



The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 42 (2008)

Article 4

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Citation Information

Bredt, Christopher D. and Finley, Margot. "R. v. Bryan: The Supreme Court and the Electoral Process." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 42. (2008).
<http://digitalcommons.osgoode.yorku.ca/sclr/vol42/iss1/4>

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R. v. Bryan: **The Supreme Court and the** **Electoral Process**

Christopher D. Bredt and Margot Finley*

I. INTRODUCTION

At the heart of the commitment to freedom of expression guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*¹ lies the belief that this liberty is “the matrix, the indispensable condition of nearly every other form of freedom”.² As Nicholas E. Devlin has noted, “the intimate connection between freedom of expression and the institutions of democracy has secured a place of privileged protection for political speech in Canadian rights jurisprudence.”³

Political expression has been held to be “the single most important and protected type of expression. It lies at the core of the guarantee of free expression”.⁴ Political expression embraces the right of the speaker to communicate with fellow citizens as well as the right of voters to listen and have access to the commentary, perspective and opinions of other Canadians on the electoral process. Political speech is regarded as “high value” speech because it is said to further the “core values” of

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

² *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.), citing Cardozo J. in *Palko v. Connecticut*, 302 U.S. 319, at 327 (1937).

³ Nicholas E. Devlin, “Opinion Polls and the Protection of Political Speech — A Comment on Thomson Newspapers Co. v. Canada (Attorney General)” (1996-1997) 28 *Ottawa L. Rev.* 411, at para. 15.

⁴ *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 at para. 11 (S.C.C.), *per* the Chief Justice and Major J. (dissenting in part) [hereinafter “*Harper*”].

individual autonomy and self-development, the search for truth and the promotion of public participation in the democratic process.⁵

Recently, the Supreme Court of Canada was faced with a constitutional challenge under section 2(b) to section 329 of the *Canada Elections Act*,⁶ which prohibits the transmission of election results in one electoral district to another electoral district before the close of all polling stations in that other district. In *R. v. Bryan*,⁷ a majority of the Supreme Court of Canada held that the Attorney General was justified in limiting political expression. The objective that outweighed that most important right was “informational equality”.⁸ The majority accepted the Attorney General’s argument that “democracy requires that no individual should have a general access to information, unavailable to others, that can play a role in the exercise of his own right to vote.”⁹ The majority found that the government might reasonably adopt measures to deal with the perception of unfairness created when some voters have general access to information that is denied to others, and the further possibility that access to that information will affect voter participation or choices.¹⁰ Further, the majority of the Court adopted a relatively low standard for the measurement of harm, a highly deferential approach to Parliament in the electoral process, and little acknowledgement of arguably our most important Charter right. In contrast, the dissent held that a limitation on the core Charter guarantee of political expression must be justified by convincing evidence, which was not present in this case.

In this paper, we first provide an overview of recent Supreme Court of Canada jurisprudence in the area of freedom of expression in the political context, focusing on *Thomson Newspapers Co. v. Canada (Attorney General)*,¹¹ *Harper*¹² and *Bryan*.¹³ The paper then critiques the elevation of “informational equality” to a democratic imperative. We then discuss how the Court has extended the “reasoned apprehension of harm” test from its origins in speech at the fringes to political expression

⁵ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.) [hereinafter “*RJR-MacDonald*”].

⁶ S.C. 2000, c. 9.

⁷ [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527 (S.C.C.) [hereinafter “*Bryan*”].

⁸ *Id.*, at paras. 32-53.

⁹ *Id.*, at para. 22.

¹⁰ Justice Fish wrote concurring reasons, which will not be addressed in this paper.

¹¹ [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.) [hereinafter “*Thomson*”].

¹² *Supra*, note 4.

¹³ *Supra*, note 7.

at the core of the section 2(b) guarantee. Finally, the paper considers the majority's unquestioning deference to government in the electoral process. Our conclusion is that the Supreme Court of Canada is not providing core political expression with the protections that are demanded.

II. THE SUPREME COURT OF CANADA AND POLITICAL EXPRESSION: FROM *THOMSON NEWSPAPERS* TO *BRYAN*

Prior to *Bryan*,¹⁴ the Court had considered the issue of freedom of expression in the electoral context in *Thomson*¹⁵ in 1998, and in *Harper*¹⁶ in 2000. We will briefly address these cases and draw attention to some of the themes that run throughout the Court's jurisprudence in the area of political expression.

1. *Thomson Newspapers Co. v. Canada (Attorney General)*

Thomson was a challenge to section 322.1 of the *Canada Elections Act*. The impugned provision prohibited the dissemination of opinion survey results about voting intentions within a three-day period prior to the day of the election. The appellants claimed that this was contrary to section 2(b) of the Charter.¹⁷

Justice Bastarache, writing for the majority, concluded that section 322.1 infringed section 2(b) and was not justified by section 1. The judgment began by calling for "close attention to context".¹⁸ This would facilitate determining the intention of the legislation, performing the proportionality analysis and deciding what kind of proof would be required from the legislator for the section 1 test. Contextual considerations, Bastarache J. wrote, include: (1) whether the government is balancing interests; (2) the vulnerability of the group protected by the provision; and (3) whether or not the harm in question is capable of scientific

¹⁴ *Supra*, note 7.

¹⁵ *Supra*, note 11.

¹⁶ *Supra*, note 4.

¹⁷ The appellants also claimed that the s. 3 right to vote had also been unjustifiably restricted. However, neither judgment hinged on the right to vote analysis, although the majority and the minority both concluded in *obiter* that "to constitute an infringement of the right to vote, a restriction on information would have to undermine the guarantee of effective representation." See *Thomson*, *supra*, note 11, at paras. 19, 82.

¹⁸ *Id.*, at para. 87.

measurement.¹⁹ Justice Bastarache emphasized that the presence of these factors does not change the standard of proof in the Charter context from the civil, balance of probabilities standard. However, they do “bear on the degree of deference which a court should accord to the particular means chosen to implement a legislative purpose”.²⁰

The judgment observed that opinion polls are political information, and therefore at the core of the sphere protected by section 2(b).²¹ The group protected by the legislation included both “those who incorrectly assume that polls are a perfect measure of voting results on election day, and rely on them to an excessive degree in consequence”²² and those “who are perfectly aware of the general shortcomings of polls as predictions of the result on election day, but who are misled by the publication of an inaccurate poll result.”²³

Justice Bastarache identified the objective of allowing time for scrutiny and analysis of inaccurate polls before the vote as a pressing and substantial (if perhaps overstated in some of the evidence) objective.²⁴

Justice Bastarache was skeptical about whether the “rational connection” required by the *Oakes*²⁵ test was present. He observed that pollsters were not required to publish methodology and other background information along with their polls. It was not therefore clear to him that scrutiny and analysis of the results would be possible, with or without section 322.1’s three-day blackout.

