of time and method of distribution

One of the main arguments for the reservation system was the need to ensure availability of time. That is a laudable goal, at least so far as political parties are concerned. Thus, says the appellant, there must be a means by which to distribute that time. The fear of preference of certain parties by broadcasters raises justifiable concerns, particularly in view of the fact that broadcasting is controlled.

Section 8 of the Television Broadcasting Regulations, 1987, SOR 87 – 49 provides:

> Political Broadcasts
>
> 8. During an election period, a license shall allocate time for the broadcasting of programmes, advertisements or announcements of a partisan political character on an equatable basis to all accredited political parties and rival candidates represented in the election or referendum.

It is recognised that is not a total safeguard, but at least the word "equitable" becomes the governing rule. Parliament could have similarly provided for "equitable distribution" without a formula. Obviously the word "equitable" on its own was not sufficient to meet the government's true intent, nor were they will to leave distribution of time to the broadcasters, who have an obligation to distribute time equitably. The word "equitably" on its own is capable of being interpreted as equally, or nearly equally, or at least fairly. Not so the allocation formula. That formula becomes pivotal, and lends support to the fact that this legislation was passed for the very purpose of imposing the allocation formula on the parties, granting all free broadcast time in accordance with its guidelines and restricting the right to purchase time outside that formula.

(4) Restrict fringe parties

There was also an argument that this legislation was aimed at ensuring the fringe or the satirical party did not take up the valuable broadcast time necessary to communicate to the electorate. Why should a party, which is not a serious contender, receive time, particularly equal free time? The objective, however, is not limited to these parties, because it works a similar disadvantage on other new and emerging parties, as well as established parties who did not perform well in the last election. They are all still serious contenders, as was illustrated by the 1993 election, when two of the emerging parties, despite their disadvantage, were second and third place in the election. Moreover, if the suggestion is that satirical, fringe parties do not have sufficient support to be serious contenders, it is the government who defines the qualifications for becoming a political party, and has the right to change them. If they meet those qualifications, who is to say they are not serious contenders, or have serious messages, that would help evaluate serious contenders. It is not possible to interpret his legislation as being aimed solely at the fringe or satirical party – again its true objective goes beyond that.

(5) Create unequal opportunity to broadcast time in favour of established parties

It is obvious the intent of this legislation is to control access to broadcast time, limit the time available to broadcast messages, and to share that time unequally. Equality is not an objective of this scheme. The statute has provided an allocation formula which is the starting point for any distribution of time. That formula is designed to ensure the established parties receive the most broadcast time, both free and purchasable; the main criterion for distribution being past performance. It is designed to favour incumbents. Nor does access to the arbitrator alter that purpose, because the formula is the starting point for the arbitrator's analysis. As referred to later in this judgement an arbitrator would never exercise his discretion to achieve equality because equality, or near equality, has nothing to do with the obvious intent of Parliament.

The object of this legislation flows form the formula. Its object is to control the use of the main medium of communication and to ensure that all distribution of broadcast time is made in favour of the established parties on the basis of past performance. It is structured to reserve time, to distribute it disproportionately in favour of the established parties, and then restrict the ability of

political parties to broadcast time in any manner outside the allocation scheme. The AG Canada agrees that the purpose of this legislation is to ensure that the air time is used primarily for the benefit of the parties who have the best chance of forming the next government. They argue that the restrictive sections (sections 303, 319 and 320) support the integrity of the system, and are necessary for it. Otherwise parties could purchase time and destroy the distribution scheme. *The appellant argues that it is a legitimate legislative objective to recognise that all messages are not of equal value, and it is important to prevent the over-saturation of the airwaves with messages of lesser value, to ensure that the messages of those parties who have a chance of forming the next government reach the electorate.* This legislation restricts the ability of all political parties to broadcast in any manner outside the allocation scheme and the scheme is aimed at benefiting parties on the basis of past performance. This legislation is designed to regulate and control the messages that reach the public. That objective is consistent with both the construction of the section itself, and the position stated by the AG Canada.

Legislative History

It is also construction that is consistent with the history of this legislation in Canada. An examination of the historical documents exhibited at trial, as well as certain academic articles, provides a telling insight into the purpose of the reservation and allocation of broadcast time. Parliament has consistently wanted to control this major form of political influence, and ensure that the political parties who benefit are those with a proven representative following. As stated by J. Lacalamita in "The Equitable Campaign: Party Political Broadcasting Regulation in Canada" (1984), 22 Osgoode Hall L.J. 543 at 545, "From the very first, the goal of social cohesion and the role of government were stressed." The prevailing attitude of fear of this new form of political influence is aptly summarised in the 1928 Aird Commission report in its recommendation with respect not political broadcasting:

> While we are of opinion that broadcasting of political matters should not be altogether banned, nevertheless, we consider that it should be very carefully restricted under arrangements mutually agreed upon by all political parties concerned.
>
> (Exhibit 2, Binder 1, Tab 1 at p.11):

One need look no further than the Parliamentary debates prior to the 1935 election to note the concerns expressed by various Parliamentarians. From the Right Honourable W. L. MacKenzie King, Leader of the Opposition:

> Personally, I feel that the radio today plays such an important part in all matters affecting public opinion that it would be quite proper that some provision should be made whereby, for example, *each political party which has a representative following should be entitled to have broadcast at the expense of the state one or*

> *two addresses which would set forth its platform or policies for the people......* Apart from that I think there ought to be some definite understanding that radio where it is to be used for political purposes will be *used in a manner which will not give one party which may happen to have more in the way of financial backing than other parties, a larger use of that national instrument.* (House of Commons, *Debates,* 30 June 1934 at 4511.)
>
> (Trial Exhibit 2, Binder 1, Tab 2)

And in answer Prime Minister R. B. Bennette (same cite):

> ... I assure the right hon. gentleman that I agree with him that something will have to be done to prevent any abuses or cause for complaint that the radio facilities are placed by contract or otherwise at the disposal of one party *to the exclusion* of others.
>
> (emphasis added)

However, the Prime Minister balked at the use of public funds for any free broadcasts. The issue was not pursued by the Leader of the Opposition, however, Mr. E. J. Garland of the United Farmers of Alberta cited the lack of financial resources of his party as grounds for support for some broadcasting paid for by the state.

These exchanges illustrate the fear that the monied interests could attain undue influence through the use of this new and powerful tool of expression, and the fear of one party gaining an advantage against others. It is also a recognition that one party could gain control of facility for the purpose of broadcasting to the exclusion of others. The context of these debates is important to understanding the views of the members. The material before the Court reveals that there was a desire to nationalise the broadcasting industry, but insufficient funds to accomplish the task. It was common for only one broadcasting outlet to service an entire community, so there was a fear that those who happened to control the license could dictate which messages would be broadcast. As well, providing free time on the CBC was viewed as unfair competition to both private broadcasters and newspapers.

The report of the 1936 Report of the Special Committee of the House of Commons on the Canadian Radio Commission ("Beaubien Report") (Trial Exhibit 2, Binder 1, Tab 3) again asserted a commitment to the eventual nationalisation of the broadcast industry. They also found that there had been "serious abuse of broadcasting for political purposes" during the 1935 election. Based on these findings the report recommended that dramatised political broadcasts be banned; that full sponsorship of all political broadcasts be required; *that the limitation and distribution of time for political broadcasts be under the complete control of the corporation, whose duty it shall be to assign time on an equitable basis between all parties and rival candidates;* that no political broadcasts be allowed on an election day or during two days immediately preceding same: House

of Commons, Special Committee on the Canadian Radio Commission, Ottawa, King's Printer, May 26, 1936, pp 785–86.

This report led to the passing of the *Canadian Broadcasting Corporation Act*, S.C. 1936, c. 24. As noted by Lacalamita, *supra* at p 546 of his paper, the legislation implemented all of the above recommendations, "(h)owever, the legislation itself did not solve the largely organisational problem of equitable allocation of time." Thus the "equitable allocation" of political broadcast air time was left to CBC policy directives until the age of television. The allocation of formula used to this day in section 310 has its roots in the Statement of Policy With Respect To Controversial Broadcasting, July 8, 1939 ("White Paper"). As stated at p 3 of the White Paper:

> The Corporation assumes this obligation as a function of public service broadcasting, in accordance with its general policy of encouraging fair and adequate presentation of controversial questions which are of public interest and concern. The CBC accepts...... the task of bringing to all listeners within reach authoritative statements of the position and policies of the respective parties. Full discussion of the principal contending points of view on national issues is a vital part of the democratic process.
>
> (Exhibit 2, Binder 1, Tab.4)

It is notable that that policy had provision for free time only; no other national network political broadcasts were allowed. The While Paper, *supra*, went on at p 3–4 to say:

> The national political parties will be given the opportunity of speaking to the people over the national network in accordance with factors other than simply their capacity to buy time... the political parties may welcome the arrangements as a means of avoiding unnecessary competition between themselves which often results in the purchase of time for beyond actual requirements. The provision of national network time on a free basis will relieve the parties of an expense which has rapidly become one of the most onerous features of modern political contests.

