LIBERTÉ, EGALITÉ, ARGENT: THIRD PARTY ELECTION SPENDING AND THE *CHARTER*

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Both the federal government and the courts have brought about changes in election law. The author reviews these recent changes in the legal landscape that surround election rules, in particular third party election spending. The questions of "what rules exist" and "who shall make them" are particularly important to the discussion as this area of law tries to reconcile individual interests in liberty and equality in a democracy. The trio of Supreme Court of Canada decisions, Libman v. Quebec (A.G.), Thomson Newspapers v. Canada (A.G.) *and* Sauvé v. Canada (Chief Electoral Officer), *reveal ambiguity in the Court's rationale for limiting individual liberty at election time. This ambiguity is broached in the recent Supreme Court of Canada case of* Harper v. Canada (A.G.) *where the Court accepted that Parliament may legitimately seek to create a "level playing field" at election time.*

Le gouvernement fédéral et les cours de justice ont apporté des modifications à la loi électorale. L'auteur revoit les récents changements dans le cadre légal entourant les règles électorales, tout particulièrement les dépenses électorales de tiers. La question, à savoir « quelles sont les règles qui existent » et « qui les mettra en place » est particulièrement importante dans cette discussion étant donné que ce domaine du droit tente de réconcilier les intérêts individuels et la notion de liberté et d'égalité d'une démocratie. Les trois décisions de la Cour suprême du Canada, notamment Libman c. le Québec (A.G.), Thomson Newspapers c. le Canada (A.G.) *et* Sauvé c. le Canada (Directeur général des élections), *manifestent l'ambiguïté relativement au raisonnement de la Cour de limiter la liberté individuelle pendant un scrutin. Cette ambiguïté a été entamée dans la récente cause de la Cour suprême du Canada de* Harper c. le Canada (A.G.) *où la cour a accepté que le Parlement puisse, en toute légitimité, créer « une égalité des chances » au moment d'un scrutin.*

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I. INTRODUCTION

A general election in Canada causes a lot of people to become intensely excited, and with good reason. For one thing, an election provides a now largely secular society with one of its few national civic rituals; it presents the polity with a set of shared experiences as we witness the campaign unfold before heading *en masse* to the polls and culminates in the sportive excitement of watching the results roll in. Underpinning this sense of occasion on election day is the fact that the winner at the ballot box then gets to take a direct part in choosing the binding social rules (laws) the rest of us subsequently will have to live under. The distribution of social rule making power through the election process means that a great many individuals and groups have cause to care who wins out at the ballot box. And so candidates frantically campaign to win the ballots of as many voters as they can, with the aim of capturing a place in Parliament and possibly the government. Each candidate is directly aided in his or her vote-seeking quest not only by the members of the political party that he or she may represent, but also by other supportive individuals and groups who think that the candidate represents the best choice come election day. To a degree that reflects their varying levels of interest, the voters themselves may become involved in the election campaign process by gathering information on the candidates and their parties, discussing the issues with one another and perhaps even by actively posing questions and challenges to those seeking their votes. Interest groups will try and take advantage of this heightened political awareness by making their particular concerns known to the voters, as well as to those competing to win the right to represent the electorate. Various news media cover the issues and personalities involved in the campaign in a manner that, depending on your school of thought, either helps to inform the voters or sensationalizes matters in an unhealthy way. Pundits attempt, with a mixed level of success, to predict the final outcome. And afterwards, academics, such as myself, pour over the entrails of the process in order to dissect where it worked, and where it went wrong.

What is often lost in the sound and the fury generated by these disparate forms of electoral interaction is the role that legal rules play in both ordering how an election campaign is to operate and controlling the way in which participants may act during it. As is discussed in more detail in Part II, virtually everything that the participants experience during an election campaign is a direct or indirect consequence of legal regulation.[1] Therefore, the combined importance of elections as a procedure for determining who gets to wield law making power in a democratic society, along with the centrality of legal regulation in determining how this procedure will take place, make the area of electoral law an important, if often overlooked, field.[2] How the current legal rules work to structure the democratic moment that we experience as an election, as well as whether these various rules are adequate or desirable, are questions that are worthy of more sustained and structured investigation than they have received to date.

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1 Louis Massicotte, André Blais & Antoine Yoshinaka, *Establishing the Rules of the Game: Election Laws In Democracies* (Toronto: University of Toronto Press, 2004).

2 A notable Canadian exception is J. Patrick Boyer, *Election Law In Canada: The Law and Procedure of Federal, Provincial and Territorial Elections* (Toronto: Butterworths, 1987).

This article contributes to this investigative project by considering in some depth one particular issue of electoral regulation — Canada's experience with regulating third party election spending. This term of art refers to expenditures on public communications during an election campaign by individuals or groups wishing to somehow influence the outcome of the process but not seeking election themselves. Repeated attempts have been made in Canada to subject this type of spending to legal controls, for reasons discussed in Part II. One purpose of this article is to give a comprehensive, descriptive account of how the issue has been confronted in Canada through both various legislative measures and constitutional reviews of these measures by the courts. In addition to providing a descriptive account of the issue, this article also uses it to illustrate two questions that must be confronted any time the general topic of electoral regulation arises. These questions, which are outlined in greater detail in Part II, may be summarized here as "what electoral ground rules should we have?" and "who ought to decide what these ground rules will be?" For the necessarily limited purposes of this article, these twin questions serve as a framing device, in order to clarify what is at stake when the issue of regulating third party election spending is considered by either the courts or Parliament.

These two questions are pertinent for a number of reasons. First, as shall be seen, third party spending on election related communications raises the problem of how to reconcile individual interests in liberty and equality, both of which are important in ensuring that an election process forms a legitimate means of deciding who will wield law making power in a democratic society. This problem of reconciliation leads to the first order question outlined above: what ground rules, if any, should third party spending be subject to? However, there often will be ongoing disagreement in society at large, and between Canada's courts and its national and provincial legislatures in particular, over what the most appropriate answer is to this question. The existence of this dispute or, to use a more loaded term, "dialogue" between Canada's courts and its legislative bodies then brings into play the second order question outlined above: in the final analysis, which of these institutions should decide how third party election spending will be regulated? The deeper purpose of this article is to demonstrate how the approach taken to the first order question of "what electoral ground rules should we have?" has conditioned the response of Canada's courts when they confront the second order question of "who ought to decide what these ground rules will be?"

Therefore, this article seeks to provide a relatively complete account of the history of the regulation of third party election spending in Canada, and to examine some wider underlying issues of electoral regulation. It commences in Part II by surveying the theoretical terrain; exploring the interlinking issues of democracy, legality and legitimacy with the aim of showing how the issue of electoral regulation requires that a society confront the dual ordering of questions already outlined. The linkage between these first and second order questions is then illustrated in the remainder of the article by a consideration of the history of the issue of third party election spending in Canada: why such expenditures are considered to be a cause for concern, the actions taken by the federal Parliament and various provincial legislatures to try and remedy this perceived problem and the disparate response of Canada's courts to these measures. This more descriptive account begins in Part III by examining the first legislative attempts at regulating third party election spending, and subsequent decisions from the Alberta courts that these provisions breach the *Canadian Charter of Rights and*

Freedoms.[3] The net effect of these decisions was to deregulate nationwide third party election spending by court order.

Part IV then considers a trio of Supreme Court decisions: *Libman v. Quebec (A.G.)*,[4] *Thomson Newspapers v. Canada (A.G.)*[5] and *Sauvé v. Canada (Chief Electoral Officer)*.[6] These decisions review the *Charter* compatibility of different aspects of electoral regulation. It is argued in Part IV that despite the Supreme Court's apparently strong endorsement in the *Libman* case of the constitutionality of limits on third party election spending, the latter two decisions reveal some ambiguity in the Supreme Court's approach when it considers the justifiability of limiting the individual freedom to participate at election time. This ambiguity somewhat undermines the strength of the Court's judgment in the *Libman* case, and means that its view of the constitutionality of limiting third party election spending perhaps was not as clear cut as that case might seem to indicate. Part IV then returns to this issue by outlining Parliament's latest attempt to regulate third party election spending through the *Canada Elections Act, 2000*,[7] and reviewing the Alberta courts' subsequent decision that this legislation once again breaches the *Charter*. Finally, the article concludes with a discussion of the Supreme Court's recent decision in *Harper v. Canada (A.G.)*,[8] in which a majority overturns the Alberta courts' decision and upholds the constitutionality of Parliament's chosen limits. The reasons behind the Supreme Court's judgment are assessed in the light of the previous discussion, before some final thoughts on the Court's approach to electoral regulation under the *Charter* are aired.

II. LAW, DEMOCRACY AND CAMPAIGN SPENDING

In contemporary liberal societies, such as Canada,[9] democracy provides the procedural and normative foundation for the validity of a nation's legal ordering: whether in the classic, Diceyan form of Parliamentary sovereignty,[10] or sporting other, more complex colours.[11] However, although *democracy* plays a foundational role in the legal ordering of such societies, it is never experienced in a pure, unmediated form. Democratic decision making rather occurs through a particular set of institutions, practices and procedures, which are in turn set up and controlled by legal regulation.[12] Therefore, in contemporary liberal societies

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

4 [1997] 3 S.C.R. 569 [*Libman*].

5 [1998] 1 S.C.R. 877 [*Thomson Newspapers*].

6 [2002] 3 S.C.R. 519 [*Sauvé*].

7 *Canada Elections Act*, S.C. 2000, c. 9.

8 2004 SCC 33 [*Harper* (S.C.C.)].

9 As the Supreme Court notes in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 48, "the evolution of [Canada's] constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability."

10 Albert Venn Dicey, *Introduction To The Study of The Law of The Constitution*, 10th ed. (London: Macmillian, 1959) at 88.

11 See *e.g.* Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986) at 373-79.

12 As John Courtney puts the point, "what if we held an election and there was no machinery by which to conduct it?" (John Courtney, "Reforming Representational Building Blocks: Canada at the Beginning of the Twenty-First Century" in William Cross, ed., *Political Parties, Representation, and Electoral Democracy in Canada* (Don Mills: Oxford University Press, 2002) [Cross, *Political Parties*] 115 at

a circularity lies at the very heart of the relationship between law and democracy. In the final analysis, the societal framework of collectively binding legal rules depends upon some democratic genesis for its legitimacy, yet democracy only exists within a given society as a procedural form created and controlled by the law.[13] The subject matter that forms the legal "ground rules" that govern a democracy are diverse:[14] who should get to vote (mandatory voting? prisoner voting?), how should votes be cast and counted (internet voting? proportional representation?) and what restraints should be placed on participants' conduct during the election process (campaign spending limits? restrictions on broadcasting political messages?) are but a sample of the issues that require some sort of legal resolution before an election can be held. Significant disputes will occur within a society over the appropriate answer to each of these questions.

The problem posed by electoral regulation is not simply one of coordination, concluded whenever the law provides the electoral participants with a set, or any set, of common electoral ground rules to govern their behaviour. Disagreement over how the election process ought to be regulated instead arises because these ground rules must provide both a *conclusive* answer to the issues involved and they must also ensure that the outcome of the democratic procedures constituted by the rules provides a *legitimate* basis for apportioning future legal rule making power.[15] Therefore, the ground rules governing a society's election process ought to be structured in a manner that provides the best, most justifiable answer to the issues involved for the members of that society, given their need to establish commonly acceptable terms of cooperation within their necessarily shared social space.[16]

The requirement of a legal structure to guarantee the legitimacy of a society's election process raises two levels, or orders, of questions. The first order question has already been flagged: "what form should the various legal ground rules required to control a society's election process take, so as to best guarantee that the outcome of that procedure will be

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116). Also see Samuel Issacharoff, Pamela Karlan & Richard Pildes, *The Law of Democracy: Legal Structure of the Democratic Process* (Westbury, NY: Foundation Press, 1998) at 1-3; Andrew C. Geddis, "Confronting the 'Problem' of Third Party Expenditures in United Kingdom Election Law" (2001) 27 Brook. J. Int'l L. 103 at 103-105 [Geddis, "Confronting the 'Problem' of Third Party Expenditures"].