However, the decision really hinged on the “minimal impairment” branch of the *Oakes* test. Justice Bastarache found that none of the appropriate contextual factors that might have suggested deference to the government were present. First, there was no vulnerable group being protected. The evidence did not establish that Canadian voters are a vulnerable group relative to pollsters and the media who publish polls. The presumption should be that the Canadian voter is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information.

¹⁹ *Id.*, at paras. 87-90.

²⁰ *Id.*, at para. 111.

²¹ *Id.*, at para. 92.

²² *Id.*

²³ *Id.*

²⁴ The objective of creating a “rest period” before the vote, during which the onslaught of polling data would be subdued, encouraging voters to focus on the issues, was not found to be sufficiently pressing and substantial.

²⁵ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter “*Oakes*”].

Second, while a “reasoned apprehension of harm” might in some cases constitute sufficient evidence from the government, “the claims of widespread or significant harm based on logical inferences derived from surrounding factors are not compelling in the context of factors which refute such logical inferences.”²⁶ Justice Bastarache explained that the reasoned apprehension of harm test had been applied in earlier cases where it had been suggested, but not proven, that the nature of expression at issue undermined the position of groups or individuals as equal participants in society, and where it was difficult to establish that type of harm scientifically.²⁷

The majority refused to accept that the harm that some voters might be misled by polls warranted a significant level of deference to government to fashion means that infringe on freedom of expression.²⁸ Justice Bastarache concluded that there was no proportionality between the deleterious effects and the benefits of the ban, given the profound impact of section 322.1 on the constitutional freedom of expression.²⁹ Such an impact could not be tolerated, given the respondent’s failure to show that the harm allegedly remedied by the section was a pressing one.

Justice Gonthier wrote in dissent, supported by Lamer C.J.C. and L’Heureux-Dubé J. While concurring with the majority’s conclusions about the constitutional right to vote and the finding of an infringement of section 2(b), Gonthier J. argued that the infringement was saved by section 1.

Justice Gonthier observed that freedom of expression is not an end in of itself, but rather a means to three broader ends — “promoting truth, political or social participation, and self-fulfillment.”³⁰ The impugned provision, he found, was designed to bring about informed votes rather than misinformed votes, and therefore actually *contributed* to these three goals.

The dissent accepted the general principle that misleading political speech will be corrected by other voices in an atmosphere of free expression, and need not therefore be constrained by the state. However, he argued, the final three days of an electoral campaign (the period affected by the impugned provision) constitute an exception to this rule.

²⁶ *Thomson, supra*, note 11, at para. 113.

²⁷ *Id.*, at para. 115.

²⁸ *Id.*, at para. 117.

²⁹ *Id.*, at para. 127. At paras. 123-26, Bastarache J. explained how this branch of the *Oakes* test was distinguished from other parts of it.

³⁰ *Id.*, at para. 25.

The election ends the debate. Therefore, although “errors and misinformation may be corrected after the election ... the value of the correction is lost.”³¹ This exceptional circumstance suggested that the exceptional remedy of section 322.1 might be appropriate.

Justice Gonthier defined the purpose of section 322.1 as “improving the search for truth, by providing for the timeliness of the publication of poll results, so as to allow discussion”.³² Under the proportionality test, Gonthier J. found the rational connection between the law’s ends and means to be self-evident.³³ He adopted a highly deferential threshold for the “minimal impairment” analysis:

... this Court should not second-guess the wisdom of Parliament in its endeavour to draw the line between competing credible evidence, once it has been established, on the civil standard of proof, that Parliament’s objective was pressing and substantial ...³⁴

The dissent was willing to allow Parliament discretion, so long as it had a “reasonable basis” for concluding the measure was minimally impairing and that 72 hours was the minimum necessary period for the blackout.³⁵ Justice Gonthier concluded that the measure fostered the decision-making process for voters and therefore had “a positive impact on freedom of expression”³⁶ at the small price of a short-term publication blackout.

The majority’s approach in *Thomson* affirmed section 2(b)’s underlying values, regardless of context, and ensured that any limits on expressive activity are conditional on the evidentiary requirements of section 1.³⁷ Unfortunately, during the Court’s next foray into political expression, a majority of the Court did not demand strict adherence to these important principles.

³¹ *Id.*, at para. 28.

³² *Id.*, at para. 29.

³³ *Id.*, at para. 40.

³⁴ *Id.*, at para. 42.

³⁵ *Id.*, at paras. 43, 51.

³⁶ *Id.*, at para. 61.

³⁷ See Jamie Cameron, “Governance and Anarchy in the s. 2(b) Jurisprudence: A Comment on *Vancouver Sun* and *Harper v. Canada*” (2005) 17 N.J.C.L. 71, at 102.

2. *Harper v. Canada (Attorney General)*

*Harper*³⁸ was a challenge to the third-party spending limitations in the *Canada Elections Act*. Among other things, the impugned sections of the Act restricted election spending by persons other than candidates or political parties to \$3,000 per riding and \$150,000 nationally per election, forbade third party advertising on election day, and required third party advertisers to register with and report to the Chief Electoral Officer.³⁹ Justice Bastarache once again wrote the majority judgment, but this time upheld these restrictions on freedom of expression as constitutional.

Both majority and dissent found that the impugned sections violated section 2(b).⁴⁰ The two judgments also agreed that the provisions had “pressing and substantial” objectives — promoting equality in political debate; preventing circumvention of candidate and party spending limits; and promoting public faith in the democratic system.⁴¹ There was also consensus that the provisions were sufficiently rationally connected to the objectives, despite the inability of the Attorney General to precisely specify the extent of their effect.⁴²

It was at the final two steps of the *Oakes* test — whether the law is minimally impairing and whether its benefit is proportional to its Charter infringement — that the dissent parted company from the majority, finding that the spending provisions were neither minimally impairing nor proportional. The majority found that the law was sufficiently “tailored so that rights are impaired no more than necessary”⁴³ and that its salutary effects outweighed its impact on freedom of expression.⁴⁴

The dissent’s *Oakes* analysis in *Harper* was consistent with the majority’s approach in *Thomson*,⁴⁵ wherein the Charter right at issue — expressive freedom in the electoral context — was at the heart of the analysis. Chief Justice McLachlin, in dissent, Major and Binnie JJ. concurring, emphasized that the denial of effective communication to

³⁸ [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.).

³⁹ *Canada Elections Act*, S.C. 2000, c. 9, ss. 323, 350-57, 359-60, 362.

⁴⁰ *Harper*, *supra*, note 38, at paras. 9, 66. The s. 2(b) violation was conceded by the Attorney General.

⁴¹ *Id.*, at paras. 22-27, paras. 91-103.

⁴² *Id.*, at paras. 28-31, 104-109.

⁴³ *Id.*, at para. 110, quoting the standard set out in *RJR-MacDonald*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at para. 160 (S.C.C.).

⁴⁴ *Harper*, *id.*, at paras. 119-21.