Thus, it is noted that the provision of free time for the purpose of communicating messages was an important one. It is also important to note that the only broadcast time was that within the government's scheme.

The White Paper at p 6 then went on to state the criteria which replaced wealth (note that under section 310 of the current Elections Act the first three criteria remain intact and are weighted 2:2:1); (i) standing in the house at dissolution; (ii) popular vote in the previous election; (iii) number of candidates in the preceding campaign; (iv) standing in the House of Commons at the preceding dissolution; and (v) a "factor designed to give recognition to the principle that the listener is entitled to an equal presentation of the points of view of al the existing parties." The blatant inconsistency of this last factor seems to have escaped the authors of the White Paper.

In the current Elections Act this principle that the listener is entitled to an equal presentation of all viewpoints has been reduced to two free minutes per party: was wealth ever *really* a concern? If the issue was to prevent domination of public discourse by wealth, why the reluctance to fund broadcasts through the public purse? There was a constant reluctance to open up a medium for communication that might result in unfairness to a party and at the same time a system put in place to do that very thing.

Interestingly, the third criterion is justified, on the basis that "new parties often have a conduct several campaigns as a general effort at political education and persuasion, before achieving a commensurate measure of national support" and the fourth on the basis that it is necessary to "take into account party continuity and tradition, an all-important element in the life of political institutions" (White Paper, p 6).

The stated purpose for the fifth criterion, however, is internally inconsistent:

> It may be said that each of the parties has something to offer the electorate, and that the electorate should be given an equal opportunity of judging as between them. This consideration would enter into the formula, but only as one of several factors.

If the electorate should be given an equal opportunity to judge between the parties, it is difficult to rationalise a formula designed to ensure messages are not received equally. Interestingly, the current Elections Act has not such fifth factor. One must keep in perspective how the free time section in fact works. To place this in perspective, the vague notion of equality under the current Elections Act provides for equality only with respect to the minimum two minutes' free time. The actual result was that one party was allocated 173 minutes purchasable time while another party was allocated 5 minutes. This results in a similar imbalance in free time. Thus the fear of wealth creating an advantage is replaced by an advantage created by legislation in favour of established parties. That advantage is tremendous because not only do the established parties receive the large allocations for purchasable time, but they are awarded free time at the same disproportionate rate. They are entitled to that free time whether they actually purchase any of the allocated purchasable time. Moreover, the commercial value of the time does not need to be considered in calculating election expenses, a considerable benefit. If the established parties are also the ones with the largest financial base, the scheme exacerbates the problem of wealth domination of the airwaves.

At the very inception of the allocation criteria over fifty years ago, while there were many legitimate fears and concern, the purpose has consistently been to control and limit the use of broadcast time to protect the established parties, not the emerging parties. It was consistently designed to ensure that the established parties received the majority of the free time provided. One wonders how new parties were expected to ever established a significant base of support under such a scheme given that national political advertising was not allowed on a paid basis.

Such a system was put in place amidst copious statements about the need for the CBC to administer political broadcasting fairly:

> The Corporation desires to administer it equitably and impartially, without fear or favour, to the disadvantage of none of the parties but, it is hoped, to the benefit of each and of the country as a whole. Necessarily the scheme must be considered largely as an experiment. (White Paper, p 5)
>
> (emphasis added)

The conclusion that providing an "equitable" allocation means controlling the messages and providing the majority of the time to the mainstream parties is supported by the following unsuccessful motion found in the minutes of the Special Committee on Broadcasting, *Minutes of Proceedings,* No 13, June 16, 1955, p 808:

> The Committee, while affirming the principle of freedom of expression, cannot fail to take note of the fact that the present regulations respecting political broadcasts have been used by the Communists to obtain free network time at public expense for the so-called Labour Progressive [Communist] Party by the device of nominating straw candidates in general elections. The Committee also notes that in the recent general election in the United Kingdom no free time was given by the BBC to the Communist Party. The committee recommends that consideration be given by the Board of Governors to the revision of the regulations in such a manner as to prevent their being circumvented for this purpose.
>
> (Italics in Original)
> (Exhibit 2, Binder 1, Tab 7, p. 385)

Substantial reform of the election system next occurred in 1974. Interestingly, the majority government chose not to impose an overall spending limit on parties, despite the recommendation of the Chappell Special Committee on Election Expense. Instead, restrictions on the purchase of broadcast air time during election campaigns were justified on the basis that these would function as spending limitations. This is difficult to reconcile with the position taken by the government with respect to individual candidates. During the debates leading up to the adoption of the 1974 reforms the government's rationale is made clear:

> ....while...there is.... guaranteed minimum access to the media in the way I have stipulated, each candidate is free to purchase media time up to the limits of his own election budget....(H)e cannot be denied any amount of time he wishes to purchase up to the ceiling imposed on his election expenses.

Hon. Allan J, MacEachen, House of Commons Debates, May 16, 1972, p 2408.

There is no suggestion in that statement that indicates the government was concerned that candidates would be unable to purchase time. Scarcity of time was not the issue historically, control was. It is also interesting that the approach was different for the parties, as opposed to the candidate. While there is no indication of why this should be different for parties, the comments of members from smaller parties give some guidance. For example, Mr Benjamin of the New Democratic Party, *supra*, at p 2414 (May 18):

> Parties can spend more on many things in provinces, regions and constituencies. Money can be spread around and cannot be proven to have been spent on behalf of any one candidate. What saddens me is that in traditional fashion the Liberal government can take a good principle, bring in legislation incorporating that principle and then proceed to pervert it with the provisions in the legislation.

And from a Social Credit Member of Parliament, *supra*, at p 2435 (May 19):

> ...such publicity, in newspapers as well as on television and radio, should be equal for all parties or at least distributed according to a fair proportion. *When I say "fair proportion", I want to point out that I mean almost equal proportion...* As the mass media, specifically radio and television, have secured their broadcasting rights from the CRTC, it seems to me that they should provide free of charge all the political parties with the time they need to inform the public of their respective programs, and I repeat, "free of charge".
>
> (Emphasis Added)

Also from the Social Credit Party, at p 2577 (May 25):

> Outside Parliament, in my opinion, all parties are equal. We do not work looking back on the past nor on the basis of the heavy majority of the party in power, but we keep the future in mind.
>
> ....
>
> We are all on the same footing when it comes to telephone calls and postage. This is why in my opinion the CBC should not serve one group more than another.
>
> We know that the broadcasts will be allotted under the supervision of the CRTC. We must remember, Mr. Speaker, that these supervisors are friends of the government, that they have been hired are paid by it.
>
> ....
>
> I do not trust the impartiality of this group...... the allocation.....should be done not in favour of the members who have managed to get elected at the previous election......

And Mr. Stanfield for the Progressive Conservatives, *supra*, at 2942 (June 7):

> Moreover, clearly it is useless and it is wrong to limit simply the spending of a candidate or party on publicity while leaving completely open the amount that can be spent in other categories. For instance, most of us in politics recognize that the publicity you get in the news columns or on the news shows of the networks is worth much more than advertising. Yet this bill...... does not limit in any way how much the candidate or party can spend on extravaganzas designed to create news and be reported on news shows.
>
> ....The party or the candidate who should be allowed to decide how the money should be spent; it is not for Parliament to tell candidates how to run an election. I would favour that, provided there is an over-all limit on expenditures... It is nonsense and absurd to introduce a bill which simply limits expenses on publicity but leaves the sky as the limit for all other kinds of expenses. I say this is an absurd bill, I cannot regard it seriously as a measure put forward in terms of electoral reform.

Mr MacEachen responded to this by explaining that the Barbeau Committee (Trial Ex. 2, Tab.7) had recommended controlling broadcasting as a method of controlling spending because such expenses are "obvious, knowable, provable and controllable" (*supra* p 2946). This ignores the fact that the more recent Chappell Report (Trial Exhibit 2, Tab 8) had recommended overall limits on election spending by parties and did not foresee any particular enforcement difficulties.

This was again attacked by members of smaller parties as a sham. Points were made as to how the government, through this Ministers, received vast amounts of free publicity. The point was again made that limiting broadcasting would not be an effective expense control tool. As Mr. Lewis said at p 2950 of House of Commons Debates, June 7, 1972, 'There is no reason why we cannot enforce a limit on party expenditures, unless we assume that the political parties in this country are thoroughly dishonest, will not obey the law and will find ways of evading it when they can." Eventually in 1973, a revised bill was presented to Parliament containing limits on spending by political parties as well as candidates (Hon. Allan J. MacEachen, House of Commons Debates, July 10, 1973, Ex.2, Tab 10). These limits were incorporated into the 1974 Elections Act and are found in section 39 of the current Act.