13 *Reference re Secession of Quebec*, *supra* note 9 at para. 67:

> The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the 'sovereign will' is to be ascertained and implemented.... Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people.

14 Massicotte, Blais & Yoshinaka, *supra* note 1.

15 The question of how some procedure for apportioning legal rule making power can be legitimated within a given society is a fraught and complex one. For an overview of the issues involved, see David Beetham, *The Legitimation of Power* (London: MacMillan Education Ltd., 1991) at 64-99.

16 Here Habermas' concept of "constitutional patriotism" is useful (see Jürgen Habermas, "Struggles for Recognition in the Democratic Constitutional State" in Jürgen Habermas, *The Inclusion Of The Other: Studies In Political Theory*, ed. by Ciarin Cronin & Pablo De Greiff (Cambridge: MIT Press, 1998) 203 at 225-26; Frank I. Michelman, "Morality, Identity and 'Constitutional Patriotism'" (1999) 76 Denv. U.L. Rev. 1009 at 1024-27; Mark Tushnet, "Forms of Judicial Review as Expressions of Constitutional Patriotism" (2003) 22 Law & Phil. 353 at 375-79).

regarded within that society as a legitimate means of apportioning political and legal rule making power?" However, there is then a second order question which must also be answered: "given that disputes will occur within a society over what the best answer is to this first order question, who should get to decide the form that these electoral ground rules will take?" In this part, I begin by examining a couple of ways in which this first order question might be answered, before turning to look at how these dual answers may then influence the response given to the second order question.

There are (at least) two possible approaches to answering the first order question outlined above.[17] One answer is that a society's electoral ground rules ought to be structured in a manner that allows the various participants the maximum freedom to involve themselves in the election process. Therefore, the "default position" for making election law should be the protection of the "negative liberty" of participants by minimizing the restraints placed on the extent to, and manner in, which they may choose to take part in the electoral process. This default position may be justified either through an argument that the freedom to participate is in itself a necessary precondition for constitutional legitimacy,[18] or because there are strong reasons to be suspicious that any rules limiting such involvement will be primarily designed to benefit those in possession of the power to make the rules.[19] Whichever justification is given for taking this default position, the practical consequence is that a legal rule maker must surmount a high evidentiary threshold in order to overcome it. In order to justify placing a legal restriction on how a participant may involve him or herself in the electoral process, the rule maker must demonstrate a real and tangible danger of some "harm" occurring as a result of that participation. Furthermore, the category of "harms" that may justify restricting the participation rights of any person or group should be narrowly drawn to include only outcomes that undermine or traduce the formal freedom of others to participate in the overall

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17 K.D. Ewing, *Money, Politics, and Law: A Study of Campaign Finance Reform in Canada* (Oxford: Clarendon Press, 1992) at 26-31 [Ewing, *Money, Politics, and Law*]. I have elsewhere developed in more detail an argument that the answer given to this first order question will, in the final analysis, depend upon the observer's underlying "vision" of the democratic process (Andrew C. Geddis, "Democratic Visions and Third-Party Independent Expenditures: A Comparative View" (2001) 9 Tul. J. Int'l. & Comp. L. 5 at 9-22 [Geddis, "Democratic Visions"]). The two approaches outlined below also find echoes in Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000); Gavin W. Anderson, "Understanding Constitutional Speech: Two Theories of Expression" in Gavin W. Anderson, ed., *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (London: Blackstone Press Limited, 1999) 49.

18 Robert Post, "Reconciling Theory and Doctrine in First Amendment Jurisprudence" (2000) 88 Cal. L. Rev. 2353 at 2368:

> [C]itizens in a democracy experience their authorship of the state in ways that are anterior to the making of particular decisions.... [I]t is a necessary precondition for this experience that a state be structured so as to subordinate its actions to public opinion, and that a state be constitutionally prohibited from preventing its citizens from participating in the communicative processes relevant to the formation of democratic public opinion.

See also Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge: Harvard University Press, 1995) at 277.

19 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at c. 5; Samuel Issacharoff & Richard H. Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process" (1998) 50 Stan. L. Rev. 643; Samuel Issacharoff, "Gerrymandering and Political Cartels" (2002) 116 Harv. L. Rev. 593 at 611-30.

process of public will formation.[20] As the legitimacy of law making power depends upon the liberty of individuals to participate in deciding who gets to exercise that power, the only justifiable role for the state in regulating the electoral process is as guarantor of the individual right to freely participate in this process.[21] Therefore, only conduct that may result in this individual freedom to participate being taken away from others can reasonably be made subject to legal limits.[22]

The alternative answer to this first order question does not focus simply on the formal freedom of participants to involve themselves in the electoral process, but rather looks to the impact that such activities may have on the overall "fairness" of the relationships between the various participants in the electoral process.[23] According to this second approach, the ground rules for an election should be structured so as to prevent inequalities in wider society from overwhelming or distorting the presumptively egalitarian structure of the democratic process.[24] In particular, the disparate spread of resources amongst the members of society at large may translate into vastly unequal abilities to participate come election time. The very possibility of such unequal participation undermines one of the key tenants of democracy — that the views and desires of each participant ought to count for as much, and only for as much, as those of any other.[25] In order to prevent the electoral process from becoming skewed in this fashion, the ground rules that govern it should be designed to "level the playing field" between electoral participants.[26] Therefore, as the legitimacy of law making power rests on each person having an equal say as to who will get to exercise it, the state ought to take steps to constrain each individual's formal opportunity to participate, in order to guarantee conditions that allow every person or group a fair chance to participate in the electoral process in something of an equally meaningful fashion.[27]

Both of the above approaches draw on different, but equally important, strands that are to be found in "liberal democracy" as a general, normative concept.[28] For example, each makes

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20 Examples of such "harms" justifying the imposition of some limits on participation will include using threats or force to influence someone's voting decision, or engaging in corrupt behaviour of a direct, *quid pro quo* nature. More controversial, however, is the issue of whether limits may be placed on the *indirect* use of money to buy votes (Richard L. Hasen, "Vote Buying" (2000) 88 Cal. L. Rev. 1323).

21 Kathleen M. Sullivan, "Political Money and Freedom of Speech" (1997) 30 U.C. Davis L. Rev. 663 at 680-82; Bradley A. Smith, "Some Problems With Taxpayer-Funded Political Campaigns" (1999) 148 U. Pa. L. Rev. 591.

22 Randy Barnett provides a good example of such an argument when he claims that a constitutional system is legitimate if, but only if, it "[imposes] restrictions on a citizen's freedoms [that are] (1) *necessary* to protect the rights of others, and (2) *proper* insofar as they [do] not violate the preexisting rights of the person on whom they [are] imposed"(Randy E. Barnett, "Constitutional Legitimacy" (2003) 103 Colum. L. Rev. 111 at 142 [emphasis in the original]).

23 Compare with the "relational account" of freedom of expression outlined by Moon in *The Constitutional Protection of Freedom of Expression*, *supra* note 17 at 37.

24 Janet L. Hiebert, "Money and Elections: Can Citizens Participate on Fair Terms amidst Unrestricted Spending?" (1998) 31 Can. J. Pol. Sc. 91 at 111.

25 Lori A. Ringhand, "Concepts of Equality in British Election Financing Reform Proposals" (2002) 22 Oxford J. Legal Stud. 253.

26 Owen M. Fiss, *The Irony of Free Speech* (Cambridge: Harvard University Press, 1996) at 16-18; Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993) at 98.

27 Andrew C. Geddis, "Campaign Finance Reform After McCain-Feingold: The More Speech — More Competition Solution" (2000) 16 J.L. & Pol. 571 at 582-83.

28 Barry Holden, *Understanding Liberal Democracy* (Oxford: Philip Allan, 1988) at 14-38.

an appearance during what remains the Canadian Supreme Court's closest encounter with outright political philosophy — its judgment in *Reference re Secession of Quebec*.[29] What is more, the two approaches are somewhat actualized in real world "liberal democratic" societies. We might compare, for instance, the approach taken towards electoral regulation in the United States (where a strong commitment to the individual liberty interests of participants is evident),[30] with the more heavily regulated (in the name of equality and fairness) electoral processes in the United Kingdom.[31] The conceptual and practical plausibility of each of the above approaches to the issue of how electoral ground rules should be structured means that there are grounds for reasonable people to disagree over which is the better one to adopt, in the sense of being the most legitimate for their particular society. Ongoing disagreement over the best answer to this first order question, and the consequent necessity of choosing between alternatives, leads to the second order question outlined above. Since there are two possible, reasonably defensible alternative approaches to how a given society's electoral ground rules ought to be structured, who ought to decide which one will be adopted?

A simple answer to this question of "who decides" might be that it is the business of a society's primary law makers, as represented in a liberal democracy by the legislature.[32] If a selection between two different and competing policy paths or social values must be made, then that choice ought to be left to those who are elected to represent and are directly accountable to the members of that society. However, the legal rules adopted by the legislature to govern a society's electoral process inevitably will implicate the individual rights of those who participate, or wish to participate, in it.[33] In those liberal democratic

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29 *Supra* note 9. Compare, for instance, the claim that "[t]he Court must be guided by the values and principles essential to a free and democratic society which ... embody ... [a] commitment to social justice and equality ... and faith in social and political institutions which enhance the participation of individuals and groups in society" (*ibid.* at para. 64, citing *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136); with "No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top" (*ibid.* at para. 68).

30 Lillian R. BeVier, "The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis" (1999) 85 Va. L. Rev. 1761 at 1774. See also *Buckley v. Valeo*, 424 U.S. 1 (1976) [*Buckley*]; *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 at 496-97 (1985); *Buckley v. American Constitutional Law Foundation, Inc.*, 119 S. Ct. 636 at 639-40 (1999); *McConnell v. F.E.C.*, 124 S. Ct. 619 (2003).

31 See K.D. Ewing, "Transparency, Accountability and Equality: The Political Parties, Elections and Referendums Act 2000" [2001] P.L. 542; Keith Ewing, "Promoting Political Equality: Spending Limits in British Electoral Law" (2003) 2 Election L.J. 499; Geddis, "Confronting the 'Problem' of Third Party Expenditures," *supra* note 12 at 125-30.

32 An even more simple answer may be that the people themselves ought to get to choose *via* a referendum. However, this again raises the two-fold question of what ground rules ought to govern this referendum process, and who ought to decide this matter?

33 This is true whichever approach the legislature takes to the first order question of what ground rules should be adopted. Clearly, a legislative decision to limit some participant's freedom to act, in pursuit of the end of overall equality and fairness, will raise individual rights issues. But a decision *not* to impose such limits can also be claimed to breach the individual rights of participants in the electoral process; see *e.g. Albanese v. Federal Election Commission*, 884 F. Supp. 685 (E.D.N.Y. 1995); *NAACP, Los Angeles Branch v. Jones*, 131 F.3d 1317 (9th Cir. 1997); *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259 (11th Cir. 1999) (all arguing that the *failure* to impose limits on campaign spending by electoral candidates breaches the right of voters and rival candidates to equal protection guaranteed by the U.S. Constitution).

societies that have chosen to adopt some kind of written "Bill of Rights" type instrument, and even in some that have not done so,[34] this fact may result in the courts carrying out a constitutional review of the effects of the legislature's decision on those individual rights. Review by the courts of the constitutionality of the legislature's actions creates the potential for conflict, as these two institutions may disagree over which approach to electoral regulation is the best approach to guarantee the overall legitimacy of that society's democratic process. This potential for conflict remains even under a "dialogic"[35] or a "relational"[36] analysis of the roles played by a society's legislature and its courts. There may be ongoing disagreement even after some form of inter-institutional debate over which approach is the right one to take, meaning that one or the other institution will finally have to decide the matter for society as a whole.[37]

One of the purposes of this article is to demonstrate that the approach taken to the first order question of "what electoral ground rules should we have?" will condition the response of a society's courts when they confront the second order question of "who ought to decide what these ground rules will be?" If preserving the individual liberty to participate is considered by some court to be the default position required to guarantee the overall legitimacy of the electoral process, then it will, in carrying out a constitutional review of any measures designed to limit such participation, demand that the government show strong and compelling evidence of some particular harm to another individual's participatory rights in order to justify the restrictions imposed. Absent such evidence, the court will act to protect the individual right to participate by striking down Parliament's chosen measures. However, if a court accepts the approach that individual involvement in the electoral process ought to be limited in order to establish conditions of fair and equal participation, then inevitably this goal will involve some sort of balancing, or trading off, of different values and ends. And because the legislature is considered to be the better — both more capable, and more legitimate — institution to conduct this type of balancing exercise, a court will display significant deference to the manner in which the legislature chooses to weigh these different values and end goals against each other.