⁴⁵ *Thomson*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.).

citizens through limiting third-party spending violates free expression where it warrants the greatest protection — in the sphere of political discourse. Any limits on the core value of political expression must clearly and convincingly demonstrate that they serve a valid objective, minimally impair the right and enhance the democratic process rather than hinder it. In this case, the dissent found that there was no evidence to support the connection claimed by the government, and found that the limitation on third-party spending resulted in a virtual ban on participation in electoral debate except through political parties. The concerns of the dissent in *Harper* would resurface again in the dissenting opinion in *Bryan*,⁴⁶ with which McLachlin C.J.C. concurred.

For the majority, Bastarache J. identified “contextual” factors, as he did in *Thomson*,⁴⁷ before beginning his section 1 analysis. The majority relied on two factors in particular to shift the scales in favour of the impugned law. The first contextual factor that supported deference to the government was that “the nature of the harm and the efficaciousness of Parliament’s remedy in this case is difficult, if not impossible, to measure scientifically.”⁴⁸

The second key contextual factor was the Court’s endorsement of the “egalitarian model”⁴⁹ of elections:

The state can equalize participation in the electoral process in two ways. ... First, the State can provide a voice to those who might otherwise not be heard. ... Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well.⁵⁰

Under the “egalitarian” model of democracy, active management of the political process by Parliament is not only tolerated, but encouraged by the Court.

These two factors resulted in a reduced burden on the Attorney General of justifying the section 2(b) infringement. Whereas in *Thomson* Bastarache J. found that no particular deference was due,⁵¹ in *Harper* he found that “the contextual factors indicate that the Court should afford deference to the balance Parliament has struck between political expression

⁴⁶ [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527 (S.C.C.).

⁴⁷ *Supra*, note 45, at paras. 87-95.

⁴⁸ *Harper, supra*, note 38, at para. 79.

⁴⁹ *Id.*, at para. 64.

⁵⁰ *Id.*, at para. 62.

⁵¹ *Thomson, supra*, note 45, at para. 95.

and meaningful participation in the electoral process.”⁵² Another key distinction between *Thomson* and *Harper* was that the dangers posed by the restricted expression were taken much more seriously in the latter case than in the former. Justice Bastarache wrote in the *Thomson* judgment that “the social science evidence did not establish that the Canadian voter is a vulnerable group relative to pollsters and the media who publish polls.”⁵³ In *Harper*, by contrast, his conclusion on this point was that “the danger that political advertising may manipulate or oppress the voter means that some deference to the means chosen by Parliament is warranted.”⁵⁴

With its unquestioning acceptance of the egalitarian model, failure to acknowledge the significance of the right at issue, and unreflective deference, the *Harper* judgment expanded upon the few troubling aspects of the *Thomson* decision, and signalled the direction of the Court when it again addressed justifiable limits on political expression in *Bryan*.

3. *R. v. Bryan*

During the 2000 federal election, Paul Charles Bryan transmitted the election results from 32 ridings in Atlantic Canada while polling stations remained open elsewhere in Canada, by posting the information on a website. He was charged with contravening section 329 of the *Canada Elections Act*, which prohibits the transmission of election results in one electoral district to another electoral district before the close of all polling stations in that other district. Bryan’s application for a declaration that section 329 was unconstitutional for unjustifiably infringing his freedom of expression was dismissed, and Bryan was convicted of the offence. The summary conviction appeal judge declared the provision unconstitutional on the ground that it infringed section 2(b) and was not saved by section 1, and overturned Bryan’s conviction. The Court of Appeal held that section 329 was a justified limit on freedom of expression and restored the conviction.

A majority of the Court dismissed the appeal. With its decision again written by Bastarache J., the majority concluded that section 329 does infringe freedom of expression, but was justified under section 1. The

⁵² *Harper, supra*, note 38, at para. 111.

⁵³ *Thomson, supra*, note 45, at para. 112.

⁵⁴ *Harper, supra*, note 38, at para. 85.

dissenting opinion, written by Abella J., McLachlin C.J.C., Binnie and LeBel JJ. concurring, strongly disagreed, finding that this limitation on the core Charter guarantee of political expression was not justified by the evidence provided by the Attorney General.

The majority found that the objective of section 329 is to ensure “informational equality” by adopting reasonable measures to deal with the perception of unfairness created when some voters have general access to information that is denied to others, and the further possibility that access to that information will affect voter participation or choices.

In determining the nature and sufficiency of the evidence required to justify an infringement of section 2(b) of the Charter, the majority found that section 329 must be viewed in its context. According to the majority, the context is best established by reference to the four factors which the Court set out in *Thomson*⁵⁵ and expanded upon in *Harper*:⁵⁶ (1) the nature of the harm and the inability to measure it; (2) the vulnerability of the group protected; (3) subjective fears and apprehension of harm; and (4) the nature of the infringed activity.⁵⁷ The result of this contextual analysis will determine the level of deference to be afforded to the government.

As Bastarache J. explained:

The contextual factors are essentially directed at determining to what extent the case before the court is a case where the evidence will rightly consist of “approximations and extrapolations” as opposed to more traditional forms of social science proof, and therefore to what extent arguments based on logic and reason will be accepted as a foundational part of the s. 1 case.⁵⁸

Though the majority and dissent agreed that this contextual analysis is the appropriate method of determining the level of deference to government, and that Parliament is owed a degree of deference in matters such as the electoral process, the Court split on what exactly this deference entails.

The majority concluded that, given that the harm associated with the loss of public confidence in the electoral process or with a breach of the principle of informational equality is difficult to measure, logic and reason assisted by some social science evidence could constitute sufficient proof of the harm. The majority’s approach to deference in the electoral

⁵⁵ *Thomson, supra*, note 45, at paras. 90-96.

⁵⁶ *Harper, supra*, note 38, at paras. 77-88.

⁵⁷ *Bryan, supra*, note 46, at paras. 16-30.

⁵⁸ *Id.*, at para. 29.

process suggests that the government will have a greatly reduced burden to demonstrate through evidence of harm that its restriction of a Charter right is justified. In contrast, the dissent demanded that the evidence must convincingly establish the consequences of imposing or failing to impose the limit on expressive freedom to be justified. In the dissenters' view, "while scientific proof may not always be necessary or available, and social science evidence supported by reason and logic can be relied upon, the evidence must nonetheless establish the consequences of imposing or failing to impose the limit."⁵⁹ Instead, in the context of staggered hours, the government proffered only speculative and unpersuasive evidence to support its claim that an information imbalance is of sufficient harm to voter behaviour or perceptions of electoral unfairness that it outweighs any damage done to a fundamental and constitutionally protected right.⁶⁰

The Attorney General relied on three sources of evidence to support the publication ban of electoral results under section 329: (1) the evidence of Dr. Robert MacDermid, a professor of political science at York University; (2) the findings of *Electoral Democracy*;⁶¹ and (3) the Decima Research/Carleton University Poll, conducted during the period November 25 to December 5, 2005. Though the majority and dissent cited almost identical principles from these sources, they came to very different conclusions about whether the evidence supported the government's position.