Thus a review of the history of the reservation and allocation provisions is consistent with problems presented by the current scheme. Many of the original motivating factors were similar to the ones referred to by the trial judge, namely, the fear that wealth would create unfairness, inequality or advantage to some at the expense of others, and the desire to inform the public. The government legislation consistently ensured that the airwaves were controlled in such a fashion that parties who ranked best on the formula had the advantage, notwithstanding the many comments that indicate that the legislation of that manner defeated the legitimate objective. The

parties that received the free time were the parties that had the most established financial base. Always the stated (and arguably justifiable) purposes are twisted by the formulas employed to favour the incumbent parties. The interpretation of the objective must be tied to the formula. A review of the history makes it clear that Parliament wanted to ensure there would be free time and that all broadcast time would be controlled by a reservation and allocation system favouring the incumbents.)

Issue 2 Does either the purpose or effect of the legislation infringe any rights enumerated under the Charter?

The question in this appeal comes down to this: Is the legislative objective of regulating broadcast time during federal election campaigns in such a way as to ensure both the free time and purchasable time are distributed to parties based primarily on past political success for the purpose of ensuring certain messages reach the public constitutional? Is this legislation which infringes any of the Charter guarantees in its purpose? For reasons that follow, in my view, it does. I find that such a purpose flies directly in the face of the guarantee of freedom of expression. It is legislation aimed at creating unacceptable governmental interference in supposedly free elections. This manipulation of the freedom to speak in an election, through what is now the most effective communication tool, is the very type of freedom the Charter seeks to protect.

Section 2(b) of the Charter provides as follows:

> 2. Everyone has the following fundamental freedoms:
>
> ....
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Freedom of expression has long been recognised as a cornerstone of democracy, and there can be no expression more important than electoral free speech. The suggestion that political messages are of different values, or that the platforms of those parties with a reasonable chance of forming the government are the most important messages, flies in the face of the guarantee of freedom of expression. Even more offensive is legislation designed to favour the incumbent. It is the discourse of political views that is important. "Single issue" or "fringe" parties may raise for discussion the most critical issues of a particular election. It matters not that they cannot form a government. What is important is the content of the message being communicated. Moreover, even if they are not running sufficient candidates to ever have a majority in the House of Commons, one elected representative is of consequence. Important in a free and democratic society, is the right of a party to communicate its message, and the right of the public to receive it. In the arena of elections, I am satisfied that the guarantee is not merely to protect the right of the person to speak, but the right of the public to hear. Communications is fundamental to expression of any kind. Regulation of the most effective medium of communication for the

purpose of conferring advantages on a political party in an election is the very evil at which the Charter is aimed. The guarantee is a guarantee that government will not interfere with, manipulate, or suppress electoral messages, no matter how unfavourable, extreme or unpopular.

Freedom of expression is a universally recognised core value of our society. In the case *Com. Commonwealth of Canada* v *Canada,* [1991] 1 S.C.R. 139, L'Heureux-Dubé J canvassed the position of the Supreme Court as to the scope of freedom of expression. She quotes from the judgement of Dickson J in *R.* v *Big M Drug Mart,* [1985] 1 S.C.R. 295 (at p 170):

> It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is the same centrality that in my view underlies their designation in the Canadian Charter of Rights and Freedoms as "fundamental". They are the sine qua non of the political tradition underlying the Charter.

Madam Justice L'Heureux-Dubé went on to say that:

> The profound role of freedom of expression, as one of the fundamental freedoms in s. 2, was underlined by this Court in several ensuring Charter cases. For instance, Cory J in Edmonton Journal v Alberta (Attorney General), [1989] 2 S.C.R. 1326, stated that it would be "difficult to imagine a guaranteed right more important in a democratic society than freedom of expression."

After outlining various theories advanced in support of freedom of expression, she concluded at p 172:

> The alternatives are particularly frightening. History is replete with the examples of entrenched groups which have sought to maintain their elevated station by suppressing emerging and challenging new thoughts and ideas. Sniffling opponents by revoking their right to express dissent and disenchantment may have produced desired results in the short run, but ultimately all such attempts led to insurrection and rebellion.

and at p 174:

> However, especially in the realm of political debate, it is the idea itself that must be encouraged, regardless of its apparent veracity. In fact, there can be no "political truth" – assertions to the contrary may be welcome in the context of campaign literature, but not as the basis for repression of political challengers.

> Freedom of expression, like freedom of religion, serves to anchor the very essence of our democratic political and societal structure.

She then quotes Robert J. Sharpe (citation omitted):

> *Those who purport to legislate the truth invariably turn out to be tyrants. The market place of ideas argument prescribes an open process precisely because we cannot agree on what is the truth.*
>
> (Emphasis original)

The clear and fundamental purpose or aim of the scheme set out by the impugned sections of the legislation is *to interfere with the freedom of expression of political parties* during an election. It is intended to restrict, regulate and allocate the use of the most effective means of communication of political expression. I cannot conceive of a more gross interference with a fundamental right enshrined in the Charter.

Moreover, even in a narrow sense, the legislation is restrictive. It is superimposed on legislation that brings the broadcasting of all messages under government control. It is restrictive in that it restricts all parties from advertising outside of the scheme. That is its very object. It intends to so restrict. It does so far what the appellant claims is a legitimate purpose, namely, that the airwaves do not get over-saturated with unimportant messages, and that only those messages of parties which have a realistic chance of forming the next government reach the public. What possible legitimate objective can there be in a free and democratic country for the government to decide for the people which political views are important? An objective aimed at ensuring some messages are conveyed to the electorate, in preference to other messages, cannot, in my view, be a constitutionally valid objective. Unlike *Butler, supra*, *Keegstra*, *supra*, and *Zundel*, *supra*, this is not a restriction of speech for a valid purpose.

Not to be forgotten is the content of the message. We are talking about paid political commercials, designed in part for name recognition and presentation of positions popular to the electorate for the purpose of winning votes. These messages are, in the mainstream, commercials designed to win support. It is, as mentioned previously, frequently the fringe party, or the single issue party, or the emerging party that raises the real issues – the controversial issues – the ones which an established party may wish to avoid. Are their messages not equally important, or perhaps more important? The majority parties have access to the public on a regular basis as a result of news coverage, House of Commons proceedings coverage, debates and other access to the networks. They receive free press on a continuous basis as a result of their exposure to news and ability to create news. Yet this legislation is designed to favour the communication of their messages. It is legislation passed by the party in whose favour it operates.

In my view the freedom guaranteed by the constitution includes a right to be free from government inference in deciding what messages will be heard in an election. The allocation

formula central to this scheme is, in my view, interference with freedom of expression in its very purpose.

Discriminatory versus Interference

It follows that I do not accept the appellant's argument that the legislation is merely discriminatory and not an interference with freedom of expression. The AG Canada argued that Barrett and A.G. [1994] R.J.Q. 671 (C.A.) supports the proposition that legislation of this sort is merely discriminatory in that it confers advantages on one as opposed to the other. In that case, the impugned statutory provisions provided government assistance to candidates who had achieved certain levels of success in an election campaign. McCarthy J A agreed with the trial judge that sections 2(b) and (3) of the Charter placed no obligation on the government to help candidates express themselves and make their platforms known to the electorate. His Lordship then went on to find that there is no implicit Charter requirement that if the government chooses to provide such assistance, that it must do so equally to all candidates.

A key difference between the Barrett situation and the case at bar is that the effect on a party or candidate's ability to express its position to the voters is at most indirect, and after the fact, in Barrett, while it is direct and before the fact here. In terms of spending, a party or candidate can only spend the amount of money they can raise or borrow, subject to the spending controls. The fact that they may be reimbursed afterwards is incidental to their ability to communicate with the voters before the election. The case at bar involves provisions which directly, and specifically, affect the amount of expression, the place of expression, the time when such expression can be disseminated in an attempt to gain political power.

Applying a narrow approach to the Charter guarantees the scheme in place restricts the right of *all* political parties in their freedom of expression. It does so by its limiting sections (sections 303, 319 and 320) as well as its distribution of the reserved time. Time limits have been placed on the use of airwaves which use is already restricted by the Broadcasting Act. In short, the legislation restricts all parties in the place, time, and amount of time they access.

It is true that free time stands in a somewhat analogous position to the Barrett decision, and the reimbursement of expense money to candidates. However, the constitutional guarantee is, as stated earlier, much broader than mere restriction when one considers its application to electoral freedom of expression. Section 2(b) provides for protection from interference in the freedom of expression. This scheme goes beyond discriminatory legislation, and is an interference with freedom of expression of the worst kind. I do not say there was some malicious intent of Parliament when they passed this law. They may well believe that the messages of the parties who have proven track records, or the contender parties, have the most important messages for the people to hear. Even greater is the need for the constitutional guarantee. The 1993 election

is illustrative of the fact that it is the people who decide which messages are important and correct.

