Harper *v.* Canada (Attorney General), [2004] 1 S.C.R. 827, 2004 SCC 33

Attorney General of Canada *Appellant*

v.

Stephen Joseph Harper *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General of Manitoba, Democracy Watch and National Anti-Poverty Organization, Environment Voters, a division of Animal Alliance of Canada, and John Herbert Bryden *Interveners*

Indexed as: Harper *v.* Canada (Attorney General)

Neutral citation: 2004 SCC 33.

File No.: 29618.

2004: February 10; 2004: May 18.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for alberta

Constitutional law — Charter of Rights — Freedom of expression — Federal elections — Third party election advertising — Spending limits — Attribution, registration and disclosure requirements — Blackout period — Whether third party election advertising scheme and blackout on third party advertising on polling day infringe freedom of expression — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Canada Elections Act, S.C. 2000, c. 9, ss. 323, 350, 351, 352 to 357, 359, 360, 362.

Constitutional law — Charter of Rights — Right to vote — Federal elections — Third party election advertising — Spending limits — Attribution, registration and disclosure requirements — Blackout period — Whether third party election advertising scheme and blackout on third party advertising on polling day infringe right to vote — Canadian Charter of Rights and Freedoms, s. 3 — Canada Elections Act, S.C. 2000, c. 9, ss. 323, 350, 351, 352 to 357, 359, 360, 362.

Constitutional law — Charter of Rights — Freedom of association — Federal elections — Third party election advertising — Spending limits — Whether limits on third party election advertising expenses infringe freedom of association — Canadian Charter of Rights and Freedoms, s. 2(d) — Canada Elections Act, S.C. 2000, c. 9, ss. 351, 356, 357(3), 359, 362.

The respondent brought an action for a declaration that ss. 323(1) and (3), 350 to 360, and 362 of the *Canada Elections Act* were of no force or effect for infringing ss. 2(*b*), 2(*d*) and 3 of the *Canadian Charter of Rights and Freedoms*. Section 350 limits third party election advertising expenses to $3000 in a given electoral district and $150,000 nationally; s. 351 prohibits individuals or groups from splitting or colluding

for the purposes of circumventing these limits; ss. 352 to 357, 359, 360 and 362 require a third party to identify itself in all of its election advertising, to appoint financial agents and auditors, and to register with the Chief Electoral Officer; and s. 323 provides for a third party advertising blackout on polling day. The trial judge concluded that ss. 350 and 351 were in *prima facie* violation of ss. 2(*b*) and 2(*d*) and that neither was justified under s. 1 of the *Charter*. The Court of Appeal upheld the unconstitutionality of ss. 350 and 351 and also struck down ss. 323, 352 to 357, 359, 360 and 362 on the basis that the provisions "must all stand or fall together as part of the same design".

Held (McLachlin C.J. and Major and Binnie JJ. dissenting in part): The appeal should be allowed. The impugned provisions of the *Canada Elections Act* are constitutional.

Per Iacobucci, Bastarache, Arbour, LeBel, Deschamps and Fish JJ.: The current third party election advertising regime is Parliament's response to this Court's decision in *Libman*. In promoting the equal dissemination of points of view by limiting the election advertising of third parties who are influential participants in the electoral process, the overarching objective of the spending limits is electoral fairness. This egalitarian model of elections seeks to create a level playing field for those who wish to engage in the electoral discourse, enabling voters to be better informed. The Court of Appeal erred in considering the provisions on third party spending limits globally. While the regime is internally coherent, its constituent parts stand on their own and the constitutionality of each set of provisions must be considered separately.