The majority cited Dr. MacDermid's evidence to support the finding that informational imbalance would result in the loss of public confidence in the electoral process, and a resultant decline in participation and voting rates, which might ultimately affect the outcome of elections.⁶² It was Dr. MacDermid's evidence that knowing election results from the rest of the country — especially when combined with a media prediction of the election's outcome — could have an impact on voter behaviour, including lower turnout and strategic voting.⁶³ However, as the dissent noted, the professor based his conclusion that informational imbalance can affect voter participation and behaviour on the American experience, where staggered voting hours are not part of the electoral reality; unlike

⁵⁹ *Id.*, Abella J. dissenting, at para. 103.

⁶⁰ *Id.*, Abella J. dissenting, at para. 110.

⁶¹ (1991) Report of the Royal Commission on Electoral Reform and Party Financing [hereinafter "Lortie Report"].

⁶² *Bryan*, *supra*, note 46, at para. 18.

⁶³ *Id.*, Abella J. dissenting, at para. 92.

western Canadian voters in the context of staggered hours, western American voters may know the likely outcome of an election before they vote. Dr. MacDermid acknowledged that before there can be any impact on voters' perception and behaviour from an informational imbalance, that imbalance must be of such a nature that voters know or can predict the outcome of the election.⁶⁴ In the context of staggered hours, Canadians in western Canada would not be able to predict the outcome of the election as they would know, at most, 11 per cent of the national election results.

Both the majority and dissent cited the Lortie Report's conclusion that "Canadians feel very strongly about premature release of election results".⁶⁵ The basic problem, the Lortie Report stated, "is ensuring that voters in western Canada do not know who will form the government before the polls close there"⁶⁶ and suggested that Canadians favoured changes in voting hours to eliminate the problem. The majority relied on this finding to conclude that the Lortie Report supported maintaining public confidence in the electoral system by restraining publication of election results until most or all Canadians have voted.⁶⁷ The majority concluded that staggered hours alone do not address the impact on the confidence of the public regarding informational equality not being respected.⁶⁸ However, the dissent noted that the Lortie Report's findings that Canadians feel strongly about informational imbalances refers to Canadians' attitudes *before* staggered hours and explains why the Commission recommended staggered hours as an alternative to what the Commission acknowledged was an ineffectual ban under section 329.⁶⁹

Both the majority and dissent also cited the Commission's conclusion that "the release of some election results before polls close in the West — specifically, the results from the 32 seats in Atlantic Canada — would not constitute a major problem so long as other results from eastern Canada were not available until after the polls closed in the West."⁷⁰ For the majority, however, this did not lead to the logical conclusion that the ban is unnecessary to combat the harm of informational imbalance. Instead, the majority concluded that the staggered hours

⁶⁴ *Id.*, Abella J. dissenting, at paras. 112-14.

⁶⁵ *Id.*, at paras. 36, 41 and 118.

⁶⁶ *Id.*, at para. 46.

⁶⁷ *Id.*, at para. 45.

⁶⁸ *Id.*, at para. 47.

⁶⁹ *Id.*, Abella J. dissenting, at para. 118.

⁷⁰ *Id.*, at paras. 45, 120.

solution addresses imperfectly only the “basic problem” of western voters knowing who will form the government, but “does not address the impact on confidence of the public in light of its knowledge that the principle of information equality is not being respected.”⁷¹ The majority concluded that section 329 must be maintained because informational imbalance will remain if it is not. The dissent came to a very different conclusion based on this same evidence. The dissent found that the Lortie Report showed that there would be no harm to public perceptions from knowing the results of the 32 ridings and thus section 329 is an unnecessary and unjustified limitation on freedom of expression.

The third source of evidence put forward by the government was a 2005 Decima Research/Carleton University Poll, which was offered to show that without the ban under section 329, Canadians would perceive elections to be unfair. According to this poll, 70 per cent of Canadians surveyed “thought people should not be able to know election results from other provinces before their polls close.”⁷² From this, the majority concluded that a majority of Canadians believe in the principle of informational equality and that failure to adhere to this principle would harm Canadians’ view of the electoral system.⁷³ However, the dissent revealed that the purpose and effects of staggered hours were not explained to the Canadians responding to the poll. The poll did not address one way or the other whether the particular informational imbalance of some westerners knowing the results of 32 Atlantic ridings — or, at most, 11 per cent of the election outcome — would cause harm.⁷⁴ Absent the relevant context, the dissent stated, “the answer is a very general response to a very general question” which simply shows an “unsurprising public preference for the goal of electoral fairness”.⁷⁵

The majority relied on these three sources of evidence to conclude that there was *some* evidence that public confidence depends on the perception that Canadians have equal access to information before voting and therefore on the presence of the section 329 ban.⁷⁶ The dissent disagreed, finding:

⁷¹ *Id.*, at para. 47.

⁷² *Id.*, at para. 25.

⁷³ *Id.*, at para. 41.

⁷⁴ *Id.*, at para. 108.

⁷⁵ *Id.*, Abella J. dissenting, at para. 122.

⁷⁶ *Id.*, at para. 41.

... only speculative and unpersuasive evidence to support the government's claim that this particular information imbalance is of sufficient harm to voter behaviour or perceptions of electoral unfairness — the objects sought to be addressed by the ban — that it outweighs any damage done to a fundamental and constitutionally protected right.⁷⁷

The dissent concluded that there was no persuasive evidence of harm requiring the remedial attention of a publication ban.⁷⁸

In considering the nature of the right at issue in *Bryan*, the majority concluded that while political expression lies at the core of the guarantee of free expression, the right at issue was the “putative right” to receive election results before the polls close and that restricting access to such information before polls close carries less weight than after they close.⁷⁹ In contrast, the dissent identified the rights at issue as the “core democratic right” of the media to publish and of Canadians to receive election results in a timely fashion.⁸⁰ It is these two very different delineations of the centrality of the political expression at issue that informs the analysis of the majority and dissent, as they determine whether that right may justifiably be infringed on the basis of the evidence proffered by the government.

We will now discuss three significant issues raised by *Bryan*, the roots and development of which are apparent in the *Thomson*⁸¹ and *Harper*⁸² decisions: the Court's adherence to the egalitarian model, reliance on the reasoned apprehension of harm evidentiary test, and deference to government in the electoral process. Our conclusion is that the majority's treatment of these issues demonstrates a troubling direction for the Court in cases concerning core expressive freedom.

III. THE CHIMERA OF INFORMATIONAL EQUALITY

The egalitarian model has been endorsed by the Court with the goal of equalizing participation among the electorate.⁸³ In *Bryan*, the Court

⁷⁷ *Id.*, at para. 110.

⁷⁸ *Id.*, Abella J. dissenting, at para. 132.

⁷⁹ *Id.*, at para. 30.

⁸⁰ *Id.*, Abella J. dissenting, at para. 110.

⁸¹ [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.).

⁸² [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.).

⁸³ *Harper, id.*, at para. 62.

found that informational equality is in keeping with this egalitarian model and is an essential component of our democratic society.