With respect, I disagree with McFadyen J A's decision that since the broadcast time became available for use only through the operation of the impugned legislation, a party's opportunity for political expression can only be enhanced by this scheme. First, prohibition against purchasing extra time or purchasing broadcast time outside the country cannot be seen to be an enhancement of a party's opportunity for political expression. That is particularly true when they have not had access to the same time as their opponents. It is also difficult to find an enhancement of a party's right to expression when their opponent receives considerably more free time. Moreover, the agreed statement of facts acknowledges that networks have always pre-empted previously sold advertising to allow the conveyance of political messages during provincial elections and the national referendum, despite not being compelled to do so by legislation. I also, with respect, find inconsistency in the conclusion of McFadyen J A that once the so-called enforcement provisions are removed, there is no restriction on freedom of expression because parties are free to go to the market and purchase more air time. At the same time, it is stated there would be no time available but for the reservation and allocation provisions. It cannot be both ways. Either air time is available absent ???the scheme, or it is not. If not, then the reservation and allocation provisions clearly restrict freedom of expression on their own. If there is time available, then the scheme would be needed. Either way, it is not an enhancement.

In my view, the argument that freedom of expression is not infringed by the scheme because parties are being granted a benefit under the scheme also breaks down at another level. The reservation and allocation sections still infringe the freedom of expression, and voting rights, of everyone else. In addition to the Reform Party having standing as the directly affected group, the respondent Diane Ablonczy has public interest standing to attack this legislation. If time is, as alleged, limited then the allotment of a substantial portion of air time to registered political parties limits the remaining amount of air time for anyone else wishing to advertise during the campaign. This obviously includes the commercial sponsors whose messages will be pre-empted, as well as non-political parties such as special interest groups and independent candidates, who wish to broadcast political viewpoints for the electorate.

Nor do I accept that the free time sections are saved by deleting sections 319 and 320. In my view, the sections relating to free time must also fail. On a technical basis, as the free time is allotted in accordance with the purchased time, if parties are allowed to purchase more time than the scheme allows, there would be no purchased *allocated time* upon which the free time could be based. Moreover, it is impossible to conclude that the sections were intended to exist absent the restrictions on paid time. As mentioned earlier, a scheme designed to confer free time in accordance with the allocation formula is more than discriminatory legislation. Electoral free speech encompasses the right to be free from a government regulatory scheme that confers benefits and creates uneven opportunity. Freedom of speech in the electoral sense must surely include freedom from governmental interference in one's access to the public. A manipulated

communication system favouring the government in power attacks the very core of the protected freedom.

In dealing with section 2(b), it is the type of message that is being conveyed that has importance. L'Heureux-Dubé J in *Commonwealth of Canada* v *Canada, supra*, makes a very telling assertion of the value of political expression at p 174 of that judgement:

> However, especially in the realm of political debate, it is the idea itself that must be encouraged, regardless of its apparent veracity. In fact, there can be no "political truth" – assertions to the contrary may be welcome in the context of campaign literature, but not as a basis for repression of political challengers.

This statement starkly points out the misguided nature of the government's attempt here to define an equitable allocation of air time in terms of the importance of the message conveyed. In this case, a sitting Parliament passed legislation with the specific purpose and effect of ensuring greater access to the airwaves in future elections for certain parties based on the formula. This necessarily encourages the maintenance of the status quo to the benefit of those parties which happen to have achieved electoral success in the past.

This legislation is an interference with freedom of expression in not only its effect, but its very purpose and it cannot be justified by a section 1 analysis. There is no valid objective to support the scheme.

Right to Vote

I am also of the view that the legislative scheme infringes section 3 of the Charter of Rights and Freedoms as it has been interpreted. Section 3 guarantees the following right:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a Legislative Assembly and to be qualified for membership therein.

The respondents argued that this legislation infringes on the right of every citizen of Canada to vote. At trial, Moshansky J looked at the core values of the section 3 guarantee of the right to vote as articulated in *Dixon* v *British Columbia* (A.G.) [1989], 4 W.W.R. 393 (B.C.S.C.) by McLachlin C.J.S.C. (as she then was). She enumerated ten rights that flow from the right to vote. The trial judge recognised that three of those values, namely the right to be presented with a choice of candidates or parties; the right to sufficient information for public policies to permit an informed decision; and the right to cast one's vote in an electoral system which has not been gerrymandered (that is deliberately engineered so as to favour one political party over another) were particularly applicable to the case at bar. The respondent, Diane Ablonczy, has public

interest standing to challenge this legislation, so the distinction between her role as a voter and as a candidate discussed by Moshansky J, is not important. This case is analogous to the right to vote in an electoral system that has not been gerrymandered. Instead of boundaries being designed to favour one political party over another, the dissemination of information is deliberately engineered to accomplish the same end.

It is this question of favouring one party over another that strikes at the heart of this appeal. Until now, the key right to vote cases have dealt with the issue of fairness in electoral boundaries. In Reference *Re Prov. Electoral Boundaries*(Sask.), [1991] 2 S.C.R. 158, McLachlin J emphasised the purposive approach as opposed to the narrow legalistic approach to interpretation of Charter rights. She went on to say that practical considerations must be borne in mind in constitutional interpretation and that "(o)f final and critical importance to this appeal is the canon that in interpreting the individual rights conferred by the Charter, the Court must be guided by the ideal of a free and democratic society upon which the Charter is founded." (At p 181). She then went on to endorse the view that the guarantee of a right to vote is to guarantee "effective representation " rather than "one person – one vote."

In applying the core values enumerated in Dixon to the right to vote embodied in section 3 of the Charter, I am drawn inescapably to the conclusion that this right is violated by the impugned legislation. A key aspect of selecting "effective representation" flows from exposure to a wide range of views from which to select the candidate or party that best represents the views of the individual voter. The right to vote includes the right to hear the discussion of issues of concern to members of the public to enable an assessment and evaluation of all parties with that information in hand. As well, a purposive and historical approach to the right to vote in a free and democratic society leads to the conclusion that government interference to favour the dissemination of some views over others is unacceptable. This is so whether the specific concept of "gerrymandering" riding boundaries is at issue, or preferential access to the acknowledged preferred choice of dissemination of political ideas is at issue, as in the case at bar. As stated by professor Bernard Crick in *In Defense Of Politics,* London, 1962, at p 28:

> The hall-mark of free government everywhere, it is an old but clear enough test, is whether public criticism is allowed in a manner conceivably effective – in other words, whether opposition is tolerated.

A government should not be able to use its power to manipulate a key form of communication in its favour.

In the *Saskatchewan Boundaries Reference* case there were practical considerations which, when combined with the historical treatment of riding boundaries, led McLachlin, J to the conclusion that the right to vote had not been infringed. No such practical considerations exist in this case. The appellant argued that the airwaves should not be over-saturated by the messages of parties who have no realistic chance of forming the government. Such over-saturation is alleged to result

in voters not receiving sufficient information, or losing interest in, the messages of parties who have a realistic chance of forming the government. To the extent that this is relevant to the voting decision, if it is a judgement to be made by the voter, not by Parliament, nor a broadcast arbitrator, nor any other government official. The availability of information to the public from all sources relevant to electoral issues is of utmost importance to the voter. Frequently, as previously mentioned, the emerging party identified, and is willing to discuss, issues of critical concern to the public. Those are often issues which they allege have not been dealt with properly by the parties in power, and issues the contenders may prefer to by pass. Presentation of those issues may force parties to deal with the substance of the complaints, the very type of information the public desires at election time. It is the wide exposure to a variety of views that allows the electorate to make an informed choice.

The idea of legislation forcing broadcasters to provide free time other than equally to political parties attacks the information component of the right to vote. Moreover, the majority parties frequently receive extensive air time via the national news and the concentration by the press on their campaign. It is not possible to say that the messages of the emerging parties, or fringe parties, are not as important as the messages conveyed by those parties who have a chance of forming the next government. They may be crucial messages. Thus, if free time is to be provided, it must be provided equally. As mentioned earlier, if there is concern that satirical or fanatical groups will form parties simply to obtain free time to communicate information of little or no value to the electorate, that should be examined and dealt with at the point of defining the constitution of a party (if at all). If there is sufficient support for a group to meet that criterion, then why should it be treated unequally? Moreover, free time could be eliminated, limited, or allowed only after the purchase of enough time to ensure that a party was sufficiently serious to expend funds. This legislation was not designed to deal with fanatics of the world. It was designed to "gerrymander" the dissemination of information.

I acknowledge that the trial judge found that the electorate has the ability to become fully informed through other sources. While that may well be relevant to justify a section 2(b) breach, it is not the issue with respect to section 3. For one thing, such a finding suggests that this scheme is not needed. The key problem is that this is an attempt by the government to deliberately engineer a crucial element in the electoral process so as to favour one political party over another. Just as gerrymandering electoral boundaries to accomplish that end can result in a breach of section 3, I am satisfied that this legislation contravenes section 3.