The general linkage between these first and second order questions is illustrated by the history of the issue of third party election spending in Canada.[38] Spending by "third parties"

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[34] See *e.g. Australian Capital Television Pty. Ltd. v. The Commonwealth* (1992), 177 C.L.R. 106 (Australian High Court overturning a ban on purchasing television time for election time on the grounds that it breached an "implied" right to free speech contained in the Australian Constitution).

[35] Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* (Toronto: Irwin Law, 2001).

[36] Janet L. Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Toronto: McGill-Queens University Press, 2002).

[37] F.L. Morton, "Dialogue or Monologue?" (1999) 20:3 Policy Options 23 at 24. Also see *Sauvé*, *supra* note 6 at para. 17, McLachlin C.J.C. ("Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of 'if at first you don't succeed, try, try again.'")

[38] See Jennifer Smith & Herman Bakvis, "Canadian General Elections and the Money Question" in Cross, *Political Parties*, *supra* note 12, 132 at 142 [Smith & Bakvis, "Canadian General Elections"] ("The debate over the regulation of third-party advertising, however mundane the issue might seem at first

— individuals or groups other than the candidates or political parties — who wish to involve themselves in an election campaign in order to influence its outcome, provides a clear cut illustration of the two approaches to the first order question discussed above.[39] Because virtually any form of communicative activity costs money, third parties have to spend something in order to present their views to the voting public. Not only is this "spending-to-speak" an exercise of their basic liberty right to participate in the election process, it can also help to provide the wider voting public with a variety of viewpoints on the issues with which the third party is concerned, thereby allowing them to cast a more informed vote. Therefore, third party expenditures can be a public, as well as a private, good. However, while spending-to-speak is a necessary part of virtually any kind of third party involvement in the democratic process, such third party expenditures may also produce toxic consequences. In particular, the unequal share of wealth owned by different members of society raises the fear that third party spending on political matters may enable those with wealth to wield greater influence over the public decision making process, thereby systematically undermining or distorting the ideal arrangement of a democratic polity in which the concerns of each citizen ought to be accorded an equal weight.[40] Thus, the spending-to-speak of those who have the wealth to afford to participate in this manner may not, in all cases, be to the good of the rest of society.

In light of this duality, it is not surprising that the first order question of the degree to which third party expenditures should be regulated in Canada or, indeed, whether they should be subject to any regulation at all, has raised its head on numerous occasions over the past thirty years. Legislatures at both the provincial and federal levels have taken repeated steps to restrict the amounts that third parties are permitted to spend on election related communications, in the name of protecting the overall fairness of the electoral process. In turn, these legislative measures have been subject to first interpretation, and following the advent of the *Charter* in 1982, outright constitutional review by the courts. In the course of conducting this review, differing judicial views have been expressed as to the proper answer to the first order question of the desirability of these legislative limits. Consequently, the courts have given conflicting responses to the second order question of who ought to decide whether third party spending ought to be regulated. The different responses to this second order question have then centred on the type and amount of evidence that the government is required to produce in order to justify the limits placed upon third parties' speech. Where the courts regard the freedom to participate (in the form of third party spending-to-speak) as fundamental to the democratic process in Canada, it has demanded that the government produce substantial evidence that this activity may cause some "harm" to other electoral participants in order to justify limiting this freedom. In the absence of such evidence, the court has then been prepared to exercise its powers under the *Charter* to strike down the legislative limit. However, where equality between electoral participants and the basic

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glance, is intimately linked to the debate over the role of money in politics and so to the larger debate over the type of politics that is desired." [footnotes omitted]).

39 I examine the benefits and problems associated with third party spending in greater depth in Geddis, "Democratic Visions," *supra* note 17 at 22-27.

40 Colin Feasby, "Issue Advocacy and Third Parties in the United Kingdom and Canada" (2003) 48 McGill L.J. 1 at 18-23 [Feasby, "Issue Advocacy"]. But see A. Brian Tanguay, "Parties, Organised Interests, and Electoral Democracy: The 1999 Ontario Provincial Election" in Cross, *Political Parties*, *supra* note 12, 145 at 156 (pointing out that "it is not necessarily or always the 'moneyed interests' that take advantage of a lax regulatory regime in an effort to influence the vote, thereby undermining the central democratic role played by political parties." [footnote omitted]).

fairness of the electoral process is given priority by the courts, much more deference is shown to legislative judgments as to how the right to participate should be restricted in order to establish such conditions. The courts then require little evidence to justify the legislature's policy choice, as it is seen to be the outcome of a fundamental balancing exercise between competing social values and end goals.

The interplay between these two positions can be seen throughout the history of regulating third party election spending in Canada. This article proceeds with a review of this history by first examining Canada's early experience of such limits and the Alberta courts' approach when considering whether these provisions could be justified under the *Charter*. It then examines how the two positions are given voice in a trio of Supreme Court decisions on election related topics relevant to the issue of third party election spending. Parliament's most recent attempts at limiting third party election spending in the *Canada Elections Act, 2000* are then outlined, along with the view of Alberta's courts as to the justifiability of these measures under the *Charter*. The article then concludes by reviewing the Supreme Court's final word on the matter in light of the foregoing discussion.

III. BEGINNING AT THE BEGINNING: THE EARLY HISTORY OF THIRD PARTY SPENDING RESTRICTIONS

Canada's federal Parliament first attempted to impose controls on election related spending by third parties as a part of the comprehensive reforms to election financing contained in the *Canada Elections Act, 1974*.[41] This legislation originally banned anyone, apart from an agent of a candidate or political party, from incurring an "election expense" unless they first received permission to do so from the agent of the candidate or party supported.[42] Granting such permission then deemed the expense to be that of the candidate or political party involved, thereby contributing towards the overall limit these primary electoral contestants could themselves spend on campaign expenses. As these contestants were often reluctant to use up the limited amounts they were allowed to spend on campaigning by adopting third party expenditures, the necessity to first gain an agent's permission effectively meant that many third parties were prohibited from spending money on promoting or attacking a candidate or political party during an election period.[43]

However, the original legislative scheme exempted from this prohibition any expenses incurred for the "purpose of gaining support for views held by [the third party] on an issue

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41 R.S.C. 1970 c. E-2, am. by *Elections Expenses Act*, S.C. 1973-74, c. 51 [*Elections Act, 1974*]. For accounts of the events leading to the passage of this legislation see Robert E. Mutch, "The Evolution of Campaign Finance Regulation in the United States and Canada" in F. Leslie Seidle, ed., *Comparative Issues In Party and Election Finance* (Toronto: Dundern Press, 1991) 57 at 86; Ewing, *Money, Politics and Law*, *supra* note 17 at c. 3; Smith & Bakvis, "Canadian General Elections," *supra* note 38 at 133-35.

42 *Elections Act, 1974*, *ibid.*, s. 70.1(1). The *Act* defined an "election expense" as expenditure incurred during an election period "for the purpose of promoting or opposing, directly and during an election, a particular registered party, or the election of a particular candidate" (*ibid.*, s. 2).

43 Also, the measure gave candidates and parties an effective veto over third party advertising, in that they could refuse to authorize the spending if they felt the communication was one they did not wish to be associated with, or which muddied the political message they were trying to promote.

of public policy."[44] This provision came to be interpreted by the courts in an extremely expansive fashion,[45] meaning that virtually all expenses incurred by third parties during an election were regarded as spending on an issue of public policy. With the aims of the legislation essentially frustrated by this judicial approach, in 1983 Parliament accepted the Chief Electoral Officer's recommendation that the defence be removed from the legislative framework. Consequently, there was a complete prohibition on third parties spending any money to support or oppose a political party or candidate in the period immediately preceding an election without an agent's permission.

This rather draconian measure was immediately challenged before the Alberta courts under the recently adopted *Charter*.[46] In the resulting case, *National Citizens' Coalition v. Canada (A.G.)*,[47] the ban on third party election spending was struck down as a *prima facie* breach of the *Charter*'s s. 2(b) guarantee of freedom of expression, which could not then be shown to be a "reasonable limit ... prescribed by law and demonstrably justified in a free and democratic society" under the s. 1 balancing test. The government had attempted to justify the ban as necessary to counteract the "unfair advantage to those who have access to large campaign funds"[48] and to "ensure a level of equality amongst all participants in federal elections."[49] However, the Court rejected this argument on the grounds that

> [a] limitation to the fundamental freedom of expression should be assessed on the basis that if it is not permitted, then harm will be caused to other values in society.... Fears or concerns of mischief that may occur are not adequate reasons for imposing a limitation. There should be actual demonstration of harm or a real likelihood of harm to a society before a limitation can be said to be justified.[50]

The Court concluded that even though some electoral contestants would, in the absence of spending limits, be able to spend significantly more on expressing their viewpoints than could others, this did not by itself count as a "harm" to any relevant value in society. As shall be seen below, this aspect of the *NCC* case — that the existence, or "real likelihood," of some particular "harm" must be demonstrated in order to justify placing limits on third party spending — establishes a consistent theme in the Alberta courts' *Charter* review of such restrictions.

There was no appeal of the judgment in the *NCC* case, which technically only had binding authority in Alberta. However, a general election was due in 1984, and instead of having different electoral rules applying in different provinces, the Chief Electoral Officer effectively deregulated third party spending by applying the Alberta court's ruling across all of Canada. The result of this move became clear in the 1988 general election campaign when the issue of whether Canada should join the North American Free Trade Agreement

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44 *Elections Act, 1974*, *supra* note 41, s. 70.1(4)(a).

45 See *R. v. Roach* (1978), 101 D.L.R. (3d) 736 (Ont. Co. Ct.) (holding that hiring a plane to tow a banner reading "[Union members] vote but not Liberal" fell within the s. 70.1(4)(a) defense).

46 Keith Ewing, in *Money, Politics and Law*, *supra* note 17 at 138, remarks that "[i]t may or may not be a coincidence that the Alberta courts are reputedly conservative and the Calgary court is particularly so regarded."

47 (1985), 11 D.L.R. (4th) 481 (Alta. Q.B.) [*NCC* case].

48 *Ibid.* at 482.

49 *Ibid.* at 495.

50 *Ibid.* at 496.

(NAFTA) attracted an unprecedented amount of spending by third parties,[51] the bulk of it on the pro-NAFTA side.[52] This experience of unrestrained interest group participation lead to a widespread public feeling that allowing the open slather purchase of publicity conferred an unfair electoral advantage on those groups with the wealth to take advantage of this liberty. In response to such concerns, the Government of Canada convened a Royal Commission on Electoral Reform, named after its chairman, Pierre Lortie. The Lortie Commission's final report largely reaffirmed the original egalitarian aims of the *Canada Elections Act*.[53] Specifically, the Commission concluded:

> Restrictions on the election expenditures of individuals or groups other than candidates or parties were central to the attempt to ensure that the financial capacities of some did not unduly distort the election process by unfairly disadvantaging others. The objective of these restrictions on independent expenditures was to ensure that money was not spent in ways that would nullify the effectiveness of spending limits on candidates and political parties. If individuals or groups were permitted to run parallel campaigns augmenting the spending of certain candidates or parties, those candidates or parties would have an advantage over others not similarly supported.[54]

In order to actualize these objectives, the Lortie Commission recommended that partisan third party expenditures during the period of an election campaign be limited to $1000 per individual or group, but that spending outside this period be left untouched.[55]

Following this recommendation, Parliament enacted a $1000 cap on spending by a third party "for the purpose of promoting or opposing, directly and during an election campaign, a particular registered party or the election of a candidate."[56] It is quite probable that this measure would largely have been ineffective in practice. Much of the third party spending that occurred during the 1988 election would have arguably fallen outside the plain words of the prohibition as it was aimed at the issue of free trade rather than parties or candidates. However, the legislation was never tested in action, and so such speculation remains

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51 Some $4.73 million, an amount equal to 40 percent of the total money spent on advertising by the three main political parties in the election (Janet Hiebert, "Interest Groups and Canadian Federal Elections" in F. Leslie Seidle, ed., *Interest Groups and Elections in Canada* (Toronto: Dundern Press, 1991) 1 at 20).