The limits on third party election advertising expenses set out in s. 350 infringe the right to freedom of political expression guaranteed by s. 2(*b*) of the *Charter*

but they do not infringe the right to vote protected by s. 3. The right to meaningful participation in s. 3 of the *Charter* cannot be equated with the exercise of freedom of expression. The two rights are distinct and must be reconciled. Under s. 3, the right of meaningful participation in the electoral process is not limited to the selection of elected representatives and includes a citizen's right to exercise his or her vote in an informed manner. In the absence of spending limits, it is possible for the affluent or a number of persons pooling their resources and acting in concert to dominate the political discourse, depriving their opponents of a reasonable opportunity to speak and be heard, and undermining the voter's ability to be adequately informed of all views. Equality in the political discourse is thus necessary for meaningful participation in the electoral process and ultimately enhances the right to vote. This right, therefore, does not guarantee unimpeded and unlimited electoral debate or expression. Spending limits, however, must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to the voter; if overly restrictive, they may undermine the informational component of the right to vote. Here, s. 350 does not interfere with the right of each citizen to play a meaningful role in the electoral process.

The harm that Parliament seeks to address in this case is electoral unfairness. Given the difficulties in measuring this harm, at the stage of the justification analysis a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient. Furthermore, on balance, the contextual factors favour a deferential approach to Parliament in determining whether such limits are demonstrably justified in a free and democratic society. While the right to political expression lies at the core of the guarantee of free expression and warrants a high degree of constitutional protection, there is nevertheless a danger that political advertising may manipulate or oppress the voter. Parliament had to balance the rights and privileges of

all the participants in the electoral process. The difficulties of striking this balance are evident and, given the right of Parliament to choose Canada's electoral model and the nuances inherent in implementing this model, a court must approach the justification analysis with deference.

Section 350 is justified under s. 1 of the *Charter*. While the overarching objective of the third party advertising expense limits is electoral fairness, more narrowly characterized, the objectives of the scheme are threefold: (1) to promote equality in the political discourse; (2) to protect the integrity of the financing regime applicable to candidates and parties; and (3) to ensure that voters have confidence in the electoral process. In view of the findings of the Lortie Commission, the central piece of the evidential record in this case, these three objectives are pressing and substantial. Section 350 also meets the proportionality test. First, the third party advertising expense limits are rationally connected to the objectives. They prevent those who have access to significant financial resources, and are able to purchase unlimited amount of advertising, to dominate the electoral discourse to the detriment of others; they create a balance between the financial resources of each candidate or political party; and they advance the perception that the electoral process is substantively fair as it provides for a reasonable degree of equality between citizens who wish to participate in that process. Second, s. 350 minimally impairs the right to free expression. Third party advertising is unrestricted prior to the commencement of the election period, and third parties may freely spend money or advertise to make their views known or to persuade others. Further, the definition of "election advertising" in s. 319 only applies to advertising that is associated with a candidate or party. The limits set out in s. 350 allow third parties to inform the electorate of their message in a manner that will not overwhelm candidates, political parties or other third parties while precluding the voices of the wealthy from

dominating the political discourse. Third, the s. 350's salutary effects of promoting fairness and accessibility in the electoral system and increasing Canadians' confidence in it outweigh the deleterious effect that the spending limits permit third parties to engage in informational but not necessarily persuasive campaigns.

Section 351 is ancillary to s. 350 and its primary purpose is to preserve the integrity of the advertising expense limits established under s. 350. It does not violate the freedom of expression, the right to vote or freedom of association. With respect to freedom of association, s. 351 does not prevent individuals from joining to form an association in the pursuit of a collective goal but rather precludes an individual or group from undertaking an activity, namely circumventing the third party election advertising limits set out in s. 350.

Section 323 infringes the right to free expression by prohibiting third parties from advertising on polling day. While it also engages the informational component of the right to vote, s. 323 does not infringe s. 3 as it does not have an adverse impact on the information available to voters. The infringement of s. 2(*b*) can be saved under s. 1. The objective of s. 323 — to provide an opportunity to respond to any potentially misleading election advertising — is pressing and substantial. The section is rationally connected to this objective and is minimally impairing. The blackout period is approximately 20 hours long and only applies to advertising. It has not been demonstrated to have any deleterious effects.