In the context of *Bryan*, “informational equality” means that all voters have general access to the same information before they cast their votes in an election. In *Bryan*, the Attorney General presented informational equality as an “inherently worthy goal”.⁸⁴ The Court interpreted this to mean that the mere fact that one voter could have general access to information about election results that another voter does not have might create the perception of unfairness or affect voter participation or choices. The majority accepted that informational equality is a “logically direct result of the requirement that elections be fair.”⁸⁵ This finding was based on the argument that “democracy *requires* that no individual should have a general access to information, unavailable to others, that can play a role in the exercise of his own right to vote.”⁸⁶ Thus the Court found that the fairness of Canada’s electoral process *demand*s that no individual voter have access to general information not available to any other voter.⁸⁷

As Robert E. Charney and S. Zachary Green have noted, language suggesting that the egalitarian model is a constitutional imperative is not new to the Court.⁸⁸ In *Harper*, the Court found that spending limits are “an *essential* means of promoting fairness”,⁸⁹ “an *essential* component of our democratic society”,⁹⁰ and “*necessary* for meaningful participation in the electoral process”,⁹¹ with the inevitable consequence that they are not inconsistent with the Charter’s democratic guarantees.

The Court has repeatedly recognized that fairness of the electoral process and the enhancement of participation in that process are essential to a free and democratic society. In *Harper*, the Court stated:

Maintaining confidence in the electoral process is essential to preserve the integrity of the electoral system which is the cornerstone of Canadian democracy. In *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136,

⁸⁴ [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527, at para. 12 (S.C.C.).

⁸⁵ *Id.*, at para. 22.

⁸⁶ *Id.* (emphasis added).

⁸⁷ Unfortunately this focus on equality does not extend to ensuring that each vote is counted equally. See *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] S.C.R. No. 46, [1991] 2 S.C.R. 158 (S.C.C.).

⁸⁸ Robert E. Charney & S. Zachary Green, “It’s My Party and I’ll Run if I want to: *Figueroa*, *Harper* and the Animal Alliance Environment Voters Party” (2007) 21 N.J.C.L. 257.

⁸⁹ *Harper*, *supra*, note 82, at para. 61 (emphasis added).

⁹⁰ *Id.*, at para. 62 (emphasis added).

⁹¹ *Id.*, at para. 72 (emphasis added).

Dickson C.J. concluded that faith in social and political institutions, which enhance the participation of individuals and groups in society, is of central importance in a free and democratic society. If Canadians lack confidence in the electoral system, they will be discouraged from participating in a meaningful way in the electoral process. More importantly, they will lack faith in their elected representatives. Confidence in the electoral process is, therefore, a pressing and substantial objective.⁹²

We accept that maintaining confidence in the electoral process is vital in a free and democratic society. However, we dispute that informational equality as understood by the Court is *required* under the Constitution or that informational equality is an essential component of maintaining confidence in the electoral process.

The majority's approach to this issue suggests that the very *notion* that someone in Victoria might be able to find out the results of the election in St. John's offends the principle of equality. The majority has accepted without question that informational equality is a necessary component of electoral fairness and thus required in a free and democratic society. According to the majority's opinion, the electoral process would not be fair — or, at the least, would not be perceived to be fair — without the government legislating to ensure that the information available to Canadians before they go to the polls is “equal”. Both the government and the majority of the Court speciously accept that informational equality is, first, a realistic goal and, second, an inherently good principle.

The egalitarian model is not universally appropriate, necessary, or effective in Canada's electoral process. This is not a process in which every aspect can and should be regulated. There are numerous aspects of the electoral process that are not equal and cannot be equalized. For example, the resources available to political candidates are not and cannot be completely equalized. The government cannot regulate a candidate's political capital or the amount of interest the media might take in that candidate; the political, social, or media status of a candidate might affect the amount of information about that candidate that is available to the public at large and thus affect the elector's vote. Yet, this is not seen as unfair, or worthy or capable of regulation.⁹³

⁹² *Id.*, at para. 103.

⁹³ See Christopher D. Bredt & Laura Pottie, “Liberty, Equality and Deference: A Comment on Colin Feasby's ‘Freedom of Expression and the Law of the Democratic Process’” (2005) 29

Furthermore, it is absurd to suggest that the government can or should regulate information available to voters that might play a role in the exercise of their right to vote, in an effort to make that available information “equal”. Information that is “generally available” to voters is not equal across the country. A pundit opining in the local watering hole might impart information about the election to other patrons that is not available generally to other Canadians but which might affect how or whether those bar patrons choose to vote. The Federal Liberal Party might choose to take one advertising tactic in Nova Scotia and a different one in British Columbia; the information and spin addressed to those provinces might be completely different but inaccessible to residents in the other province, yet influence how those voters act.

The Court has approved of legislation that suppresses expressive freedom because it has the goal of informational equality. This suggests that the government should not only curb an excess of information reaching one part of the electorate, but also that the government should actively ensure that each piece of information available to each Canadian voter is the same across the country. The value of this forced equalization is questionable. Information that is important and relevant to voters in a rural riding in Saskatchewan is simply not going to be entirely the same as the information that is significant to constituents in urban Toronto. While there are some universal issues that extend across Canada’s vast expanse — health care, for example — not every electoral issue that might affect a voter’s choice will be shared by every other voter. It is not possible to provide each Canadian with equal access to every shred of information that is disseminated to any other Canadian. Further, even if equal access were possible, the wisdom of the principle is doubtful. For example, it would be both inefficient and ineffective to ensure that an inhabitant of Cape Breton is apprised of how street crime in the downtown eastside of Vancouver will be handled by the government, with the goal of informational equality across the country.

As the majority in *Thomson*⁹⁴ found, and the dissent in *Bryan* reiterated, “it is impossible to immunize voters from all conceivable influences ... The question is whether the impact will be a harmful one”.⁹⁵ As the dissent found in *Bryan*, the government provided no

S.C.L.R. (2d) 291; Colin Feasby, “*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model” (1999) 44 McGill L.J. 5.

⁹⁴ *Supra*, note 81.

⁹⁵ *Bryan*, *supra*, note 84, Abella J. dissenting, at para. 117.

convincing evidence that informational imbalances have an inherently harmful impact in that all information imbalances are problematic or harmful, either perceptually or behaviourally.⁹⁶ One of the pieces of evidence provided by the government to support its position, the Lortie Report, does not suggest that the mere fact of an information imbalance creates a perceptual harm to public confidence in electoral fairness. In fact, as the dissent notes, the Commission observed that “the release of some election results before polls close in the West — specifically, results from the 32 seats in Atlantic Canada — would not constitute a major problem so long as other results from eastern Canada were not available until after the polls closed in the West”.⁹⁷

The majority found that in “curb[ing] widespread dissemination of this information ... [section 329] contributes materially to its objective of informational equality between voters in different parts of the country.”⁹⁸ The objective, therefore, is informational equality and the means to achieve this objective is to curb the dissemination of information. The majority did recognize that election results are part of the political process and, thus, at the core of expression guaranteed by the Charter, and that curbing the dissemination of that information does restrict the right to freedom of expression.⁹⁹ However, the majority was quick to state:

Whether the s. 2(b) interest in receiving or disseminating political information, or both, is at the centre of this case, it is not at all clear that that interest can supersede the value of the countervailing principle that no voter should have general access to information about the results of the election unavailable to others.¹⁰⁰

With respect, we suggest that freedom of expression should supersede the putative inherently important goal of informational equality. With this statement, the majority of the Court has elevated the purported democratic imperative “that no individual should have general access to information, unavailable to others, that can play a role in the exercise of his own right to vote”¹⁰¹ over that of freedom of expression. To answer the Court’s query as to why one would suggest that the *right* to receive

⁹⁶ *Id.*, Abella J. dissenting, at paras. 117, 119.