52 Pro-free trade groups were estimated to have spent four to ten times as much as anti-free trade groups. See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Pub., 1992) at 290; William T. Stanbury, "Financing Federal Politics in Canada in an Era of Reform" in Arthur B. Gunlicks, ed., *Campaign and Party Finance in North America and Western Europe* (Boulder: Westview Press, 1993) 68 at 97-99.

53 Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol. 1 (Ottawa: Minister of Supply & Services Canada, 1991) at 6-18, 322 (Chair: Pierre Lortie) [Canada, *Lortie Report*]:

> The constitutional recognition of [individual] rights and freedoms constitutes a necessary but insufficient condition if citizens are to have an equal opportunity to exercise meaningful influence over the outcomes of elections. For this fundamental equality of opportunity to be realized in the electoral process, our electoral laws must also be fair.

54 *Ibid.* at 327.

55 *Ibid.* at 356, recommendation 1.6.6.

56 *An Act to amend the Canada Elections Act*, S.C. 1993, c. 19, s. 112. This definition was actually narrower than the one recommended by the Lortie Commission, in that it did not cover expenditures used "to approve or disapprove a course of action advocated or opposed by a candidate, registered party or leader of a registered party." See Canada, *Lortie Report*, *supra* note 53 at 341.

academic. Only two months after becoming law, the restriction came before the Alberta bench in the case of *Somerville v. Canada (A.G.)*.[57] And, once again, the trial court struck down the provision as a breach of s. 2(b) of the *Charter*, which could not then be justified under s. 1.

This time the Attorney General appealed the matter to Alberta's Court of Appeal,[58] which agreed with the trial court that the spending limits represented an unjustified breach of both the *Charter's* guarantee of freedom of expression and freedom of association, as well as the right to vote contained in s. 3.[59] During the course of examining the government's justifications for the spending limit under s. 1 of the *Charter*, the Court of Appeal concluded that as the expenditure restrictions on third parties gave preferential treatment to the expression of candidates and parties by working to exclude other groups in the electoral process, the provision "arguably [was] legislation which has at its very purpose the restriction of these rights and freedoms, which can never be justified."[60] In a similar fashion, the Court of Appeal struck down "blackout" restrictions on election advertising within 48 hours of the close of the polls,[61] choosing to characterize the issue as

> not a question of voters being swayed improperly on the eve of polling day by an effective advertisement; rather it is a question of voters finding the information about candidates and parties identified with their own personal preference on issues. Not only is this not inherently wrong, it is desirable and fundamental to democracy.[62]

The Alberta Court of Appeal's conclusions were founded upon an approach that viewed the legislature as "ironically purport[ing] to protect the democratic process, by means of infringing the very rights which are fundamental to democracy."[63] Such a step could only, if ever,[64] be justified by evidence of a strong causal link between third party election spending and some form of "harm." In Conrad J.'s view, before third party expenditures could be justifiably restricted, this evidence had to reach a level that showed such spending could "buy" some participant an election result.[65] Absent such a demonstration, it was the court's role when conducting a *Charter* review to protect the democratic process by ensuring

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57 [1993] A.J. No. 504 (Q.B.) (QL).

58 *Somerville v. Canada (A.G.)* (1996), 184 A.R. 241 [*Somerville*].

59 The Court in *Somerville*, *ibid.* at para. 48, held that third party expenditure limits breached the s. 3 right because "[t]he alternative to allowing third party advertising is that a so-called 'informed vote' amounts to little more than a choice from among various candidates, where citizens are only as 'informed' (or not) as the news media, the parties and the candidates themselves want the citizens to be."

60 *Ibid.* at para. 77. However, one judge did suggest further examining:

> the validity of the suggestion that new forms of advertising are at once overwhelmingly influential and extremely expensive, [because] if both these suggestions are or may in the future be true, elections may be debates only about the merits of those suggestions are or may in the future be true, elections may be debates only about the merits of those ideas that are supported by those with access to huge sums of money. I find that possibility troubling for the future of our society and our democracy, if only because I am not aware of any natural association between wealth and wisdom. (*ibid.* at para. 103, Kerans J.A.)

61 *Elections Act, 1974*, *supra* note 41, s. 213(1).

62 *Sommerville*, *supra* note 58 at para. 91. In addition, the Court struck down the blackout provisions prohibiting electoral advertising before the 29th day proceeding an election.

63 *Ibid.* at para. 65.

64 *Supra* note 59 and accompanying text.

65 *Somerville*, *supra* note 58 at para. 65.

that the legislature did not traduce the bedrock freedom of third parties to participate in the election process to whatever extent they may choose. It is not surprising, given the strength of this commitment to the liberty interests of individual electoral participants, that the Alberta Court of Appeal's decision approvingly cited the U.S. Supreme Court's ruling in *Buckley*,[66] and suggested that the system of contribution limits and disclosure requirements adopted in the United States could provide a "less intrusive means of fostering the purported objectives of this legislation."[67]

In the absence of any further appeal, the Chief Electoral Officer again deregulated third party spending on election campaigns by applying the Alberta Court of Appeal's ruling to all of Canada. Certainly, the Alberta courts' general hostility to the idea that participation in an election could justifiably be limited seemed to have sounded a death knell for the legislative policy of controlling political expenditures to ensure that conditions of equality prevailed within the wider electoral process.[68] By demanding the government prove the necessity of imposing third party spending limits through demonstrating that their absence will result in real "harm," where "harm" appears to mean something as strong as successfully using campaign expenditures to "buy" a particular election result, the Alberta's Court of Appeal had made it virtually impossible for the government to meet its s. 1 burden.

IV. MUDDYING THE WATERS: THE SUPREME COURT'S HAZY ELECTION LAW JURISPRUDENCE

Prior to the recent *Harper* litigation, these various decisions of the Alberta courts were the only direct judicial analysis of the *Charter* compatibility of limits on third party election spending at the national level. However, on three occasions the Supreme Court has considered legislative restrictions placed upon the electoral process which bear upon this issue in a more or less direct fashion. The first case, *Libman*,[69] involved a provincial limit on third party spending relating to a referendum question. The second, *Thomson Newspapers*,[70] related to a nationwide ban on the publication of opinion polls in the three days prior to a general election. Finally, *Sauvé* brought the issue of the constitutionality of prohibiting prisoners from voting back before the Supreme Court.[71] Each of these cases involved a constitutional challenge to a restriction imposed by Parliament on some aspect of individual participation in the electoral process. As such, the Supreme Court was required to decide whether the infringement of these individual rights could be justified under s. 1 of the *Charter*. The manner in which it did so in each of these three cases is somewhat ambiguous,

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66 *Supra* note 30 at 48-49 ("But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

67 *Somerville*, *supra* note 58 at para. 83.

68 The Alberta Court of Appeal also ruled that the *Charter* prevents limits on certain forms of spending by the political parties (see *Reform Party of Canada v. Canada (A.G.)* (1995), 165 A.R. 161 (Alta. C.A.) (striking down restrictions on the amount of television advertising time political parties may purchase)). This general hostility of Alberta's Courts to restrictions on political spending is noted by Herman Bakvis & Jennifer Smith, "Third-Party Advertising and Electoral Democracy: The Political Theory of the Alberta Court of Appeal in *Somerville v. Canada (Attorney General)* [1996]" (1997) 23:2 Can. Pub. Pol'y 164.

69 *Supra* note 4.

70 *Supra* note 5.

71 *Supra* note 6.

leaving some uncertainty as to which model of elections the Court regarded as the more compelling.

A. *LIBMAN V. QUEBEC (A.G.)*

In *Libman*, the Supreme Court considered the constitutional validity of Quebec's prohibition upon almost all forms of third party expenditures in support of or in opposition to a referendum question unless that spending was authorized by the national committee of an officially recognized campaign.[72] However, the Court's discussion in *Libman* proved to be as concerned with the overall validity of limiting third party election spending as it was with the immediate provision under challenge. The Court commenced its unanimous judgment by reiterating the importance to "democratic societies and institutions" of the *Charter*'s s. 2(b) right to freedom of expression,[73] and accepting that the restrictions complained of in the *Quebec Referendum Act*, and similar limits on third party election spending, were a *prima facie* breach of this right.[74] This conclusion then led the Court to consider whether such a breach nevertheless could be justified under the *Charter*'s s.1 balancing test. In the course of this exercise, the Court expressly stated its disapproval of the Alberta Court of Appeal's decision in the *Somerville* case[75] and instead described the objective of limiting third party election spending as "highly laudable."[76] However, it then concluded that the extent of Quebec's particular restriction was not a proportionate response to this objective, as the limit placed upon third party spending failed to minimally impair the s. 2(b) rights of third parties by barring unaffiliated third parties from taking *any* effective part in the referendum campaign.[77] Therefore, as the Supreme Court found the offending provision was not saved by s. 1, it struck it down.

The specific outcome of the *Libman* case is of less interest than the Court's approach to weighing the general reasons for restricting third party election spending against the *Charter's* right to free expression. Three justifications were identified for imposing such limits: protecting equality of participation and influence irrespective of participants' wealth, permitting an informed choice by stopping some voices from drowning out others and ensuring public confidence in the process.[78] In *Libman*, the Court emphasized the importance of these egalitarian goals in the Canadian context:

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72 *Quebec Referendum Act*, R.S.Q. c. C-64.1.

73 *Libman*, *supra* note 4 at para. 28, quoting *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at 1336, Cory J.

74 *Ibid.* at para. 36. The Court also found the restrictions to be a prima facie breach of the right to freedom of association guaranteed under s. 2(b) of the *Charter*, but chose to treat the two issues together.

75 *Ibid.* at para. 76. ("We cannot accept the Alberta Court of Appeal's point of view because we disagree with its conclusion regarding the legitimacy of the objective of the provisions.") The Court in *Libman* also gave *obiter* approval to the $1000 limit at issue in the *Somerville* case (*ibid.* at paras. 55 and 78).

76 *Ibid.* at para. 42.

77 The *Quebec Referendum Act* not only limited how *much* third parties could spend, but it also restricted the *types* of activities that third parties were allowed to make expenditures on. The legislation struck down by the Court in *Somerville* only restricted the total amount that could be spent. The Supreme Court in *Libman* took this difference to be crucial (see *ibid.* at paras. 70-80). In fact, the Court pointedly refrained from commenting on whether an overall spending limit of $600 would have been constitutionally acceptable (*ibid.* at para. 75).

78 *Ibid.* at para. 42. The appellant conceded that these concerns were "pressing and substantial."

> The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of political equality of citizens. If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate. To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of freedom to spend does not hinder the communication opportunities of others.[79]

Therefore, the Supreme Court accepted that regulating the electoral contest in a "fair" manner constitutes a legitimate governmental objective under the Canadian Constitution,[80] which *necessarily* requires that some individual participation rights be circumscribed in pursuit of equality of opportunity.[81]

It is this acceptance of the desirability of preserving electoral fairness that fundamentally distinguishes the Court's approach in *Libman* to third party election spending limits from that previously taken by the Alberta courts.[82] Having recognized the basic importance of such egalitarian goals, the Court then indicated that Parliament should be accorded a significant margin of deference when deciding how best to achieve these ends:

> This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups.[83]

Therefore, even though third party spending limits impinge upon freedom of political expression, and usually would require "a high standard of justification" under s. 1,[84] the Court accepted that its role with regard to such measures "is to determine whether the means chosen by the legislature to attain this highly laudable objective are reasonable, while according it a considerable degree of deference since the latter is in the best position to make such choices."[85]

This reduced justificatory burden then requires that the government show far less by way of "harm" in order to validate any limit on third parties' speech rights. In *Libman* the Court apparently accepted that the very prospect of some third parties spending significantly more than others *prima facie* results in "harm" to a fair election process.[86] Certainly, it did not demand that the government then empirically demonstrate that such unequal spending is *effective* in the sense of altering how individuals may vote and thereby changing an election

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79 *Ibid.* at para. 47 [footnote omitted].