Because they restrict the political expression of those who do not comply with the scheme, ss. 352 to 357, 359, 360 and 362 have the effect of limiting free expression. They do not infringe s. 3, however, as they enhance the right to vote. The

infringement of s. 2(*b*) is justified under s. 1. These provisions advance the pressing and substantial objectives of proper implementation and enforcement of the third party election advertising limits and of provision to voters of relevant election information. They are rationally connected to the first objective and the disclosure provisions, by adding transparency to the electoral process, are also rationally connected to the second objective. Sections 352 to 357, 359, 360 and 362 are minimally impairing. The disclosure and reporting requirements vary depending on the amount spent on election advertising and the personal information required of contributors is minimal. The salutary effects of the impugned measures outweigh the deleterious effects. By increasing the transparency and accountability of the electoral process, they discourage circumvention of the third party limits and enhance the confidence Canadians have in their electoral system. The deleterious effects, by contrast, are minimal.

Per McLachlin C.J. and Major and Binnie JJ. (dissenting in part): The third party advertising spending limits in s. 350 of the *Canada Elections Act* are inconsistent with the s. 2(*b*) *Charter* guarantees and, hence, invalid. The effect of third party limits for spending on advertising is to prevent citizens from effectively communicating their views on issues during an election campaign. The denial of effective communication to citizens violates free expression where it warrants the greatest protection — the sphere of political discourse. Section 350 puts effective radio and television communication beyond the reach of "third party" citizens, preventing citizens from effectively communicating their views on election issues, and restricting them to minor local communication. Effective expression of ideas thus becomes the exclusive right of registered political parties and their candidates.

Because citizens cannot mount effective national television, radio and print campaigns, the only sustained messages voters see and hear during the course of an election campaign are from political parties. The right of a citizen to hold views not espoused by a registered party and to communicate those views is essential to the effective debate upon which our democracy rests, and lies at the core of the free expression guarantee. Any limits to this right must be justified under s. 1 of the *Charter* by a clear and convincing demonstration that they serve a valid objective, do not go too far, and enhance more than harm the democratic process. Promoting electoral fairness by ensuring the equality of each citizen in elections, preventing the voices of the wealthy from drowning out those of others, and preserving confidence in the electoral system, are pressing and substantial objectives in a liberal democracy.

However, the infringement of the right to free expression is not proportionate to these objectives. There is no evidence to support a connection between the limits on citizen spending and electoral fairness, and the legislation does not infringe the right to free expression in a way that is measured and carefully tailored to the goals sought to be achieved. The limits imposed on citizens amount to a virtual ban on their participation in political debate during the election period, except through political parties. As in *Libman*, the Attorney General has not demonstrated that limits this draconian are required to meet the perceived dangers.

Section 351 is invalid since it is keyed exclusively to the spending limits in s. 350. The polling day blackout in s. 323 infringes s. 2(*b*) of the *Charter*, but is justified as a reasonable measure in a free and democratic society under s. 1. The provisions in ss. 352 to 357, 359, 360 and 362 of the Act requiring citizens to register with the Chief Electoral Officer, self-identify on advertisements, and disclose their adherents and the

nature of their expenditures serves the interests of transparency and an informed vote in the political process. Thus, the infringements to s. 2(*b*) are saved by s. 1.

Cases Cited

By Bastarache J.

Applied: *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Oakes*, [1986] 1 S.C.R. 103; **disapproved:** *Somerville v. Canada (Attorney General)* (1996), 184 A.R. 241; *Pacific Press v. British Columbia (Attorney General)*, [2000] 5 W.W.R. 219, 2000 BCSC 248; **referred to:** *National Citizens' Coalition Inc. v. Attorney General of Canada* (1984), 32 Alta. L.R. (2d) 249; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

By McLachlin C.J. and Major J. (dissenting in part)

Libman v. Quebec (Attorney General), [1997] 3 S.C.R. 569; *R. v. Guignard*, [2002] 1 S.C.R. 472, 2002 SCC 14; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *United States v. Dellinger*, 472 F.2d 340 (1972); *Somerville v. Canada (Attorney General)* (1996), 184 A.R. 241; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *R. v. Butler*, [1992] 1 S.C.R. 452; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

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Canada Elections Act, S.C. 1974, c. 5.