In summary, I am of the view that this legislation also infringes section 3 in its very purpose. It follows that it is impossible to justify the legislation in a section 1 analysis. Assuming I am wrong in determining that the purpose of this legislation breaches section 2(1)(b) and section 3, then I agree with McFadyen J A that the effect of the legislation infringes upon that freedom. That brings me to the argument of prematurity raised by the appellant.

Did the trial judge err in finding a factual basis for the constitutional argument?

At the rehearing of this appeal, the Reform Party and Diane Ablonczy ("Reform Party and Abloczy") sought leave to introduce fresh evidence arising from the last election. That application was in response to the earlier argument of the AG Canada that the respondents had failed to establish an evidently basis demonstrating that their freedom of expression had, in fact, been denied. But that argument assumes the respondents must prove they would have used more than the limited air time allotted by the impugned formula.

In my view, it is unnecessary to resolve the fresh evidence issue. Once standing to make a section 52 challenge to the constitutional validity of legislation is established, I am satisfied it is unnecessary to prove a further evidentiary basis. It is important in this analysis to understand the tests required for standing in a constitutional challenge. The first test set forth by the Supreme Court of Canada in *Smith* v *The Attorney General of Ontario,* [1924] S.C.R. 331 is the "...exceptionally prejudiced..." test. In that case, the Supreme Court refused standing to a plaintiff wishing to attack the temperance legislation of the day directly, rather than break the law, be criminally charge, and attacked the legislation in defence. Duff J recognised the problem of forcing individuals to break the law in order to attain standing before the courts, when he stated at p 337:

> Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are authorised or illegal. We think, however, that to accede to appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could maintain a similar action; and we can discover no firm ground upon which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a similar way in his business or personal life.
>
> We think the recognition of such a principle would lead to grave inconvenience and analogy is against it. An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right *unless he is exceptionally prejudiced by the wrongful act.*
>
> (Emphasis added)

The meaning of this test and its effect in the context of modern regulatory legislation were explained by Laskin J (as he then was) in *Thorson* v *Attorney General of Canada,* [1975] 1 S.C.R. 138 at p 147:

> Where regulatory legislation is the object of a claim of invalidity, being legislation which puts certain persons, or certain activities therefore free of restraint, under a compulsory scheme which such persons must adhere on pain of a penalty or a prohibitory order or nullification of a transaction in breach of the scheme they may properly claim to be aggrieved or to have a tenable ground on which to challenge the validity of the legislation.

This is on all fours with the case at bar. In this case we have provisions in the *Elections Act* designed specifically to regulate the actions by political parties and broadcast networks. Obviously the Reform Party of Canada, and their candidates in a federal election, are "exceptionally prejudiced" by any unconstitutionality in the impugned legislation. As found by Moshansky J at trial *(Reform Party of Canada* v *Canada (Attorney General)* (1992), 7 Alta. L.R. (3d 1) at p 15:

> I find on the issue of standing that the Plaintiff Reform Party of Canada is affected directly by the impugned legislation. Accordingly, it is entitled to and has standing to sue and seek a remedy on that basis, subject to the applicability of the specific Charter provisions. I further find that Diane Ablonczy, as an individual, and on behalf of all members of the Reform Party of Canada, has a genuine interest as a citizen in the validity of the legislation and is entitled to and has standing on that basis.

and at p 29:

> The plaintiffs' freedom of expression has been limited by the regulatory scheme because it is limited in the amount of broadcast time it may purchase. The Reform party may not go directly to the market place to bid openly for space.

It is hard to imagine legislation more prejudicial. Therefore, as the trial judge found, it is open to the respondents in this action to challenge the validity of the legislation under section 52(1) of the Constitution Act.

Again, as found by the trial judge, even if the "exceptionally prejudiced" test in *Smith, supra*, is not met, then the respondents are eligible for what has come to be known as "public interest standing" as developed by the Supreme Court in the famous trilogy of cases culminating with *Minister of Justice* v *Borowski,* [1981] 2 S.C.R. 575. The test for public interest standing has recently been restated and affirmed in *Canadian Council of Churches* v *Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236. In that case, Cory J held that there are three requirements to be met before the court should exercise its discretion to grant public interest standing. The first is that there is a serious issue as to the validity of the legislation. Secondly, the plaintiff must demonstrate a genuine interest in the subject matter of the impugned legislation.

The last part of the test is to determine whether there is another reasonable and effective way to bring the issue before the Court.

While the appellant does not dispute the respondents' standing, it does suggest that, notwithstanding a scheme that regulates the amount of broadcast time to be used by various political parties in a campaign, freedom of expression has not been infringed unless there is proof that a particular party would have used more than the limited amount of time available. I do not accept that position. There is no authority for the proposition that where Government legislation, on its face, purports to regulate and limit a freedom guaranteed by the Charter, there must be additional proof that the party would have exercised the particular freedom. The question is whether it infringes the freedom. The Reform Party and Ablonczy seek freedom from government interference in the manner they choose to express their political views to the electorate. There is nothing to prove; the simple fact is that absent government regulation, they would have such freedom.

The appellant relies on *MacKay* v *Manitoba*, [1989] 2 S.C.R. 357 in support of the proposition that where it is the effect of the legislation that infringes someone's Charter right, it must generally establish the infringement with admissible evidence. In that case, Cory J stated at p 361–2:

> Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of the facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

On the other hand, as McFadyen J A pointed out in her decision, the Supreme Court has granted the remedy without proof that the rights of the applicant had been breached in several cases. See: *Minister of Justice* v *Borowski, supra*; *R.* v *Big M Drug Mart*; and *R.* v *Seaboyer,* [1991] 2 S.C.R. 577.

It is important to examine the *MacKay case.* The applicants were a group of tax-payers challenging the constitutionality of those parts of the *Election Finance Acts,* S.M. 1982-83-84, c.45, which provides for payments out of the Consolidated Fund of the Province of Manitoba to cover a portion of the election expenses of candidates and parties receiving a fixed proportion of the popular vote in a provincial election. The taxpayers charged that this provision, in effect, forced them to support candidates whom they might not want to support and thus infringed their freedom of expression. They admitted at the outset that the appeal could not succeed if it were found that the payments made to the political parties from the Consolidated Fund could not be

traced to the funds the appellants contributed as tax-payers. In other words, it was not apparent on the fact of the legislation that the appellants' rights would be engaged. The court was faced with a situation where there was no evidence put before the court from which infringement could be inferred, yet the appellants sought to establish specific concerns as to the potential effects of the legislation based on unsubstantiated propositions. In the *MacKay* case, the effects were not readily apparent.

In *R.* v *Danson* (1990), 73 D.L.R. (4th) 686, Sopinka J explains the *MacKay* case. The following passage at p 696 is particularly helpful in interpreting *Mackay*:

> This is not to say that such facts must be established in all Charter challenges. Each case must be considered on its own facts (or lack thereof). As Beetz J pointed out in *Manitoba (Attorney-General) v Metropolitan Stores (MTS) Ltd. (1987),* 38 D.L.R. (4th) 321 at p. 337 at p. 337 [1987] 1 S.C.R. 110, [1987] 3 W.W.R 1:
>
>> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter, and might perhaps be struck down right away.....(i)t is trite to say that these cases are exceptional.
>
> The unconstitutional purpose of Beetz J's hypothetical law is found on the fact of the legislation, and requires no extraneous evidence to flesh it out...(t)he present case is, for these purposes, indistinguishable from MacKay, and I would respectfully adopt and apply Cory J's comments to these circumstances. The appellant here seeks to attack the impugned rules on the basis of their alleged effects upon the legal profession in Ontario...*(i)t is not necessary that the appellant prove that the impugned rules were applied against him personally (standing not being in issue); but he must present admissible evidence that the effects of the impugned rules violate provisions of the Charter.*
>
> (Emphasis added)

To me, this case is determinative of the issue in the case at bar. First, as stated previously, I am of the view that the impugned sections of the Elections Act *on their face* interfere with the guarantee under the constitution of freedom of expression; therefore there is no need to establish that "effects" of the legislation infringe freedom of expression as that term is used in *MacKay*. Secondly, because standing is not at issue, even if it is necessary to establish effects which infringe Charter rights, there is no need for the respondents to provide evidence that the impugned

rules were applied against them specifically, or that they had the resources or the intention to use more than the scheme allows. They have more than met the burden of presenting admissible evidence of the nature called for in *MacKay* to establish a violation of the Charter.

Here the attacker is a party who is directly regulated by the scheme, in a manner that on plain reading places expression under government control. If the scheme infringes freedom of expression, this party's rights are engaged. This can be distinguished from cases such as *Edwards Books* which involved defendants to a criminal prosecution attempting to strike down legislation based on the fact that someone else's Charter right had been infringed, without leading any evidence as to how this was so.