80 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 at 8 ("[A]n egalitarian conception of democracy informed by the ideas of Rawls and other liberal theorists has been adopted by the Supreme Court of Canada in *Libman* under the guise of the elusive idea of 'fairness'") [Feasby, "Egalitarian Model"].

81 *Libman*, *supra* note 4 at para. 84.

82 Feasby, "Egalitarian Model," *supra* note 80 at 5.

83 *Libman*, *supra* note 4 at para. 59, quoting *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at 277, La Forest J.

84 *Libman*, *ibid.* at para. 60.

85 *Ibid.* at para. 62.

86 *Ibid.* at para. 56.

outcome.[87] Furthermore, the fact that Parliament had followed the recommendations of the Lortie Commission in enacting the limits, and that these limits enjoyed broad support amongst the voting public,[88] were factors given weight by the Court in assessing the justifiability of the infringement on the speech rights of third parties. In essence, once the Court had accepted the basic rationale of electoral "fairness" and recognized that this objective involves balancing equality concerns with participatory rights, it then was loathe to second-guess Parliament's decision, which was backed up by the Lortie Commission and public opinion.[89]

B. *THOMSON NEWSPAPERS V. CANADA (A.G.)*

Shortly after the Supreme Court handed down its *Libman* decision, the *Thomson Newspapers* case gave it cause to revisit the issue of electoral speech. The legislative provision challenged in this case was a ban on the publication or broadcast of new opinion polls within 72 hours of an election[90] — a move that Parliament deemed necessary to protect the electorate from being mislead by a last minute, "rogue" opinion poll containing inaccurate information. Justice Bastarache, writing for a five-member majority,[91] concluded that this ban breached s. 2(b) of the *Charter*[92] and could not then be justified under s. 1. The majority's starting presumption was "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."[93] And because there will be a multiplicity of polls conducted and published during an election campaign, one erroneous poll would have little effect as most voters will be able to spot it and consequently discount its results when deciding how to vote. Finally, the majority held that because a less intrusive remedy existed in the form of requiring the polling methodology and margin of error to be reported along with the poll result, the imposition of a complete ban failed to "minimally impair" the s. 2(b) rights of both the media and voters.

Obviously, there is something of a tension between the majority's approach here and that adopted by the Court in *Libman*. The basic presumption of the majority in *Thomson Newspapers* was that voters are capable of rationally vetting information sources for possible

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87 While the Court in *Libman* did make reference to the 1988 third party election spending blitz, it did not expressly conclude that this spending had altered the result of the election. At most, the Court concluded that the spending "benefited" some political parties more than others (*ibid.* at para. 51).

88 *Ibid.* at para. 52.

89 That said, the Court in *Libman* did strike down the Quebec legislature's decision to effectively require all third parties to channel their spending through official campaigns. However, it only did so on the very narrow ground that the legislature could not seek to create a fair electoral process by in practice *completely* abrogating a third party's right to participate. The European Court of Human Rights displays similar reasoning in *Bowman v. U.K.* (1998), 63 Eur. Ct. H.R. (Ser. A) 175, when holding that the UK's £5 limit on third party election spending breached the European Convention for the Protection of Human Rights and Fundamental Freedoms. See Geddis, "Confronting the 'Problem' of Third Party Expenditures," *supra* note 11 at 115-25.

90 *Canada Elections Act*, R.S.C. 1985, E-2, s. 322.1.

91 The bench in *Thomson Newspapers* consisted of 8 members; Sopika J. did not take any part in the decision.

92 The majority leaves aside the question of whether the restriction also breached the *Charter's* s.3 right to vote (see *Thomson Newspapers*, *supra* note 5 at para. 84).

93 *Ibid.* at para. 112.

biases and choosing which sources are able to be relied upon when deciding how to vote. This rationale would seem equally applicable when voters are confronted with messages put forward by third parties at election time. And if voters can be trusted to assess the reliability of opinion polls, they would seem equally capable of gauging the accuracy and value of information provided by third parties.[94] However, the *Thomson Newspapers* majority sought to distinguish the two forms of expression by asserting that unrestrained third party election spending raised the risk of "manipulation and oppression" of voters by "a powerful interest,"[95] while the dissemination of opinion polls by a news media concerned with "uphold[ing] their reputation for integrity and accuracy" posed no such threat.[96] This distinction appears to depend upon an empirical claim;[97] that is, that unrestrained third party election spending has the potential to somehow overwhelm voters' rational capacities and alter the outcome of an election (thereby threatening "harm" to the participation rights of other individual voters), whereas the appearance of a rouge opinion poll would not have this effect (therefore posing little risk of "harm" to the individual voter).[98]

The preparedness of the *Thomson Newspapers* majority to investigate the latter empirical conclusion represents a difference in approach from *Libman*. In *Libman*, the Court accepted at face value the government's assertion that restricting third party spending (and hence speech) was part of the balancing of social values required to ensure a "fair" electoral process that could retain the voters' faith. In contrast, the majority in *Thomson Newspapers* portrayed restrictions upon the information made available at election time as a *threat* to the voters' faith in the electoral process:

> [T]he ban denies access to electoral information which some voters may consider very useful in deciding their vote.... This undermines the very faith in the electoral process which the government suggests is one of the rationales for the ban.[99]

The individual right to unencumbered electoral expression is thus accorded a much stronger priority by the *Thomson Newspapers'* majority, leading it to conclude:

> [I]nformation which is desired and can be rationally and properly assessed by the vast majority of the voting electorate should [not] be withheld because of a concern that a very few voters might be so confounded that they would cast their vote for a candidate whom they would not have otherwise preferred. That is to reduce the entire Canadian public to the level of the most unobservant and naïve among us.[100]

Therefore, the majority refused to accord "a significant level of deference to the government" when reviewing Parliament's balancing of the right to impart and receive poll information

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94 Paul Horwitz, "Citizenship and Speech — A Review of Owen M. Fiss, *The Irony of Free Speech And Liberalism Divided*" (1998) 43 McGill L.J. 445 at 477-78; Moon, *The Constitutional Protection of Freedom of Expression*, *supra* note 17 at 56.

95 *Thomson Newspapers*, *supra* note 5at para. 114.

96 *Ibid.*

97 For a review of the then available empirical evidence relating to the potential effect of opinion polls, see Colin C.J. Feasby, "Public Opinion Poll Restrictions, Elections, and the *Charter*" (1997) 55 U.T. Fac. L. Rev. 241.

98 See Feasby, "Egalitarian Model," *supra* note 80 at 33.

99 *Thomson Newspapers*, *supra* note 5 at para. 129.

100 *Ibid.* at para. 128.

with the interest in ensuring voters are not misled by a false poll on the eve of an election.[101] In the absence of strong evidence that anything more than a small number of voters would be misled by a rouge poll,[102] meaning there would be little likelihood that the appearance of such would compromise the overall outcome of the election process, the government simply is not justified in removing this valued source of information from the electoral arena.

In contrast, the three justices who formed the *Thomson Newspapers'* minority sought to extend the "fairness" principle established by the Court in *Libman* to all voters who might be misled by an erroneous poll result and thereby cast their ballot in a way they would not have done had they been properly informed. It may be the case that these misinformed votes would not alter the overall outcome of the contest for public power. However, Parliament is still entitled to structure the electoral system in a manner that accords every citizen's vote equal respect, by protecting them from the *possibility* of being misled by such false information:

> Voters are free to cast their ballot as they see fit; however, the democratic process cares about each voter and should not tolerate the fact that, in the polling booth, some voters would express themselves on the basis of misleading, or potentially misleading, information that is *de facto* immunized from scrutiny and criticism.[103]

Therefore, while a ban on poll information would limit the information made available to voters at election time, such a restriction is a legitimate one for Parliament to impose in the name of integrity and fairness in the electoral process; "[b]eing themselves the very objects of elections, members of Parliament were in the best position to assess the effects of polls in individual campaigns and their impact on individual voters."[104]

C. *SAUVÉ V. CANADA (CHIEF ELECTORAL OFFICER)*

The third Supreme Court decision relevant to the issue of third party election spending involved a judicial reconsideration of a legislative ban on prisoner voting;[105] that is, whether denying the vote to "[e]very person who is imprisoned in a correctional institution serving a sentence of two years or more" is a justified limit on the right to vote and the right to equality before the law, respectively guaranteed by ss. 3 and 15(1) of the *Charter*.[106] A bare majority of five justices concluded that this disenfranchisement provision was a breach of the s. 3 right to vote and could not be justified under s. 1 of the *Charter*. The four dissenting justices disagreed with the majority's conclusion as to how the s.1 balancing test should be applied to this legislative measure. This division on the bench is of interest, as the approach to be followed when reviewing Parliament's decision with regards to the desirability of

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101 *Ibid.* at para. 117.

102 *Ibid.* at para. 127.

103 *Ibid.* at para. 40. The minority restated this in a slightly different way later in its decision:
> Our democracy, and its electoral process, finds its strength in the vote of each and every citizen. Each citizen, no matter how politically knowledgeable one may be, has his or her own reasons to vote for a particular candidate and the value of any of these reasons should not be undermined by misinformation (*ibid.* at para. 56).

104 *Ibid.* at para. 31. See also *ibid.* at para. 58.

105 This issue was previously considered by the Supreme Court of Canada in *Sauvé v. Canada (A.G.)*, [1993] 2 S.C.R. 438.

106 *Canada Elections Act, 2000*, S.C. 2000, c. 9, s. 51(e).

allowing prisoners to participate in the voting process has parallels with that adopted when the issue of third party election spending is considered.

Chief Justice McLachlin, writing for the majority, held that as the right to vote was "fundamental to our democracy and the rule of law":[107]

> Limits on it require not deference, but careful examination. It is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense.[108]

If the Court were to accept the government's argument that the issue of whether (some) prisoners ought to be entitled to vote is a matter of "social philosophy,"[109] and therefore an issue best left to Parliament to resolve, then this would exclude the Court from fulfilling its constitutionally required role of protecting and preserving the individual right to take part in the democratic process.[110] Therefore, McLachlin C.J.C. held that s. 1 of the *Charter* required the government to "satisfy the reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has."[111] Although the government's stated objectives in disenfranchising prisoners — enhancing civic responsibility and respect for the rule of law and providing additional punishment to those convicted of relatively serious offences[112] — were pressing and substantial enough to be *in principle* capable of justifying limitations on *Charter* rights,[113] "the rhetorical nature of the government objectives advanced renders them suspect."[114] And because the government's objectives had been expressed in such a broad and diffuse fashion, McLachlin C.J.C. found that it could not clearly demonstrate that denying prisoners the vote promoted these ends in a manner that least infringed upon the prisoner's right to vote. Thus, the majority held that the disenfranchisement provision failed to meet all three steps of the proportionality review under s. 1. The provision was not rationally connected to the government's purported pressing and substantial objectives,[115] it did not minimally impair the right to vote[116] and the negative effects of disenfranchising prisoners "would greatly outweigh the tenuous benefits that might ensue."[117]

There are clear similarities between this approach and the one taken by the majority of Supreme Court in *Thomson Newspapers*. Chief Justice McLachlin places the fundamental right of every citizen to vote at the heart of Canadian democracy, as the *Thomson Newspapers* majority did with the right to have free access to electoral information.[118] The

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107 *Sauvé*, *supra* note 6 at para. 9.
108 *Ibid.*
109 *Ibid.* at para. 10.
110 *Ibid.* at paras. 10, 13.
111 *Ibid.* at para. 18, citing *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para. 154, McLachlin J. (as she then was); *R. v. Butler*, [1992] 1 S.C.R. 452 at 502-503, Sopinka J..
112 *Ibid.* at para. 21.
113 *Ibid.* at para. 19.
114 *Ibid.* at para. 24.
115 *Ibid.* at paras. 28-53.
116 *Ibid.* at paras. 54-56.
117 *Ibid.* at para. 57.
118 *Thomson Newspapers*, *supra* note 5 at para. 92, citing *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 763-64.

core nature of these twin rights mean that a court, "unaffected by the shifting winds of public opinion and electoral interests,"[119] has a "constitutional duty"[120] to prevent the legislature from acting in a way that unduly limits them. In order to prevent an unjustified breach of these rights, a majority in both cases required more of the government than an appeal to "lofty objectives"[121] or "distorting effects."[122] Indeed, both majorities required an *extra* justificatory burden when it comes to a legislative attempt to traduce these "core" rights. In the case of *Thomson Newspapers*, this extra burden meant that the government had to demonstrate that a "rouge" opinion poll actually could influence the overall outcome of an election and that no less intrusive means of alerting the voting public to the existence of such a rouge poll existed. Similarly, while the Supreme Court in *Sauvé* (grudgingly) accepted the pressing and substantial nature of the government's purported objectives in disenfranchising prisoners, it then concluded that these objectives were so broadly stated that "it is difficult if not impossible to weigh whether the infringement of the right is justifiable or proportionate."[123] Therefore, the government's failure to clearly articulate what the legislation was designed to do, and then concretely demonstrate how it could achieve these ends in a way that had the least impact upon the right to vote, rendered the disenfranchisement provision a "disproportionate" response to the motivating concerns.