Canada Elections Act, S.C. 2000, c. 9, ss. 319, 323, Part 17, 350, 351, 352 to 357, 359, 360, 362, 496, 500, 501.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), (*d*), 3.

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APPEAL from a judgment of the Alberta Court of Appeal (2002), 14 Alta. L.R. (4th) 4, 223 D.L.R. (4th) 275, 320 A.R. 1, [2003] 8 W.W.R. 595, [2002] A.J. No. 1542 (QL), 2002 ABCA 301, affirming a judgment of the Court of Queen's Bench (2001), 93 Alta. L.R. (3d) 281, 295 A.R. 1, 9 W.W.R. 650, [2001] A.J. No. 808 (QL), 2001 ABQB 558. Appeal allowed, McLachlin C.J. and Major and Binnie JJ. dissenting in part.

Graham R. Garton, Q.C., and *Kirk Lambrecht, Q.C.*, for the appellant.

Alan D. Hunter, Q.C., *Eric P. Groody* and *David H. de Vlieger*, for the respondent.

Daniel Guttman and *Michel Y. Hélie*, for the intervener the Attorney General of Ontario.

Jean-Yves Bernard and *Jean-Vincent Lacroix*, for the intervener the Attorney General of Quebec.

Eugene B. Szach, for the intervener the Attorney General of Manitoba.

David Baker and *Faisal Bhabha*, for the interveners Democracy Watch and National Anti-Poverty Organization.

Peter F. M. Jones, for the intervener Environment Voters, a division of Animal Alliance of Canada.

John Herbert Bryden, appearing on his own behalf.

The reasons of McLachlin C.J. and Major and Binnie JJ. were delivered by

1 THE CHIEF JUSTICE AND MAJOR J. (dissenting in part) — This Court has repeatedly held that liberal democracy demands the free expression of political opinion, and affirmed that political speech lies at the core of the *Canadian Charter of Rights and Freedoms*' guarantee of free expression. It has held that the freedom of expression includes the right to attempt to persuade through peaceful interchange. And it has

observed that the electoral process is the primary means by which the average citizen participates in the public discourse that shapes our polity. The question now before us is whether these high aspirations are fulfilled by a law that effectively denies the right of an ordinary citizen to give meaningful and effective expression to her political views during a federal election campaign.

2 The law at issue sets advertising spending limits for citizens — called third parties — at such low levels that they cannot effectively communicate with their fellow citizens on election issues during an election campaign. The practical effect is that effective communication during the writ period is confined to registered political parties and their candidates. Both enjoy much higher spending limits. This denial of effective communication to citizens violates free expression where it warrants the greatest protection — the sphere of political discourse. As in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, the incursion essentially denies effective free expression and far surpasses what is required to meet the perceived threat that citizen speech will drown out other political discourse. It follows that the law is inconsistent with the guarantees of the *Charter* and, hence, invalid.

I. Citizen Spending Limits

A. *What the Law Does*

3 The *Canada Elections Act*, S.C. 2000, c. 9, sets limits for spending on advertising for individuals and groups. It limits citizens to spending a maximum of $3,000 in each electoral district up to a total of $150,000 nationally. Section 350 provides:

> **350.** (1) A third party shall not incur election advertising expenses of a total amount of more than $150,000 during an election period in relation to a general election.
>
> (2) Not more than $3,000 of the total amount referred to in subsection (1) shall be incurred to promote or oppose the election of one or more candidates in a given electoral district, including by
>
> (*a*) naming them;
>
> (*b*) showing their likenesses;
>
> (*c*) identifying them by their respective political affiliations; or
>
> (*d*) taking a position on an issue with which they are particularly associated.

Section 350(2)(*d*) is particularly restrictive. It prohibits individuals from spending more than the allowed amounts on any issue with which a candidate is "particularly associated". The candidates in an election are typically associated with a wide range of views on a wide range of issues. The evidence shows that the effect of the limits is to prevent citizens from effectively communicating their views on issues during an election campaign.