With respect, I disagree with the decision in *Strickland* v *Ermel,* [1994] I W.W.R. 417(Sask.C.A.). That was a very short decision which cited on authority. It was held that a constitutional challenge to a provision of the Saskatchewan Trade Union Act was premature because the challenging parties had not yet been disciplined under the Act, although an unfair labour practice application was before the Saskatchewan Labour Relations Board. It seems entirely proper to place a question of the constitutional validity of the statutory provision to a Superior Court Justice for determination before the Labour Relations Board went through their expensive adjudicative process. The trial judge in that case had a lengthy agreed statement of facts from which to work in deciding the constitutional question. I see no authority for the proposition that an action brought by persons who have standing is premature simply because they have not yet suffered any state-imposed sanction for their activity, or proved specifically that they have been affected directly. In fact, the Danson and Thorson decisions of the Supreme Court seems to say exactly the opposite. They are binding authority of this Court. Threat of, or potential for, state sanction is sufficient to ground a constitutional challenge in such circumstances. Likewise, it should be unnecessary for a political party to have to wait until an election to show the specific effect on them.

In *R.* v *Big M Drug Mart*, Dickson J stated at p 313:

> Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the Charter have been infringed. It is not, however, the only recourse in the fact of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, *recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.*
>
> Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged

> in such "public interest litigation" it would have had to fulfill the status requirements laid down by this Court in the trilogy of "standing" cases (cites omitted) but that was not the reason for its appearance in Court.

and at p. 314:

> A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the Charter.........

Subsequently, Supreme Court cases such as *Irwin Toy Ltd., Dywidag Systems International, Canada Ltd.* v *Zutphen Brothers Construction Ltd.,* [1990] 1 S.C.R. 705, and *R.* v *Wholesale Travel Group Inc.,* [1991] 3 S.C.R. 154, restrict from corporations the availability of certain Charter rights applicable to human beings except in circumstances of penal proceedings. However, this is not relevant to the case at bar where, instead of a corporation, actual individuals and groups of individuals are involved, and it is freedom of expression which is at issue.

In this case, the constitutionality of the legislation is in issue. By the plain words of Big M Drug Mart, the particular effect of the legislation on the challenging party is irrelevant. The case at bar is an example of a regulated group seeking to have an invalid legislative scheme struck down under section 52(1) of the *Constitution Act,* and it is appropriate for the Court to do so if the scheme is found to be invalid. The appellant in this case is confusing the issues of standing with the question of whether the respondents' rights are infringed by the impugned legislation. As discussed above, the Thorson case makes it clear that those whose previously unregulated activities are placed under government regulatory control by the coercive power of the state have a right to challenge the validity of such legislation. There is no dispute as to the fact that the respondents' activities are subject to regulation under the Elections Act.

The appellant's argument on prematurity would lead to the natural conclusion that a law passed providing that no one but the incumbent party in power could broadcast campaign information in Canada, or abroad, could not be challenged until after the next election. That conclusion is unsustainable.

If am wrong in the foregoing analysis, then I agree with McFadyen J A that the fresh evidence should be admitted and, if a factual basis is necessary, it has been established.

Issue 3 Is the legislation saved by section 1 of the Charter of Rights and Freedoms?

As I have found the overall scheme is unconstitutional in its purpose, a section 1 analysis is not possible as the purpose itself cannot justify an interference with the right. There is no valid objective against which to evaluate the legislation.

If I am wrong, and this legislation only offends the Charter in its effects, then it is necessary to determine whether the effects of the legislation can be justified pursuant to section 1 of the *Canadian Charter of Rights and Freedoms,* which reads as follows:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

R. v *Oakes,* [1986] 1 S.C.R.103 establishes the proper approach to a section 1 analysis. The onus of proving that a limitation is justified under section 1 rests upon the party seeking to uphold the limitation on the preponderance of probabilities based on the following criteria: (1) the objective to be served by the measures limiting a Charter right must be sufficiently important, at least relating to societal concerns which are pressing and substantial in a free and democratic society, to warrant overriding a constitutionally protected right or freedom; and (2) the means must be reasonable and demonstrably justified, in proportion to the importance of the objective. The proportionality test involves three components:

(i) the measures must be fair and not arbitrary, carefully designed to enhance the objective in question, and rationally connected to the objective;

(ii) the means should impair the Charter right as little as possible; and

(iii) there must be proportionality between the effects of the limiting measure and the objective.

Pressing and Substantial Concern

I approach the justification on the basis of the broad purpose, namely the fundamental purpose of the legislation is to ensure all broadcast air time is to be controlled and distributed unequally to parties primarily on the basis of their past performance for the purpose of ensuring that the message of those parties reach the public. Even if it cannot be said this fails the purpose test in Big M, it certainly fails the pressing and substantial need test. The appellant has failed to make out its onus that the importance of controlling the broadcast time to ensure that some messages reach the electorate justifies an infringement of a fundamental Charter right. The evidence is not directed at a fear of over-saturation of messages.

As mentioned earlier, the trial judge appeared to accept that the purpose of the legislation was to ensure adequate supply of broadcast time and provide an equitable allocation of that time. In dealing with the first question of whether the government has established that these legislative concerns are "pressing and substantial", the trial judge's conclusions are as follows at p 28:

> I conclude that the regulations in question were indeed enacted to address a pressing and substantial concern. Based on the evidence, I am of the view that reliance on the market place would invariably lead to an unfair domination of the airwaves by those parties with the means to outbid the others. It is a legitimate concern that new and emerging parties, primarily those with a less established financial base, not be priced out of the advertising market. The Plaintiffs' other expert witness, Dr. Fletcher, also agreed that some threshold was desirable. The documentary evidence before the Court also compels this conclusion.

In my view, the trial judge did not justify the legislation on the basis of the purpose he originally accepted. He finds that there is a pressing and substantial concern to avoid unfair domination of the airwaves by those with means, such that the new and emerging parties could be heard. However, the appellant does not seek to support the legislation on that basis. In fact, it seeks to support an unfair domination of the airwaves by established parties to the detriment of the emerging parties. Interestingly, the trial judge declared section 310 unconstitutional as infringing free speech. He did so because it discriminates against the emerging parties. In essence, he is saying that there is no justification for a government regulatory plan that interferes with freedom of expression in elections in a manner unfair to other parties. With that I agree. In my view the trial judge appreciated exactly what was wrong with this legislation – namely that very object of the allocation formula was to interfere with freedom of expression in an election for an invalid purpose. It must be remembered the trial judge did not have the benefit of the argument on purpose that we requested and heard at the rehearing of this appeal.

It is essential to keep in mind the particular legal test to be met by the government in establishing a pressing and substantial concern. There must be "cogent and persuasive" evidence in order to justify a Charter breach. According to Chief Justice Dickson in *R.* v *Oakes, supra, at* p 138:

> Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "Commensurate with the occasion". Where the evidence is required in order to prove the constituent element of a s. 1 inquiry, and this will generally be the case, it should be *cogent and persuasive* and make clear to the court the consequences of imposing or not imposing the limit (citations omitted). A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions.
>
> (Emphasis added)

The freedom being infringed here is among the most basic in our society. Although the type of freedom at issue may not be relevant to the determination of whether there has been a *prima facie* infringement, it is certainly at issue when we move on to the balancing process that is a section 1 analysis (see *Committee for Commonwealth of Canada, supra, Rocket* v *Royal College of Dental*

Surgeons of Ontario, [1990) 2 S.C.R. 232; *Edmonton Journal* v *Alta* (A.G.), [19898] 2 S.C.R. 1326). It is trite to say that it is important that political parties engage in discourse on major issues at election time and that the public be exposed to such discourse. What the government needs to prove is that this would not happen without this legislation.

They need to establish that there would be insufficient time available to meet the needs of all political parties collectively, and that the object of the equitable allocation could otherwise not be met. To establish their own stated purpose, the AG Canada must prove that messages of the parties capable of forming the next government would not, without this scheme, reach the electorate, and they need to prove that there is a pressing and substantial need for their messages to have priority. There was no finding by the trial judge that these messages would not reach the electorate, and certainly no finding of a pressing and substantial need for priority of messages.

Is there a need for free time at all? Interestingly, the trial judge found that the messages of the respondents would reach the public without the impugned legislation. *A fortiori*, the messages of the established parties, who have continual exposure to the press, would reach the public. When one keeps in mind that this is a commercial-type message, as opposed to an in-depth discussion message, it is difficult to imagine any pressing and substantial need for the established parties to have free time in priority to others, or at all.