The dissent in *Sauvé*, penned by Gonthier J., objected to the majority's approach at a fundamental level.[124] Because the minority considered the legislature's conclusion regarding the desirability of prisoner disenfranchisement to be a basic choice between "competing social or political philosophies relating to the right to vote,"[125] Gonthier J. viewed the Court's role to be

> a matter of developing the significance of the values being dealt with and asking whether Parliament, in its attempt to reconcile competing interests, has achieved a rational and reasonable balance. Proportionality, in the context of *Charter* analysis, does not mean a perfect solution, as any balance arising from competing interests will involve preferring one value over the other to some extent.[126]

This restricted role in turn required the Court to decide "not whether or not Parliament has made a proper policy decision, but whether or not the policy position is an acceptable one amongst those permitted under the *Charter*."[127] The level of deference to be accorded to Parliament's chosen policy position actually was strengthened by the essentially symbolic and thus axiomatic nature of the interests being pursued,[128] and the fact that the particular legislative provision under review was the consequence of previous "dialogue" between Parliament and the court.[129] Therefore, Gonthier J. was able to find that the prisoner disenfranchisement provision represented a proportionate response to the government's

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119 *Sauvé*, *supra* note 6 at para. 13.
120 *Ibid.* at para. 15.
121 *Ibid.* at para. 16.
122 *Thomson Newspapers*, *supra* note 5 at para. 96.
123 *Sauvé*, *supra* note 6 at para. 24.
124 *Ibid.* at para. 67.
125 *Ibid.*
126 *Ibid.* at para. 91.
127 *Ibid.* at para. 98.
128 *Ibid.* at paras. 99-103.
129 *Ibid.* at paras. 104-108.

desire to make "a moral statement about serious crime, and about its significance to and within the community."[130] Denying (some) prisoners the right to vote was rationally connected to this end,[131] limiting this denial to those who have committed serious crimes impaired the right to vote in a minimal fashion[132] and the positive effects of the measure outweighed the likely negative consequences of adopting it.[133]

Again, there are similarities between the approach taken by the minority in *Sauvé* and that of both the Court in *Libman* and the *Thomson Newspapers'* minority. The identity of those who may participate in the electoral process and the extent to which individuals participate are issues that reasonable, well-intentioned persons may disagree over. Therefore, the right to participate may justifiably be limited in order to protect or advance other important social values. In the *Sauvé* case, these social values were respect for the law and the denunciation of serious crime. In *Libman*, the value was that of participant equality within the wider democratic process. In *Thomson Newspapers*, the value was that of fully, and correctly, informed participation by every voter. In order to make sure it falls within the acceptable range of alternatives, the courts retain some limited overview of any legislative decision to limit democratic participation in pursuit of such values.[134] However, the balancing act required is one that Parliament generally is in the best position to undertake. Therefore, a high degree of deference ought to be accorded to the legislature's decision,[135] with the courts' role largely being limited to "the examination of the social or political philosophy underpinning the justification advanced by the Crown."[136] If the government's purported reasons for limiting individual participatory rights meet the values protected by the *Charter*, and as long as the limits imposed do not trespass upon these values to such an extent that they effectively negate them, then it is for Parliament to decide the manner in which the balance will be struck.

D. CONCLUSION: A SOMEWHAT AMBIGUOUS ELECTORAL JURISPRUDENCE

These three cases reveal a degree of dissonance on the Supreme Court's part when reviewing the constitutionality of placing limits on individual electoral participation. The initial strong egalitarian position taken by the Court in *Libman* is somewhat diluted by the majority decisions handed down in the *Thomson Newspapers* and *Sauvé* cases, both of which place far greater emphasis on the legitimating value of unencumbered individual participation in the electoral process when reviewing the *Charter* compatibility of regulatory provisions. The different basic approaches taken in each case manifest through the evidence required by the court to justify the limitation at issue. In *Libman*, the judicial acceptance of Parliament's "fairness" oriented electoral model led the Court to take an extremely deferential attitude to the means chosen to actualize this objective. In contrast, the *Thomson Newspapers* and *Sauvé* majorities' prioritizing of individual electoral participation led to a demand that the government produce quite concrete evidence as to why the restriction was necessary to

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130 *Ibid.* at para. 109.
131 *Ibid.* at paras. 149-59.
132 *Ibid.* at paras. 160-74.
133 *Ibid.* at paras. 175-88.
134 *Ibid.* at para. 98. See also *supra* note 89.
135 *Libman*, *supra* note 4 at para. 62.
136 *Sauvé*, *supra* note 6 at para. 97.

prevent some particular form of "harm." The backdrop of this rather unsettled electoral jurisprudence means that the question of whether or not limits on third party election spending can pass constitutional muster remained very much alive.

V. LET US BEGIN AGAIN: LEGISLATIVE CHANGE AND A NEW ROUND OF *CHARTER* CHALLENGES

The issue of third party election expenditures again gained some prominence following the passage of the *Canada Elections Act, 2000*.[137] This legislation contains a novel, broadly drawn definition of "election advertising," along with limits on how much third parties may spend on these forms of communication. The definition of "election advertising" encompasses "advertising during an election period that promotes or opposes a registered party or the election of a candidate, including by taking a position on an issue with which the registered party or candidate is associated";[138] with an "election period" defined as "the period beginning with the issue of the writ and ending on polling day."[139] A nationwide spending limit of $150,000 is placed on the election advertising of each third party, with an additional provision limiting spending in support or opposition to an identifiable candidate in a particular electoral district to $3000.[140] Third parties are prohibited from circumventing, or even attempting to circumvent, this spending limit by setting up multiple "front" organizations or by colluding with other groups.[141]

An "advertising blackout" period was also re-established by the *Elections Act, 2000*, with all electoral participants prohibited from publishing or broadcasting any election advertisements on election day.[142] In addition to limiting both the overall amounts and the particular times when third parties may make expenditures on election advertising, the *Elections Act, 2000* places formal registration and disclosure requirements on third parties undertaking election advertising. All election advertising must identify the third party that is paying for it.[143] Once a third party expends more than $500 on election advertising, they must apply to be registered with the Chief Electoral Officer,[144] and thereafter comply with a series of administrative procedures.[145] Registered third parties must also file an "election advertising report" not more than 4 months after an election, disclosing any expenditures on election advertising they have incurred, as well as the identities of all donors who gave more than $200 to the third party.[146]

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137 S.C. 2000, c. 9 [*Elections Act, 2000*]. In addition to placing limits on third party interventions in the electoral process, the new legislation also imposed a new ban on publishing a new "election opinion survey" on the day of an election (see *ibid.*, s. 328).

138 *Ibid.*, s. 319. There are exceptions made under the clause for editorials, news, speeches or interviews published or broadcast by the media; publishing a book; communicating with employees or shareholders; and transmitting personal views over the internet. See also *ibid.*, s. 349.

139 *Ibid.*, s. 2. The minimum allowable time between the issue of the writ and election day is 36 days (*ibid.*, s. 57(1.2)).

140 *Ibid.*, s. 350.

141 *Ibid.*, s. 351.

142 *Ibid.*, s. 323. This overturns the Alberta Court of Appeal's decision in *Somerville*, *supra* note 58, which allowed third parties and candidates to advertise throughout the electoral period.

143 *Ibid.*, s. 352.

144 *Ibid.*, s. 353.

145 *Ibid.*, ss. 354-55, 357-58.

146 *Ibid.*, ss. 359-60.

Parliament's rationale for passing these new rules was to re-establish the basic conditions for a fair electoral process, in which participants can engage in a relatively equal fashion. However, these measures did not garner unanimous support during the Parliamentary debate. In particular, the effect of the spending cap on third parties came in for very strong criticism.[147] And it is true that the breadth of the limits imposed upon third party spending — restricting not only the express advocacy of support for political parties or candidates, but also the discussion of public policy issues that candidates or parties are campaigning on[148] — imposes a significant restraint on both the manner and extent of third party involvement during an election campaign. Therefore, it is hardly surprising that these measures very quickly became the subject of a *Charter* challenge.

This challenge came when Stephen Harper, the then leader of the National Citizens' Coalition and present leader of the Conservative Party of Canada, sought a declaration from the Alberta courts that the legislative restrictions on third party election spending unjustifiably infringed upon the *Charter*'s s. 2(b) right to free expression.[149] In mid-2001, Cairns J., sitting in the Alberta Court of Queen's Bench, struck down these provisions on two grounds.[150] First, he ruled that the definition of "election advertising" was too vague to meet the "prescribed by law" requirement in s. 1 of the *Charter*,[151] as the breadth of issues that a party or candidate may be "associated" with made it virtually impossible for a third party to know in advance if a proposed communication would then be deemed to be "election advertising."[152] However, Cairns J. also analyzed the provisions under the balancing provisions in s. 1 of the *Charter*. This exercise concluded that the government had failed to establish the existence of any pressing and substantial concern to justify the spending restrictions, as it could not produce sufficient evidence that third party spending had any impact at all on the election process, let alone a "harmful" one.[153] What is more, Cairns J.

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147 For example, as the Reform Party MP, Ted White, stated during the debate over the third reading of the legislation:

> It is not the place of the government to limit the right of individual Canadians or groups of Canadians to spend their own money in support of a cause or candidate. The right to spend one's own money on election advertising is a right which is just a valid for the poor as it is for the wealthy (*House of Commons Debates*, 057 (25 February 2000) at 10:40 (Ted White), online: Canada's Parliament <www.parl.gc.ca/36/2/parlbus/chambus/house/debates/057_2000-02-25/han057-e.htm>).

148 See *supra* note 138 and accompanying text; Feasby, "Issue Advocacy," *supra* note 40 at 47-50.

149 The provisions of the *Elections Act, 2000*, *supra* note 137, challenged were ss. 323, 350-60, 362. These not only limit third party spending, but also contain the entire registration and disclosure regime for third parties.

150 *Harper v. Canada*, [2001] 9 W.W.R. 650 [*Harper* (Alta. Q.B.)].

151 The definition includes communications that take "a position on an issue with which the registered party or candidate is associated" (see *Elections Act, 2000*, *supra* note 137, s. 319).

152 *Harper* (Alta. Q.B.), *supra* note 150 at 701. In addition, concern was expressed at "the very broad discretion" the measure gave to the Chief Electoral Officer. On this point, also see Feasby, *Issue Advocacy*, *supra* note 40 at 43-44.