⁹⁷ *Id.*, Abella J. dissenting, at para. 120.

⁹⁸ *Id.*, at para. 79.

⁹⁹ *Id.*, at para. 26.

¹⁰⁰ *Id.*, at para. 27.

¹⁰¹ *Id.*, at para. 22.

information about the election might supersede the *principle* of informational equality, a simple response is that one is a right explicitly guaranteed in the Charter while the other is a principle the value of which is not at all clear, and certainly not from the evidence before the Court.

IV. THE CONVENIENCE OF REASONED APPREHENSION OF HARM

The “reasoned apprehension of harm” evidentiary test was developed in the context of speech that is far from the core of the expressive freedom guarantee, but is now being applied to cases concerning core political expression. In this section, we discuss how the Court in *Bryan*¹⁰² characterized the right at issue, and then consider the Court’s application of the reasoned apprehension of harm standard in that context.

1. The Relationship of the Right at Issue to the Core of Expressive Freedom

Although both the majority and dissent recognized that the right at issue is political expression, the Court split on the location of the right within the core of the expressive freedom guarantee. The decision of how to locate the right at issue is crucial to the level of deference the Court will show to the government’s decision. The Court has acknowledged that when freedom of expression comes into conflict with other core values in society, they must engage in a “concrete weighing of the relative significance of each of the relevant values”.¹⁰³ The Court will weigh the freedom of expression claims in light of their relative connection to the even more fundamental values of the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process. When the form of expression placed in jeopardy falls farther from the “centre core of the spirit”, the Court has ruled restrictions on such expression less difficult to justify.¹⁰⁴ Thus, the burden of proof is meant to be the most demanding where the government is restricting speech at the core of the expressive freedom guarantee.

¹⁰² *Id.*

¹⁰³ *RJR-MacDonald*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at para. 72 (S.C.C.).

¹⁰⁴ *Id.*

Though the majority in *Bryan* acknowledged that the expression limited by the government in this case is indeed political expression, and thus at the core of the expressive freedom guarantee, Bastarache J. shifted the right claimed to the furthest outreaches of that core:

While political expression is undoubtedly important, the right at issue is the putative right to receive election results before the polls close; restricting access to such information before polls close carries less weight than after they close.¹⁰⁵

The majority further emphasized that the limitation on freedom of expression in issue in *Bryan* involved no suppression of any information at all, but only a brief delay in its communication to voters who have not yet cast their ballots.¹⁰⁶ Thus, although the ban restricts the democratic rights of the media to publish and of Canadians to receive election results in a timely fashion, the timing of the availability of that information shifts that right further from the core of the expressive guarantee. As a result, because the government is not restricting speech at the core of the expressive freedom guarantee, the Court reduced the government's burden of proof. This result followed despite the fact that expression outside the core of the expressive guarantee has previously been reserved for hate mongering, soliciting for prostitution, tobacco advertising and pornography.¹⁰⁷

The dissent in *Bryan* fundamentally disagreed with the majority's characterization of the rights at issue, finding that the rights at issue are the core democratic rights of the media to publish and of Canadians to receive election results in a timely fashion.¹⁰⁸ Communicating and receiving election results is a "core democratic right" and an "essential part of the democratic process".¹⁰⁹ The dissent placed these rights at the very heart of the core of the expressive freedom guarantee:

It is difficult to imagine a more important aspect of democratic expression than voting and learning the results of their vote. The s. 329 ban impairs the right both to disseminate and receive election results at a crucial time in the electoral process. To suggest that this is only a

¹⁰⁵ *Bryan, supra*, note 84, at para. 30.

¹⁰⁶ *Id.*, at paras. 66, 80.

¹⁰⁷ *RJR-MacDonald, supra*, note 103, at para. 75; Arnie Hershorn, "Causation of Harm and the Charter Guarantee of Freedom of Expression" (2003) 14 N.J.C.L. 217 [hereinafter "Hershorn"].

¹⁰⁸ *Bryan, supra*, note 84, Abella J. dissenting, at para. 110.

¹⁰⁹ *Id.*

delay, not the suppression of information, unduly minimizes the significance both of the information and of the delay.¹¹⁰

Because the dissent positioned the rights at issue at the core of section 2(b), it required clear and convincing evidence to justify limiting the availability of the information about election results.

2. The Development of the Reasoned Apprehension of Harm Standard

In cases in which the Court has been faced with inconclusive or competing social science evidence relating the harm to the legislature's measures, it has relied on a reasoned apprehension of that harm to justify restrictions on expression.¹¹¹ In such cases, logic, reason and some social science evidence are relied upon in the course of the justification analysis.¹¹² Logic and common sense become all the more important in cases where the harms are "difficult, if not impossible, to measure scientifically".¹¹³

The harm at which the blackout period under section 329 is aimed is the prevention of informational imbalance so as to protect against the perception or reality of electoral unfairness. The fear is that if public confidence is lost, voting patterns may change and ultimately the outcome of elections could be affected.¹¹⁴ Given that the harm associated with the loss of public confidence in the electoral process or with a breach of the principle of informational equality is difficult to measure, the majority found that logic and reason assisted by some social science evidence could constitute sufficient proof of the harm. The majority found that the objective asserted by the government — specifically, informational equality — is a matter of the "values and principles essential to a free and democratic society".¹¹⁵ In cases of this kind, it may not be appropriate to require proof according to the usual civil requirements.

¹¹⁰ *Id.*, Abella J. dissenting, at para. 128.

¹¹¹ *Harper*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827, at para. 77 (S.C.C.).

¹¹² See *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452, at 503 (S.C.C.) [hereinafter "*Butler*"]; *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 768, 776 (S.C.C.) [hereinafter "*Keegstra*"]; *RJR-MacDonald*, *supra*, note 103, at para. 137; *Thomson*, *supra*, note 81, at paras. 104-107; *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 (S.C.C.) [hereinafter "*Sharpe*"].

¹¹³ *Harper*, *supra*, note 111, at para. 79.

¹¹⁴ *Bryan*, *supra*, note 84, at paras. 108, 117.

¹¹⁵ As discussed in *Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 64 (S.C.C.).