The authorities are clear that in order to justify a section 2(b) infringement it must be proven by the evidence that a pressing and substantial concern would exist absent the impugned legislation. In my view that concern has not been established. Even if it could be said that the reservation of time is needed, there is no pressing and substantial need for allocation on the basis of preserving the most time for the real contenders. Moreover, such a scheme is totally inconsistent with democratic principles. There is *no evidence* to suggest that the public is over-saturated with fringe party messages, or emerging party messages, or for that matter, any political messages. Moreover, it is inconceivable that a democratic system could justify a formula that provides for restriction of time to some parties, in favour of incumbents or leading parties. In my view, the only purpose that could be rationalised, if required, would be a reservation of time distributed equally between all parties. That is not the goal of this legislation, nor is it argued to be the goal of the legislation. In fact, quite the contrary is argued by the AG Canada. Further, the agreed statement of facts indicates that time had been made available in the past for election campaigning despite no other federal, provincial or territorial statute having similar legislation. Paragraph 1 provides, in part:

> 1. It is agreed by counsel to the parties that for the purpose of this action:
>
> (a) in 1941 there were approximately 1200 radio stations in North American on the standard broadcasting band, about double the number experts of 1932 thought to be the maximum;

(b) in 1956 there were more than 2800 radio stations in the United States and 182 in Canada;

(c) In 1990 Canada alone licensed over 1600 AM and FM radio stations, with an additional 3700 television transmitters and cable systems;

(d) Canada's 1400 licensed cable operators provided up to 60 channels in 1990 and were preparing to expand to as many as 80 channels;

(e) the cable television industry served in excess of 8,770,00 homes in 1989;

(f) There were 107 daily newspapers in Canada in 1988 with a total circulation of 5,993,000; and

(g) no federal, provincial or territorial statute or regulation purports to reserve or allocate advertising time for purchase by political parties except the Canada Elections Acts, R.S.C. 1985, c. E-2.

(h) The experience of many television broadcasters is that, during certain months of the year, their inventory of "prime time" advertising time is sold out in advance of the period in question. This is so particularly in October, November, April and May. If an election were called for a day within such a period, such broadcasts would have to pre-empt advertisers to whom they previously committed time in order to make broadcast time available to political parties.

(i) Broadcasters have in the past preempted previously sold advertising and made alternative arrangements for the advertising campaigns of their normal advertisers in order to make time available for political broadcasting during provincial and federal elections, though sometimes they have not provided advertising time during a particular program which the political party requested. For example, in the campaign leading up to the October 26, 1992 referendum, broadcasters are making arrangements to facilitate the anticipated advertising requirements of those who will be engaged in that campaign, including the orderly are arrangement of other advertising campaigns which had been planned for the relevant period.

In conclusion, the evidence does not support a finding of a pressing and substantial need that would justify the overriding of the constitutional right to freedom of expression.

Proportionality

(1) Fair, not arbitrary and rationally connected

Even if there were a pressing and substantial need, the means must be reasonably and demonstrably justified in proportion to the importance of the objective. The objective of allocating unequally in favour of the established parties is not a valid objective, nor a pressing and substantial need. It becomes difficult to proceed further with the section 1 analysis because I find the overall aim is not justified. I recognise there are arguments to be made that there are other purposes intermingled with the purpose tied to the formula. For instance, McFadyen J A broke the legislation into different sections and dealt with it in that fashion.

McFadyen J A states at p 26 that in her view the objective of Parliament in enacting the legislation reserving broadcast time addressed pressing and substantial concerns, being the availability of broadcast time to political parties during federal election campaigns and the control of costs at which such time would be made available.

She then discusses the proportionate response and states at pp 27–8:

> ...While other voices and interests have the right to be heard, lesser access to the free and purchasable time, which broadcasters are required by legislation to provide, is a reasonable and proportionate response to the problem. Broadcast time is limited. It must be used primarily for the purpose intended by the reservation provisions, providing information to votes to permit them to make an informed choice when they exercise their vote with the object of choosing the next government. Few political parties stand a realistic chance of forming the government. However, there can be many other parties which, if granted equal broadcast time, would greatly reduce broadcasting time available for the purpose for which it was intended. A formula granting less time to registered parties whose objects are satirical or the promotion of a single issue or regional interest is justified.

In my view, the stated needs and the responses do not relate. The pressing and substantial need relates to 'lack of time' and 'potentially increasing costs'. A reservation of time could justify a need for time if, in fact, it were a pressing and substantial need. As I have already noted, the agreed statement of facts indicates that provincial elections and the national referendum did not require time reservations. Control of costs could also be a valid objective. However, when McFadyen J A discusses proportionate response she is talking, not about a general need for time, but a need for time for so-called contender messages receiving priority. She has not found a pressing and substantial need for priority of messages, merely for a reservation of time. Also the reasons do not indicate a rational connection or proportionate response to the objective of cost control.

Cost control is already in place and unchallenged. What is in issue is the allocation of the reserved time. Certainly 6.5 hours of reserved time may be adequate to meet a need if there is one. There is no magic, however, in the 6.5 hours. I disagree with McFadyen J A that the need for time can be used to justify the unequal distribution. First, the evidence is not overwhelming that time is needed, and even if more time is needed, the government can easily access more time, or allow the time that has been reserved to be distributed to all. While limited time could justify a reservation, the *unequal distribution* of that time is not justified on the basis that it is unavailable. It is not connected. Moreover, in the past there has been reserved time that was never used, yet the legislation prohibits the purchase of more time. The scheme is not responsive to the need.

One possible objective of this legislation is to ensure that the public has information upon which to make an informed electoral decision. If the objective is to ensure public information then in my view, the response is not rationally connected or proportional to the objective. Given that the established parties are represented in Parliament already, and have access to vast amounts of free media coverage on that fact alone, and given that they have a wider financial base, surely it is the smaller papers who require the assistance of a legislative scheme of free advertising for communicating information. In my view, there is no national connection between this scheme, viewed as a whole, and any legitimate legislative objective of providing information, because while it assists in the communication of some information it denies communication of other information. The measures are disproportionate to any valid objective of communicating information. As previously noted, if wealth domination is a legitimate concern, the scheme provides considerable free time to the established parties with potentially the greatest financial base.

If time is, in fact, limited then the granting of disproportionate free time is particularly intrusive of freedom of expression. As mentioned previously, it is frequently the regional, emerging, or single issue parties, who force the real issues of the election. Moreover, as witnessed by the last election, there is no way of predicting when those emerging and regional parties become the ones most capable of forming the next government. The two emerging parties, the Bloc Québécois and the Reform Party obtained more seats than two of the established parties, including the party in power prior to the election. This legislation is arbitrary, not fair, and it is not rationally connected to a valid objective.

Both the trial judge and my colleague McFadyen J A find that the agreed purposes have the aim of ensuring that the public is fully informed of the major issues in an election. Yet the trial judge made the following specific finding of fact at pp 19–20:

> I find, therefore, that sufficient information is indeed made available to the public to permit an informed decision. Members of the public have access to a number of sources for information concerning party platforms and the policy issues before the electorate. While I would not go so far as to say that the public is at times

> fully informed. I do not hesitate to conclude that the potential for becoming fully informed certainly exists at present *and is not affected by the provisions of the impugned legislation.*
>
> (Emphasis added)

This finding was made in the context of a section 3 right to vote analysis, wherein the learned trial judge found that the impugned scheme did not interfere with the right to vote because the voters still had every possibility of becoming properly informed despite the restrictions of advertising. This finding, however, categorically refutes both the pressing and substantial nature of this concern, and the rational connection of the impugned scheme to the stated objective. This finding means that the information of the party with only two minutes of free time can still reach the public. Certainly, there can be no pressing and substantial concern that the messages of the contenders will not also reach the public.

Means

Assuming, however, that there is a rational connection between the legislative scheme and some pressing and substantial legislative object, the next question becomes: does the scheme impair the right infringed as little as possible? Obviously, given that there does not seem to be any pressing and substantial need at all for this scheme, then if the right is infringed one iota it is more of an infringement than is necessary. It is at this stage that consideration of alternatives available to the government become important. There was clear expert evidence that the election spending controls serve the legitimate purpose of the government, while leaving the parties free to decide on the most effective way to express themselves. (No argument was made that election spending controls infringed Charter rights and so I do not comment on that issue.) One can think of numerous alternatives to the one presented. In my view, if communication of information is the objective, the appropriate starting point would be an approach that involves equal treatment. If needed, more time could be set aside. There is no basis for unequal treatment in a free and democratic society. The means do not infringe as little as possible in the entrenched right. If it is a legitimate objective to prevent parties satirical or fanatical in nature from using must of the free time because they were not a serious contender (a decision I do not make), or that there is an over-saturation of messages, the free time available for all can be limited. Or the free time can only be available after expenditure of sufficient funds, or the purchase of a sufficient amount of time, to ensure that the party is a serious contender or has significant support. With respect to the paid time, if a party is willing to expend money, then surely at least they are serious, and there is no justification for different treatment. The voters will decide if their views are satirical or fanatical. I do not accept the purpose of priority of messages so it is difficult to evaluate the means.