153 This conclusion echoed the British Columbia Supreme Court's judgment when reviewing that province's $5000 limit on third party election spending in *Pacific Press v. Attorney General of British Columbia* (2000), 73 B.C.L.R. (3d) 264 at para. 89:

> There is no evidence establishing that the mischief the legislation purports to cure in fact exists, let alone that it creates a pressing and substantial concern.... There is no evidence that elections in Canada or in this province are not fair, nor that elections in other jurisdictions which have not imposed limits on third party spending are not fair. Further, there is no evidence that third party spending is or has presented a problem in Canadian elections.

considered the limits on third party spending to be not only too vague in their application, but also too widely drawn to represent a proportionate response to any concerns about the overall fairness of the electoral process.[154] Because the spending limits had the potential to impinge on communications intended to inform voters about election related issues, they restricted a greater amount of speech than was required to address any issues of fairness or equality between electoral contestants.

These latter findings were upheld in a 2-1 decision by Alberta's Court of Appeal.[155] The majority took the position that while "third party election spending limits have a valid and theoretical objective; ... lofty and symbolic goals, while unassailable as concepts, do not translate here into pressing and substantial concerns."[156] Therefore, the government was required to demonstrate how unimpeded third party spending posed some actual or potential "harm" to some aspect of the election process. The majority saw the government's claim that the expenditure limits were intended to ensure that elections remained "fair" as meaning they prevented the primary electoral contestants from using third party expenditures to evade the spending caps on their campaigns.[157] To justify this aim, the majority then required that the government demonstrate such evasion was occurring, or would occur, in the absence of third party limits; and that this evasion would then result in the election process becoming skewed or tilted in favour of those carrying out such spending. However, the majority agreed with Cairns J.'s view at trial that the government had failed to produce an evidentiary record sufficient to meet this burden of proof. While conceding that "the social science evidence establishes that third party election spending may influence voter behaviour,"[158] the evidence presented to the Court failed to "adequately describe the role which money plays in a political campaign, the issue at the heart of the debate and which warrants robust discourse."[159] The government's inability to concretely demonstrate how third party spending could exert any influence on election outcomes consequently meant it was unable to show how such spending threatened to "harm" the election process.[160] Therefore, the government fell at the very first hurdle of the s. 1 balancing test, failing to establish the existence of any

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154 *Harper* (Alta. Q.B.), *supra* note 150 at 719.

155 *Harper v. Canada (A.G.)* (2002), 320 A.R. 1 [*Harper* (Alta. C.A.)]. However, the majority did not accept that the provision limiting third party expenditures on advertising about election-related issues "associated" with a political party or candidate was too vague to meet the s. 1 "prescribed by law" requirement (see *ibid.* at paras. 53-62). For a critical view of this aspect of the decision, see Feasby, "Issue Advocacy", *supra* note 40 at 52-54.

156 *Harper* (Alta. C.A.), *ibid.* at para. 108.

157 *Ibid.* at para. 109.

158 *Ibid.* at para. 114. The empirical evidence for the effectiveness or otherwise of third party expenditures is outlined by Jennifer Smith & Herman Bakvis, "Changing Dynamics in Election Campaign Finance: Critical Issues in Canada and the United States" (2000) 1:4 Policy Matters at 26-35.

159 *Harper* (Alta. C.A.), *ibid.* at para. 120. Especially troubling was the perceived reliance placed upon a report prepared for the Lortie Commission by Professor Richard Johnston, which had purported to show how third party spending had affected the outcome of the 1988 general election. Subsequently, Professor Johnston conceded that this report had wrongly interpreted the available data (Richard G. Johnston *et al.*, *Letting the People Decide: Dynamics of a Canadian Election* (Montreal: McGill-Queen's University Press, 1992) at 163).

160 The majority decision in *Thomson Newspapers*, *supra* note 5, was heavily cited by the majority in *Harper* (Alta. C.A.), *supra* note 155 at paras. 89, 90, 111, 119, 135, 150, 152, 164. As the *Harper* majority noted, even though "the objective in *Thomson Newspapers* was exactly the same [as alleged in *Harper*]; the Supreme Court did not dispense with evidence there" (*ibid.* at para. 130).

pressing and substantial concern that could justify limiting the expressive rights of those wishing to engage in such communicative expenditures.

Having found there was insufficient evidence that third party election spending posed a real risk of any particular "harm," the majority was able to deal in a relatively straightforward manner with the Supreme Court's decision in *Libman*. Even though the Supreme Court had described the overall aim of third party spending limits as "highly laudable," the majority pointed out that this statement was made in a context where both the parties before it had conceded that the limits were directed towards a pressing and substantial concern.[161] It was precisely this aim of creating a fair election process by limiting third party spending under challenge in the *Harper* case, and the majority concluded that there was insufficient evidence to establish that this end is pressing or substantial enough to justify restricting any individual or group's right to freedom of expression under the *Charter*. Therefore, to accept at face value that "the objective [of fair and equal elections] is pressing and substantial on the basis of *Libman* alone amounts to accepting an abstract or theoretical postulate";[162] a postulate that could then justify Parliament traducing any of the *Charter's* guaranteed rights and freedoms simply by claiming that its actions were intended to promote political equality.[163]

However, should any pressing or substantial concern be established or assumed, the Court of Appeal then went on to consider whether the limits contained in the *Elections Act, 2000* were a justifiable response to those objectives. The majority found that the expenditure limits also failed this balancing test on two grounds. While it was accepted that the spending limits had a "rational connection" to the aim of ensuring political equality,[164] the breadth of issue related communications covered by the provisions meant that they could not meet the "minimal impairment" arm of the test.[165] What is more, the $3000 limit on third party spending in a given electoral district also failed the minimal impairment test as it "renders even minimally effective third party advertising nugatory,"[166] effectively amounting to a total ban on third party spending.[167] Finally, the majority ruled that the lack of evidence as to the effect of third party spending on the electoral process made it impossible to weigh the overall deleterious effects of the limits against their salutary effect, "result[ing] in a failure to demonstrate the legislative goal can be balanced against the infringement on the rights in question."[168]

Therefore, the majority of the Court concluded that the third party expenditure limits imposed by the *Elections Act, 2000* breached the *Charter*'s guarantee of freedom of expression in a manner that could not be demonstrably justified under s. 1. It also struck down the "blackout" provision on polling day advertising in the *Elections Act, 2000*,[169] as well as the registration and disclosure requirements the legislation imposed on third parties,[170]

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161 *Ibid.* at para. 147. Also see *supra* note 78.
162 *Ibid.* at para. 159.
163 *Ibid.* at para. 164.
164 *Ibid.* at paras. 166-68.
165 *Ibid.* at paras. 182-84.
166 *Ibid.* at para. 176.
167 *Ibid.* at para. 180.
168 *Ibid.* at para. 188.
169 *Supra* note 137, s. 323.
170 *Ibid.*, ss. 351-57, 359-62.

as these were "inter-dependent and inter-related" to the expenditure limits.[171] The only provision to survive *Charter* review was s. 358, which bans third parties from using contributions from foreign sources for election advertising purposes. The majority simply accepted without comment Cairns J.'s conclusion at trial that this provision did not violate the *Charter*.[172]

Compared with the majority in *Harper*, the dissenting judgment penned by Berger J. was prepared to accord Canada's Parliament far greater scope in regulating third party political expression. He began by emphasising the need for the electoral process to allow each and every participant to take part in a fair and equal manner:

> The marketplace of political ideas must afford to all a reasonable opportunity to present their case to voters. Spending limits in an election campaign have as their purpose the promotion of fairness as a primary value or objective of the democratic process.[173]

Justice Berger then placed a great deal of emphasis on the Parliament's role in deciding between the different value choices implicit in creating the set of ground rules under which a fair election contest will occur. Once this institution had decided to prioritize equality over the individual right to untrammelled participation, third party spending became a pressing and substantial concern:

> The provisions at issue are part of the overall objective of Parliament to ensure a fair electoral system. The "harm" posed by unregulated third party spending is the damage done to the regime of fairness and equity created and maintained by party and candidate spending limits. Limiting third party spending is essential to preserving the integrity of the existing scheme of electoral finance controls.[174]

Justice Berger also saw the Supreme Court's judgment in *Libman* as retaining greater precedential authority than the majority had accorded to it. He pointed out that the Alberta Court of Appeal's judgment in the *Somerville* case, which the Supreme Court expressly disapproved of in *Libman*, had already noted the revision of the evidence presented to the Lortie Commission relating to the effect of third party spending on past election outcomes.[175] Therefore, he dismissed the idea that the Supreme Court's acceptance of the constitutional propriety of third party spending limits had been based on a misunderstanding of the evidentiary record.[176]

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171 *Harper* (Alta. C.A.), *supra* note 155 at para. 190.

172 *Ibid.* at para. 191. See also *Harper* (Alta. Q.B.), *supra* note 150 at para. 108 ("I find that the objective of s. 358 is to preserve the Canadian democratic process for those with a legitimate interest in Canadian governance.") This finding seems a little at odds with the rest of the majority judgment. If the Court found there was no evidence to demonstrate that election related third party expenditures *per se* represented any sort of pressing or substantial concern, then it is hard to see why it should matter what the source of those expenditures are. To put the point in a different way, on the majority's reasoning, the only reason why the *source* of third party expenditures would matter is if there was evidence those expenditures actually might somehow be effective in altering the election outcome — which the majority held had not been demonstrated by the government.

173 *Harper* (Alta. C.A.), *ibid.* at para. 252.

174 *Ibid.* at para. 261.

175 *Ibid.* at para. 251. See also *Somerville*, *supra* note 58 at 232. This revision of the evidence is recounted at *supra* note 159.

176 *Harper* (Alta. C.A.), *ibid.* at para. 252.

After finding that the third party spending limits were responding to a pressing and substantial concern, Berger J. continued on to hold that the provisions were a justifiable response to this concern. He concluded they were rationally connected to the legislative objective, as "the opinion of the Supreme Court in *Libman* is dispositive here."[177] The issue of whether the provisions minimally impaired the *Charter*'s s. 2(b) guarantee of freedom of expression was settled by deferring to Parliament's judgment of the matter: "[t]he Court should not substitute judicial opinion for legislative choice in the face of a genuine and reasonable attempt to balance the fundamental value of freedom of expression against the need for fairness in the electoral process."[178] Also, the existence of alternative methods of communicating with the electorate meant that the restrictions imposed on third parties fell within a range of reasonable alternatives for Parliament to select from, and there were no measures clearly superior to the ones it had adopted.[179] Finally, the salutary effects of the provisions in preventing the limits on candidate and political party spending being evaded were, following *Libman*, judged to outweigh any deleterious effects associated with the limits on free speech.[180]

VI. THE SUPREME COURT'S FINAL WORD: EQUALITY RULES, OKAY?

The decision of the Alberta Court of Appeal in *Harper* was further appealed by Canada's Attorney General, and the Supreme Court recently issued what may prove the final word on the issue of third party election spending.[181] All the members of the Court rejected the majority of the Court of Appeal's finding that the government had failed to establish a pressing and substantial objective for the restrictions contained in the *Elections Act, 2000*[182] and accepted that the theoretical objective of "promoting electoral fairness" itself provided a legitimate governmental end. However, the bench then divided 6-3 on the question of whether the limits imposed on third party election spending represented a justifiable response to this objective. The majority, deferring to Parliament's "right ... to choose Canada's electoral model and the nuances inherent in implementing this model,"[183] accepted that the limits favoured by that body were proportionate to the end sought, and thus found that the entire regulatory regime imposed on third parties by the *Elections Act, 2000* was saved under s. 1 of the *Charter*. In comparison, the minority concluded that because the government only was able to posit "wholly hypothetical" dangers resulting from third party election spending,[184] the "draconian" limits imposed on such participants were a disproportionate response to the purported objective.[185] In particular, because the amounts permitted to be spent under the legislation were insufficient to allow third parties to participate "effectively" in the electoral process, these limits failed to minimally impair third parties' rights under s.