As the majority in *Bryan* noted, it was through a series of cases on freedom of expression that the Court came to recognize that the paucity of social science evidence in some cases required that a “reasoned apprehension of harm” could be sufficient to ground a section 1 argument.¹¹⁶ What the Court did not explain is that the reasoned apprehension of harm standard was developed in cases regarding peripheral speech. The origins of this standard well outside the core of expression guaranteed by the Charter raises the question of whether it is appropriate to apply it to political expression, which is at the heart of the guarantee.

The reasoned apprehension of harm standard was formulated by Sopinka J. in *Butler*¹¹⁷ to uphold the obscenity provisions of the *Criminal Code*¹¹⁸ in the absence of a demonstrated causal link between pornographic materials and harm to women or other disadvantaged groups.¹¹⁹ The Court upheld the provisions on the basis that Parliament had a “reasoned apprehension of harm” that degrading sexual representations of women affected men’s attitudes in such a way that encouraged degrading treatment of women.¹²⁰ In *Keegstra*,¹²¹ Dickson C.J.C. employed similar reasoning to uphold the criminalization of hate speech. In *RJR-MacDonald*,¹²² the Court held, in the absence of direct scientific evidence showing a causal link between the advertising bans and a decrease in tobacco consumption, that as a matter of logic advertising bans and package warnings lead to a reduction in tobacco use.¹²³ In *Sharpe*,¹²⁴ McLachlin C.J.C. looked to this standard in finding that Parliament is not required to adduce scientific proof based on concrete evidence that the possession of child pornography causes harm to children.¹²⁵

¹¹⁶ See *Butler*, *supra*, note 112, at 503; *Keegstra*, *supra*, note 112, at 503; *RJR-MacDonald*, *supra*, note 103, at para. 137; *Thomson*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at paras. 104-107 (S.C.C.); *Sharpe*, *supra*, note 112; *Bryan*, *supra*, note 84, at para. 20.

¹¹⁷ *Supra*, note 112.

¹¹⁸ R.S.C. 1985, c. C-46.

¹¹⁹ See Nicholas E. Devlin, “Opinion Polls and the Protection of Political Speech — A Comment on *Thomson Newspapers Co. v. Canada (Attorney General)*” (1996-1997) 28 Ottawa L. Rev. 411, at paras. 26-32 [hereinafter “Devlin”] on this troubling development in the Court’s jurisprudence.

¹²⁰ *Butler*, *supra*, note 112, at 504.

¹²¹ *Keegstra*, *supra*, note 112.

¹²² *RJR-MacDonald*, *supra*, note 103.

¹²³ *Id.*, at paras. 155-58.

¹²⁴ *Sharpe*, *supra*, note 112.

¹²⁵ *Id.*, at para. 88.

3. Application of the Reasoned Apprehension of Harm Standard to Political Expression

Before *Harper*¹²⁶ and now *Bryan*,¹²⁷ the reasoned apprehension of harm standard had only been applied in cases dealing with relatively “low value” speech on the periphery of the freedom of expression guarantee — obscenity, hate speech, and commercial advertising.¹²⁸ However, the Court has now applied this standard in cases concerning core political expression. With *Bryan*, the Court has fully embraced the reasoned apprehension of harm test in the electoral context under section 1. The acceptance of this standard in the core area of political expression is of concern.

One of the principal problems with the Court’s reasoned apprehension of harm standard in *Harper* and *Bryan*, particularly as applied in the area of core political expression, is that the *mere possibility* that “harm” might conceivably be occasioned by a particular expressive act seems to be sufficient to justify limiting expressive freedom. Though the Court has articulated a model which theoretically requires the government to prove causation of harm on a balance of probabilities, in practice the Court has lowered the threshold of proof of causation “from probability to possibility, or even conceivability” of harm.¹²⁹

Of particular concern is that the reasoned apprehension of harm standard is being employed to support the suppression of *factual information*, especially in the context of a national election. The harm that the government is concerned about in this case is what will result from the dissemination of *factual* information about election results and the commentary thereon. The suppression of facts is contrary to the search for truth that is so often identified as one of the fundamental purposes of free expression.¹³⁰ That the dissemination of facts about an election might affect Canadians’ perception of electoral fairness — even if there is no convincing evidence that real harm may occur — does not

¹²⁶ *Supra*, note 111.

¹²⁷ *Bryan*, [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527, 2007 S.C.C. 12 (S.C.C.).

¹²⁸ According to Devlin, *supra*, note 119, at para. 26, this standard was also employed to troubling effect in *Thomson*. Although the reasoned apprehension of harm standard was considered in *Thomson*, Bastarache J. found that the application of that test was not appropriate because the case was not one in which “the very nature of the expression in question undermines the position of groups or individuals as equal participants in society.” See *supra*, note 116, at para. 115.

¹²⁹ Hershorn, *supra*, note 107, at 219.

¹³⁰ Devlin, *supra*, note 119, at para. 29.

seem to be a sufficiently reasonable apprehension to justify limiting freedom of political expression.

To reiterate, political expression is considered “high value” speech because it furthers the core values of individual autonomy and self-development, the search for truth, and the promotion of public participation in the democratic process.¹³¹ Yet, the majority’s decision is at the expense of all of these core values. It is fundamental to our democratic system that citizens not only have the right to vote, but also the right to decide how to exercise that vote in whatever way they wish.¹³² That the government and majority of the Court support a law that suppresses electoral information on the basis that Canadians might choose to act in a harmful manner — by choosing how or whether to vote on that information, or by losing faith in the fairness of the electoral process — based upon that information is troubling. As Neuborne has noted:

[w]hen society provides its members with lawful choices, respect for individual dignity compels that the choices be the autonomous expression of individual preference. It is impossible to respect individual autonomy with the left hand while selectively controlling the information available to the individual with the right hand. A purportedly free individual choice premised on a government controlled information flow is a basic affront to human dignity.¹³³

The majority’s approach to the harm that could conceivably result from informational imbalance is troubling. This ban “protects” Canadians from perceiving inequality or choosing how, or whether, to vote based on factual information about the electoral results of 32 Atlantic ridings, or, at most, 11 per cent of the election outcome. In upholding this ban, the majority of the Court has ignored the individual autonomy of Canadians to engage in the electoral process upon whatever basis they so choose. It is not appropriate to take a test developed to address the deficiency of evidence that pornography and hate speech are harmful and apply it to cases concerning the core Charter right of political expression.

¹³¹ *RJR-MacDonald*, *supra*, note 103.

¹³² Devlin, *supra*, note 119, at para. 38.

¹³³ Burt Neuborne, “The First Amendment and Government Regulation of Economics” (1989) 55 *Brook. L. Rev.* 1, at 37, cited by Devlin, *supra*, note 119, at para. 38.