Is there proportionality between the effects of the measures which are responsible for limiting the Charter right, and the objective sought to be accomplished? In this case, we have a legislative

scheme which purports to place a state-regulated limit on the amount of time any political party may purchase during an election campaign. Given that one justification is to ensure that the public is properly informed, it is impossible to say that the effect of restricting political broadcasting is proportional to the objective. What had been established here is a very complicated, bureaucratic scheme to regulate a fundamental freedom in favour of the political parties in power. At best, it is interference with a fundamental freedom in response to nothing more than an unsubstantiated fear that the electorate will not hear the messages of the serious contenders. There is no evidentiary basis for that fear. This scheme may use time that would otherwise be available for in-depth political debate by politicians, and non-politicians alike.

Does the Broadcast Arbitrator's Discretion Make this Scheme Justifiable?

McFadyen J A concluded that the learned trial judge erred in failing to consider the discretion granted to the broadcast arbitrator to alleviate any unfairness that may result from the original application of the allocation formula found section 310(1). With respect, I fail to see how Charter rights are infringed any less because some independent officials *may* choose to alleviate unfairness in their discretion. While Parliament granted discretion with the intent that it could be used, it can be applied only after the application of the specific formula results in unfairness, which is not defined. One thing is certain, unfairness would never be interpreted to mean "unequally" because inequality is the very starting point of the formula. A discretion would never be intended to extend to a substantial departure from that formula. Certainly, there is no assurance it would. Parliament has given a clear indication of what it thinks is 'fair' and in the 'public interest'. It has set out a scheme that recognises priorities on the basis of past performance.

In my view, it would be unreasonable to conclude that an arbitrator could depart completely from the formula to, for instance, impose equality. Rather, given the purpose of ensuring that the public be informed of established parties' policies, the type of scenario that might cause an arbitrator to intervene would be an argument suggesting that the formula was not representative of the parties with the greatest chance of forming the government. It is unrealistic to expect that an arbitrator would change the order of the parties' entitlement created by the allocation formula. While it is true an adjustment was made increasing the Reform Party's time, the Reform's allocation was still significantly below the established parties, and the order of time allocation between parties was not disturbed.

The question of vagueness as to the term 'public interest' arose. In my view, the constitutional infirmity in this scheme lies in the fact that someone other than candidates and voters are making these decisions, regardless of the criteria used to make the decision. Again I refer to this Court in *Epilepsy Canada,* where at p 219, Cote J A says: "the phrase public interest is particularly untailored and unsuitable as a restraint on free speech." He cites *R.* v *Zundel* (No.2), [1992] 2 S.C.R. 731, pp 770–73. The following words of McLachlin J at 773 are particularly pertinent to this case:

> I, for one, find cold comfort in the assurance, that a prosecutor's perception of "overall beneficial or neutral effect" affords adequate protection against undue impingement on the free expression of facts and opinions. The whole purpose of enshrining rights in the Charter is to afford the individual protection against even the well-intentioned majority. To justify an invasion of a constitutional right on the ground that public authorities can be trusted not to violate it unduly is to undermine the very premise upon which the Charter is predicated.

Again, just because the arbitrator may change the allocation does not change either the fact that the parties are regulated, and therefore not free, or the fact that they are all limited in the amount of time they may purchase regardless of the allocation.

Issue 4 Is severance applicable to save any of the impugned sections?

Severance is not an appropriate remedy because the impugned sections constitute a comprehensive code or a single scheme. I recognise the argument put forward by the appellant that in Charter cases the striking down of an entire statute is unusual. Of course, the relief sought by the respondents is not that the entire Canada Elections Act be struck down, but rather that the portion dealing with the government reservation and allocation formula for political campaign broadcasts be struck.

Professor Hogg in *Constitutional Law of Canada*, 3rd ed., 1992, p 393 states:

> Charter review is not based on the pith and substance of a law, but on the question whether either the "purpose" or the "effect" of the law abridges a Charter right. Under this test, it is usually only a single section *or a few sections* of a statute that abridge a Charter right, and it is usually beyond argument that the rest of the statute can independently survive.
>
> (Emphasis added)

Here we have a number of provisions which combine to restrict the ability of political parties to make campaign broadcasts. The appellant takes the position that sections 303, 316, 319 and 320 are necessary to support the integrity of the scheme. These sections taken together infringe freedom of political expression. This being a comprehensive scheme, it is not the court's role to pick and choose among the various aspects so as to effectively redraft the *section: The Queen* v *Morgentaler,* [1988] 1 S.C.R. 30 at 80. It is argued that one can remove the enforcement sections, and the prohibition on foreign advertising, and still leave the reservation and allocation formula. But can the court conclude with confidence that absent the restrictions necessary to support the scheme Parliament would have legislated reservation and allocation? This is not a case like *R.* v *Morales,* [1992] 3 S.C.R. 711, where a few offensive words can be struck out

leaving an otherwise effective scheme in their absence. In *R.* v *Osborne,* [1991] 2 S.C.R. 70 at 105, Sopinka J said the following:

> In the final analysis, a law that is invalid in so many of its applications, as a result of wholesale reading down, bears little resemblance to the law that Parliament passed and a strong inference arises that it is invalid as a whole. In these circumstances it is preferable to strike out the section to the extent of its inconsistency with s. 2(b). To maintain a section that is so riddled with infirmity would not uphold the values of the Charter and would constitute a greater intrusion on the role of Parliament.

In my view, it is inappropriate to strike only sections 303, 316, 319 and 320 when the appellant argues they are integral to the scheme. The AG Canada argued that the restrictions on purchase of additional time was essential to support the allocation scheme. If more time is purchased, the allocation system cannot be maintained and the airwaves will be over-saturated with the less important messages. It is improper to now uphold those sections on a different basis. It is impossible to conclude that the government would have passed this legislation without the allocation scheme. McFadyen J A found that section 303 could be saved. With respect, I disagree. Section 303 limits the right of candidates to use broadcasting stations outside of Canada for the purpose of influencing an election in Canada. I am not prepared to say this restriction is minimal. Access to American stations may be vital. Broadcasting outside of the country may well influence editorials, TV commentators and news events which will be produced within the country.

Moreover, section 303 could never pass the pressing and substantial need justification, or the proportionality means test. All candidates and parties are subject to control within the country. It is well within the powers of Parliament to pass laws asking the candidates to produce documents, and swear affidavits of expenditures and production of supporting documents, if that is necessary. It is also within their power, as they have done, to control overall spending, if spending is the objective. In my view, there is simply no pressing and substantial need for section 303 short of the one submitted by the appellant, which is to ensure that all broadcast time allocated for political messages is allocated in accordance with the formula. It prohibits messages reaching the Canadian electorate from American stations. Even if the reporting of expenditures was a valid objective, keeping in mind that total election expenses can be and are strictly controlled and limited by other provisions of the Act, section 303 does not address a pressing and substantial concern, nor is it a proportionate response justifying the limit imposed by these provisions on freedom of expression during an election. In my view, even if severable, it could not be justified.

With respect to sections 319 and 320, I disagree with McFadyen J A that those sections are severable, although I agree that they are not constitutional. Again, the AG Canada argues that they are essential to the integrity of the scheme, because they preserve the balance of time

available for "important messages". Certainly they could not logically exist without the rest of the scheme because they are inextricably tied to it in the way the scheme operates. They must be considered with all the other sections. Without the formula, I am not certain any of the provisions would be passed. As mentioned earlier, I also am of the view that it is improper to sever and strike sections 319 and 320 before evaluating the purpose of the entire scheme.

An argument could be made that section 307, which merely ensures that the broadcasters reserve air time for the parties is not unconstitutional by itself. However, it is not a safe assumption that Parliament would have passed this provision without the unconstitutional allocation and enforcement scheme and the free-time scheme. Parliament would want to weigh the potentially limiting effects which a reservation of time (without a distribution formula) would have on all political parties. Parliament would want to consider and weigh the benefits, compared to the disadvantage to the broadcasters, other political interest groups, and commercial advertisers. That obviously has not been done because that was not the scheme. As well, the government will have plenty of time to redraft constitutionally acceptable legislation before the next federal election, should they decide to do so. In addition, it is doubtful that reservation of time alone would be a pressing and substantial need in view of the admitted facts of the parties and the substantial increase in broadcast stations. Considering the reality, it is particularly inappropriate for us to enter into this legislative decision-making.

Summary

In summary, I would dismiss the appeal and allow the cross-appeal on the grounds that this legislation infringes or is inconsistent with rights under sections 2(b) and 3 of the Charter and I would strike in addition to section 310, sections 303, 307, 316, 319 and 320.

JUDGEMENT DATED at Calgary, Alberta,
this 10th day of March
A.D. 1995

CONRAD J.A.

HARRADENCE J. A.