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177 *Ibid.* at para. 265.

178 *Ibid.* at para. 268.

179 *Ibid.* at paras. 271-72. See also *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at para. 168, Wilson J.

180 *Harper* (Alta. C.A.), *ibid.* at para. 278.

181 *Harper* (S.C.C.), *supra* note 8.

182 *Ibid.* at paras. 24-26, 63-64.

183 *Ibid.* at para. 87.

184 *Ibid.* at para. 34.

185 *Ibid.* at para. 38. The minority also would have struck down the s. 351 prohibition on third parties attempting to circumvent the spending limits, as this was "keyed into the spending limits and has no other purpose" (*ibid.* at para. 46).

2(b) of the *Charter*. However, the minority did agree with the majority that the *Elections Act, 2000* polling day blackout,[186] and attribution, disclosure and registration requirements,[187] were saved by s. 1 of the *Charter*.

The majority, with Bastarache J. writing, expressly characterized the issue of limiting third party election spending as requiring a choice between an "egalitarian" and a "libertarian" model of elections[188] and chided the majority of the Alberta Court of Appeal for its failure to follow the *Libman* decision in respecting Parliament's choice of electoral model.[189] Having accepted that Parliament legitimately may pursue the objective of establishing a "fair" electoral process that attempts to guarantee participants some measure of equal influence,[190] Bastrache J. then moved to consider whether the particular means adopted in pursuit of this end met the *Charter*'s s. 1 balancing test. This step raised the issue of the nature and sufficiency of the evidence presented by the government to justify the restrictions on third party expression, which in turn required that the majority confront the decision in *Thomson Newspapers*. Justice Bastrache differentiated the present situation from that case by drawing on the distinction adopted by the *Thomson Newspapers*' majority;[191] in other words, that third party election spending raised the risk of voters being "manipulated" by powerful interests, while other forms of electoral discourse (such as opinion polls) do not pose such a threat of "harm."[192] Therefore, even though no evidence was produced that third party election spending actually seeks to be "manipulative," or that such spending will be spent on negative "smear" tactics, the very "danger that political advertising may manipulate or oppress the voter means that some deference to the means chosen by Parliament is warranted."[193]

Having taken this position, Bastrache J. then demanded little from the government by way of further evidence to establish this potential "danger" that third party election spending "may manipulate or oppress the voter." His judgment still accorded the Lortie Commission Report significant weight as demonstrating the possible harm engendered by third party spending, with the later revisions to its data regarding the effect of expenditures on the 1988 election largely being discounted.[194] Even though no evidence of "the actual pernicious effects of the lack of spending limits in past elections" was put before the Court, this was considered irrelevant as "a reasoned apprehension of harm is sufficient."[195] What really seems to underpin the majority's decision is a form of common sense reasoning: "[s]urely, political parties, candidates, interest groups and corporations for that matter would not spend a significant amount of money on advertising if it was ineffective."[196] Justifying the imposition of limits on third party election spending *via* this logical loop then depends upon the further

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186 *Elections Act, 2000*, *supra* note 137, s. 323.

187 *Ibid.*, ss. 352-357, 359-360, 362.

188 *Harper* (S.C.C.), *supra* note 8 at para. 62, citing Feasby, "Egalitarian Model," *supra* note 80.

189 *Ibid.* at para. 64.

190 The majority characterizes the objectives of the legislation as "first, to promote equality in the political discourse; second, to protect the integrity of the financing regime applicable to candidates and parties; and third, to ensure that voters have confidence in the electoral process" (*ibid.* at para. 92).

191 See *supra* notes 95-96.

192 *Harper* (S.C.C.), *supra* note 8 at paras. 85-86.

193 *Ibid.* at para. 85.

194 *Ibid.* at paras. 94-100. For an account of these revisions, see *supra* note 159.

195 *Harper* (S.C.C.), *ibid.* at para. 98.

196 *Ibid.* at para. 106.

assumption that it is somehow undesirable for those electoral participants with the ability to spend to have an effect on how (at least some) voters choose to cast their ballots. Simply put, the very fact that greater wealth might give some individuals or groups increased influence come election time is in and of itself a "harm" to the values underpinning the Canadian electoral process. And the majority of the Court places this value choice entirely in the hands of Parliament: "[i]n this case, the contextual features indicate that the Court should afford deference to the balance Parliament has struck between political expression and meaningful participation in the electoral process."[197]

The minority, in a judgment jointly penned by McLachlin C.J.C. and Major J., took a distinctly different approach to the majority. While accepting that "[c]ommon sense dictates that promoting electoral fairness is a pressing and substantial objective in our liberal democracy, even in the absence of evidence that past elections have been unfair,"[198] the minority still put far greater emphasis on the need for the government to provide concrete evidence of the existence of some "harm" to be combated by measures adopted in the name of "fairness." It did so because it attached a greater degree of importance than the majority to the individual right to provide and receive electoral information contained in s. 2(b) of the *Charter*. Each individual member of the Canadian polity has, in the minority's words, "the right to effective participation" in the electoral process.[199] In turn, this "right to effective participation" entails both "a right to speak" and "a right to listen";[200] it encompasses not only the opportunity to try to persuade others at election time, but also free access to others' views so as to be informed by them.[201] And the limits on third party election spending traduce both these aspects of the right to effective participation:

> The spending limits impede the ability of citizens to communicate with one another through public fora and media during elections and curtail the diversity of perspectives heard and assessed by the electorate. Because citizens cannot mount effective national television, radio and print campaigns [within the limits set by Parliament], the only sustained messages voters see and hear during the course of an election campaign are from the political parties.[202]

Once the limits on third party election spending were portrayed as depriving voters of information they would otherwise wish to receive, thereby restricting their ability to take a fully effective part in the election process, the minority could then demand that the government provide some strong, concrete indication of "harm" resulting from such expenditures to justify its adopted measures. Although the objective of electoral "fairness" could *in theory* provide such a justification, because the government presented no evidence to show *in fact* that wealthy interests will (in the absence of spending limits) "dominate" or "hijack" the Canadian electoral process, the restrictions imposed by Parliament were "an

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197 *Ibid.* at para. 111, approvingly citing *Harper* (Alta. C.A.), *supra* note 155 at para. 168, Berger J.A. See also *supra* note 183 and accompanying text.

198 *Harper* (S.C.C.), *ibid.* at para. 26.

199 *Ibid.* at para. 15. The minority cites *Figueroa v. Canada (A.G.)*, [2003] 1 S.C.R. 912 at para. 26 [*Figueroa*], for this point. It could just as easily have cited *Sauvé*, *supra* note 6 at para. 15 ("The *Charter* charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good").

200 *Harper* (S.C.C.), *ibid.* at para. 19.

201 *Ibid.* at paras. 17-18.

202 *Ibid.* at para. 19.

overreaction to a non-existent problem."[203] Furthermore, absent such evidence of "harm," stopping citizens from participating in the electoral process by both speaking and listening may *itself* be perceived as an "unfair" form of electoral regulation.[204] Therefore, the particular limits on third party election spending imposed by the *Elections Act, 2000* failed, in the minority's view, to minimally impair the *Charter* rights of both third parties and the general voting public. In point of fact, while some form of spending limits *theoretically* might be justifiable,[205] these would appear to have to be set at such a high level — allowing for the significant purchase of television broadcast time or advertising in the national press[206] — as to be beyond the reach of all but a very few electoral participants.

The minority present their position in *Harper* as being "indistinguishable from *Libman*,"[207] in that they claim not to question Parliament's basic egalitarian purpose in enacting spending limits, but rather ensure that this aim is not pursued through means that excludes some participants from the election process. With respect, I would suggest that the minority's approach actually has more in common with the majority decisions in *Thomson Newspapers* and *Sauvé* than it does with *Libman*. In spite of the lip-service paid to Parliament's entitlement to pursue the goal of "electoral fairness," and in keeping with the former two judgments, the minority in *Harper* in practice gives primacy to the individual right of unencumbered — or "effective" — electoral participation. This right can then only justifiably be restricted where the form of participation at issue can convincingly be shown to pose a "harm" to the electoral process or some other social value. The range of relevant "harms" are then restricted; they must be something more than a "hypothetical" risk or a "vague and symbolic objective." The government is instead required to show in a quite concrete manner how allowing the form of individual participation to continue will result in the posited undesirable outcome: the "domination" or "hijack" of the election process by the wealthy; the widespread misleading of voters as the result of a rouge poll; or the undermining of respect for the law in society at large.

The majority's judgment in *Harper* is more faithful to the spirit of *Libman*. It accepts that Parliament's choice of an egalitarian or "fairness" based model of elections is essentially correct as a substantive matter; "[t]he Court's conception of electoral fairness as reflected in [*Libman*] is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society."[208] With this presumption in place, the majority then passes almost complete responsibility for balancing the values of informed participation against participant equality over to the legislative branch. Although the Court retains some vestigial responsibility under s. 1 of the *Charter* for ensuring that the means adopted do not *completely* exclude some participants from the electoral process,[209] this review is deferentially applied. Therefore, the fact that the spending limits allow third parties

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203 *Ibid.* at para. 34. This conclusion essentially is the same as that expressed by the Alberta Court of Appeal in the *Somerville* case, see *supra* note 65 and accompanying text.

204 *Ibid.* at para. 38. Compare with the reasoning of the majority in *Thomson Newspapers*, *supra* note 99 and accompanying text.

205 *Harper* (S.C.C.), *ibid.* at para. 39.

206 *Ibid.* at para. 35.

207 *Ibid.* at para. 36.

208 *Ibid.* at para. 62.

209 *Ibid.* at paras. 114-18.

to conduct "modest, national, informational campaigns and reasonable electoral district informational campaigns" demonstrates that Parliament has shown sufficient respect for their right to free expression.[210] Having ensured that Parliament has endeavoured to balance the values at issue without *entirely* abrogating the right to participate, the majority does not then further question Parliament's judgment as to how that balance ought to be struck.

VII. CONCLUSION

The Supreme Court's decision in *Harper* turns the page on an interesting chapter in the history of Canada's electoral laws. By accepting that Parliament may seek to create an egalitarian framework for participation at election time and deferring to that body's choice as to how best to achieve this end, the majority have quite conclusively settled the issue of whether limits on third party election spending are compatible with the *Charter*. To return to the two questions outlined at the beginning of this article, the majority of the Court agrees that a legitimately constituted electoral system requires rules to limit the participation of some in order to promote the overall "fairness" of the process; and consequently, views the legislative branch as the better institution to strike the required balance between the values of liberty and equality. Although a significant minority of the Supreme Court was of a different view (to say nothing of the oft-expressed opinions of the Alberta courts), the hard math of constitutional law means that because six votes beats three, the matter ends there.

However, while the particular issue of limiting third party election spending has been resolved, it seems unlikely that the story of Canada's electoral process, and the interplay between Parliament and the courts in relation to this process, has been fully written. Electoral law is a constantly developing and changing field. For example, Parliament recently enacted new limits on contributions by individuals, corporations and trade unions to political parties, their candidates and nominees for leadership positions in a political party.[211] Additionally, new legislative provisions reforming the requirements for political parties to register have been introduced in reaction to the Supreme Court's decision in *Figueroa*.[212] These sorts of developments combine important issues of public policy and individual rights with litigants who have strong incentives to try to use the courts to achieve the outcome most favourable to themselves. Therefore, it is hardly surprising that electoral law will continue to provide a fertile ground for new constitutional issues and controversies. In confronting these issues, the two questions posed in this article — "what electoral ground rules should we have?"; and, "who ought to decide what these ground rules will be?" — will continue to be relevant; as will the linkage between the answer given by the courts to the first question and their response to the second.

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[210] *Ibid.* at para. 115, quoting *Harper* (Alta. Q.B.), *supra* note 150 at para. 78.

[211] *An Act to amend the Canada Elections Act and the Income Tax Act (political financing)*, S.C. 2003, c. 19.

[212] *Supra* note 199. These new requirements are contained in *An Act to amend the Canada Elections Act and the Income Tax Act*, S.C. 2004, c. 24.