4. Evidence of Harm

Neither the approach of the majority, nor of the dissent, to the sufficiency of evidence required to limit a core Charter value is unique to the *Bryan*¹³⁴ case. Indeed, the division in the Court regarding how to address the lack of definitive proof for the factual premises underlying the challenged laws reveals a true schism in the Court's approach.¹³⁵ Before *Bryan*, in both *Thomson*¹³⁶ and *Harper*,¹³⁷ the Court divided on how great a burden to impose on the government of adducing evidence when dealing with constitutional claims involving deeply political, sociological and philosophical concepts. While judicial deference may be appropriate in cases where the mischief addressed by the statute is not capable of empirical demonstration, a vocal segment of the Court has emphasized that deference must not relieve the government of the burden which the Charter places upon it to demonstrate that the limits it has imposed on guaranteed rights are reasonable and justifiable;¹³⁸ the "contextual approach" should not relieve the state of its obligation to show that the restriction is justified on a balance of probabilities.¹³⁹

As Jamie Cameron notes, the requirement that limits on constitutionally protected activity be supported by evidence of harm must be taken seriously; not to do so makes a mockery of section 1.¹⁴⁰ Unfortunately, a majority of the Court has found it acceptable to make findings in favour of the government that suggest that "evidence does not matter, and that limits on constitutional rights are reasonable and justifiable whether or not the government can show that exercising of the right poses an articulated or articulable harm."¹⁴¹ This is so even in cases such as *Bryan* where there is very little — if any — concrete evidence that harm would result, or be seen to result, from the release of election results from 32 Atlantic ridings, but there is a real, evidenced harm to the media and the electorate through the suppression of this information about a national election. As the dissent stated:

¹³⁴ *Supra*, note 127.

¹³⁵ See Sujit Choudhry, "So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 S.C.L.R. 501.

¹³⁶ *Supra*, note 116.

¹³⁷ *Supra*, note 111.

¹³⁸ See McLachlin J. in *RJR-MacDonald*, *supra*, note 103, at para. 136.

¹³⁹ *Id.*, at para. 134.

¹⁴⁰ Jamie Cameron, "Governance and Anarchy in the s. 2(b) Jurisprudence: A Comment on *Vancouver Sun* and *Harper v. Canada*" (2005) 17 N.J.C.L. 71, at 103.

¹⁴¹ *Id.*, at 97.

It is far from clear to me that there is any evidence at all to demonstrate that the ban in s. 329, in the context of staggered hours, is directed at a demonstrated harm and sufficiently promotes public confidence in the fairness of elections to justify infringing the right to disseminate and receive election results. ...

On the other hand, the harm caused by the ban to the expressive rights in s. 2(b) is considerable. For the duration of the ban, the Atlantic election results are denied to all Canadians west of the Atlantic provinces, many of whom have already voted. It is difficult to imagine a more important aspect of democratic expression than voting and learning the results of their vote. The s. 329 ban impairs the right both to disseminate and receive election results at a crucial time in the electoral process. To suggest that this is only a delay, not the suppression of information, unduly minimizes the significance both of the information and of the delay.¹⁴²

Indeed, the majority's preference for "logic and commonsense", as applied to weak evidence, over the very real and practical deleterious effect on the freedom of expression of individual Canadians and the media to report and comment upon a national election — not just voting results, but the commentary, speeches and opinion that accompanies the results — is disturbing. Expressive freedom is at the heart of our democratic system. The electoral process is the most fundamental democratic act. The Court should be wary of undue deference to Parliament based on weak evidence where Parliament is attempting to limit political expression in the electoral context.

V. DEFERENCE AND THE ELECTORAL PROCESS

One of the "important principles" drawn from the Court's decision in *Harper*, and re-emphasized by the majority in the *Bryan* case, is that courts ought to take a "natural attitude of deference" toward Parliament when dealing with election laws.¹⁴³ There is an important issue of whether this principle should be accepted as universally appropriate or wise.

¹⁴² *Bryan*, *supra*, note 127, at paras. 127-28.

¹⁴³ *Bryan*, *id.*, at paras. 9-10, citing *Harper*, *supra*, note 111, at paras. 75-76, and *Thomson*, *supra*, note 116, at para. 88.

There is a clear tendency on the part of Parliament to legislate in its own self-interest in its role of regulating the democratic process.¹⁴⁴ As well, there is good evidence that the electoral regime is designed to protect and promote established parties and incumbents.¹⁴⁵ Though the argument may be made that the self-interest of Parliament is not served by restricting access to election results in more western parts of the country before voting ends, the self-interest of Parliament in regulating the electoral process should not be ignored by the Court when considering the level of deference owed to government in cases of this kind.¹⁴⁶ There should of course be a heightened scrutiny by the Court of the government's decisions when the government is particularly self-interested — for example, when Parliament legislates to grant incumbents greater broadcast time — but the government's general self-interest in this process must at all times be considered when determining if deference is appropriate. Deference to government decisions should not be assumed simply because a case concerns the electoral process.

However, the courts have taken an attitude of deference toward Parliament when dealing with election laws on the basis that Parliament, and not the Court, is best equipped to determine what is best for Canadians in this process. Judicial deference to Parliament should acknowledge that Parliament's authority to regulate must be balanced against Canadians' rights to comment on and receive information about that electoral system. These competing interests must be balanced with care, and certainly with greater regard than is demonstrated by the majority in *Bryan* to the importance of the right at issue.

VI. CONCLUSION

The Supreme Court of Canada is increasingly tending to diminish the importance of political expression as being at the core of the right protected by section 2(b). *Bryan* and *Harper* suggest that the Court will adhere to the egalitarian model without question, regardless of whether

¹⁴⁴ Christopher D. Brecht & Laura Pottie, "Liberty, Equality and Deference: A Comment on Colin Feasby's 'Freedom of Expression and the Law of the Democratic Process'" (2005) 29 S.C.L.R. (2d) 291.

¹⁴⁵ *Id.*, at 301-302. See the examples offered by Brecht and Pottie, *id.*, such as rules relating to the allocation of broadcast time during elections which favour incumbents, and the substantial funding provided by the *Canada Elections Act*, S.C. 2000, c. 9 for successful political parties and candidates.

¹⁴⁶ Colin Feasby, "Constitutional Questions about Canada's New Political Finance Regime" (2007) 45 Osgoode Hall L.J. 513, at 543.

the particular objective of equality is realistic or appropriate when considered in its context. The Court's jurisprudence in the area of political expression also suggests the troubling adoption of an evidentiary standard — the reasoned apprehension of harm standard — developed to address deficiencies in the kind of evidence that may be offered to prove harm caused by certain kinds of peripheral speech. This standard is ill-suited to the area of “high value”, core political speech, because it relies on the mere conceivability that harm may result from a certain kind of speech to help justify its limitation. *Bryan* also solidifies the Court's increasing and unquestioning acceptance of deference to government when issues regarding the electoral process arise. The ray of hope in these recent decisions is the strong dissents, which recognize that “political expression lies at the heart of the guarantee of free expression and underpins the very foundation of our democracy”,¹⁴⁷ and thus any limit on the availability of political information must be justified by clear and convincing evidence.¹⁴⁸

¹⁴⁷ *Harper, supra*, note 111, *per* the Chief Justice and Major J. (dissenting in part) at para. 41.

¹⁴⁸ *Bryan, supra*, note 127, at para. 110.