4 The limits do not permit citizens to effectively communicate through the national media. The Chief Electoral Officer testified that it costs approximately $425,000 for a one-time full-page advertisement in major Canadian newspapers. The Chief Electoral Officer knows from personal experience that this is the cost of such communication with Canadians, because he used this very method to inform Canadians of the changes to the *Canada Elections Act* prior to the last federal election. It is telling that the Chief Electoral Officer would have been unable to communicate this important

change in the law to Canadians were he subject — as are other Canadians — to the national expenditure limit of $150,000 imposed by the law.

5 Nor do the limits permit citizens to communicate through the mail. The Canada Post bulk mailing rate for some ridings amounts to more than $7,500, effectively prohibiting citizens from launching a mail campaign in these ridings without exceeding the $3,000 limit.

6 The $3,000 riding limits are further reduced by the national limit of $150,000, which precludes citizens from spending the maximum amount in each of the 308 ridings in Canada. This effectively diminishes the $3,000 riding maximum. Quite simply, it puts effective radio and television communication within constituencies or throughout the country beyond the reach of "third party" citizens.

7 Under the limits, a citizen may place advertisements in a local paper within her constituency. She may print some flyers and distribute them by hand or post them in conspicuous places. She may write letters to the editor of regional and national newspapers and hope they will be published. In these and other ways, she may be able to reach a limited number of people on the local level. But she cannot effectively communicate her position to her fellow citizens throughout the country in the ways those intent on communicating such messages typically do — through mail-outs and advertising in the regional and national media. The citizen's message is thus confined to minor local dissemination with the result that effective local, regional and national expression of ideas becomes the exclusive right of registered political parties and their candidates.

8 Comparative statistics underline the meagerness of the limits. The national advertising spending limits for citizens represent 1.3 percent of the national advertising limits for political parties. In Britain, a much more geographically compact country, the comparable ratio is about 5 percent. It is argued that the British limits apply to different categories of advertising over a greater period, but the discrepancy nevertheless remains significant.

9 It is therefore clear that the *Canada Elections Act*'s advertising limits prevent citizens from effectively communicating their views on election issues to their fellow citizens, restricting them instead to minor local communication. As such, they represent a serious incursion on free expression in the political realm. The Attorney General raises three reasons why this restriction is justified as a reasonable limit in a free and democratic society under s. 1 of the *Charter*: to ensure the equality of each citizen in elections; to prevent the voices of the wealthy from drowning out those of others; and to preserve confidence in the electoral system. Whether that is so is the question in this appeal.

B. *Is the Incursion on Free Speech Justified?*

(1) The Significance of the Infringement

10 One cannot determine whether an infringement of a right is justified without examining the seriousness of the infringement. Our jurisprudence on the guarantee of the freedom of expression establishes that some types of expression are more important and hence more deserving of protection than others. To put it another way, some restrictions on freedom of expression are easier to justify than others.

11 Political speech, the type of speech here at issue, is the single most important and protected type of expression. It lies at the core of the guarantee of free expression; see *R. v. Guignard*, [2002] 1 S.C.R. 472, 2002 SCC 14, at para. 20; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 23; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 92; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at p. 175; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 968.

12 The right of the people to discuss and debate ideas forms the very foundation of democracy; see *Reference re Alberta Statutes*, [1938] S.C.R. 100, at pp. 145-46. For this reason, the Supreme Court of Canada has assiduously protected the right of each citizen to participate in political debate. As Dickson C.J. stated in *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 764, "[t]he state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all."

13 Section 2(*b*) of the *Charter* aims not just to guarantee a voice to registered political parties, but an equal voice to <u>each citizen</u>. The right of <u>each citizen</u> to participate in democratic discussion was embraced by Iacobucci J., who elaborated on the scope of s. 3 for the Court in *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37, at para. 26:

> Section 3 does not advert to the composition of Parliament subsequent to an election, but only to the right of each citizen to a certain level of participation in the electoral process. <u>On its very face, then, the central</u>

> focus of s. 3 is the right of each citizen to participate in the electoral process. This signifies that the right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society and suggests that s. 3 should be interpreted in a manner that ensures that this right of participation embraces a content commensurate with the importance of individual participation in the selection of elected representatives in a free and democratic state. Defining the purpose of s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the composition of Parliament subsequent to an election, better ensures that the right of participation that s. 3 explicitly protects is not construed too narrowly. [Emphasis added.]

14 Permitting an effective voice for unpopular and minority views — views political parties may not embrace — is essential to deliberative democracy. The goal should be to bring the views of all citizens into the political arena for consideration, be they accepted or rejected at the end of the day. Free speech in the public square may not be curtailed merely because one might find the message unappetizing or the messenger distasteful (*Figueroa*, *supra*, at para. 28):

> Put simply, full political debate ensures that ours is an open society with the benefit of a broad range of ideas and opinions. . . . This, in turn, ensures not only that policy makers are aware of a broad range of options, but also that the determination of social policy is sensitive to the needs and interests of a broad range of citizens.

Participation in political debate "is . . . the primary means by which the average citizen participates in the open debate that animates the determination of social policy"; see *Figueroa*, at para. 29.

15 The right to participate in political discourse is a right to effective participation — for each citizen to play a "meaningful" role in the democratic process, to borrow again from the language of *Figueroa*. In *Committee for the Commonwealth*, *supra*, at p. 250, McLachlin J. stated that s. 2(*b*) aspires to protect "the interest of the

individual in effectively communicating his or her message to members of the public" (emphasis added). In the same case, Lamer C.J. declared that "it must be understood that the individual has an interest in communicating his ideas in a place which, because of the presence of listeners, will favour the effective dissemination of what he has to say" (emphasis added); see *Committee for the Commonwealth*, at p. 154.

16 The ability to engage in effective speech in the public square means nothing if it does not include the ability to attempt to persuade one's fellow citizens through debate and discussion. This is the kernel from which reasoned political discourse emerges. Freedom of expression must allow a citizen to give voice to her vision for her community and nation, to advocate change through the art of persuasion in the hope of improving her life and indeed the larger social, political and economic landscape; see *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8, at para. 32; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 43.

17 Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public — as viewers, listeners and readers — have a right to information on public governance, absent which they cannot cast an informed vote; see *Edmonton Journal*, *supra*, at pp. 1339-40. Thus the *Charter* protects listeners as well as speakers; see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 766-67.

18 This is not a Canadian idiosyncrasy. The right to receive information is enshrined in both the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), and the *International Covenant on Civil and Political*

Rights, Can. T.S. 1976 No. 47. Canada is a signatory to both. American listeners enjoy the same right; see *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), at p. 390; *Martin v. City of Struthers*, 319 U.S. 141 (1943), at p. 143. The words of Marshall J., dissenting, in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), at p. 775, ring as true in this country as they do in our neighbour to the south:

> [T]he right to speak and hear — including the right to inform others and to be informed about public issues — are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the means indispensable to the discovery and spread of political truth. [Citations omitted.]

19 The *Canada Elections Act* undercuts the right to listen by withholding from voters an ingredient that is critical to their individual and collective deliberation: substantive analysis and commentary on political issues of the day. 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, the only sustained messages voters see and hear during the course of an election campaign are from political parties.

20 It is clear that the right here at issue is of vital importance to Canadian democracy. In the democracy of ancient Athens, all citizens were able to meet and discuss the issues of the day in person. In our modern democracy, we cannot speak personally with each of our fellow citizens. We can convey our message only through methods of mass communication. Advertising through mail-outs and the media is one

of the most effective means of communication on a large scale. We need only look at the reliance of political parties on advertising to realize how important it is to actually reaching citizens — in a word, to effective participation. The ability to speak in one's own home or on a remote street corner does not fulfill the objective of the guarantee of freedom of expression, which is that each citizen be afforded the opportunity to present her views for public consumption and attempt to persuade her fellow citizens. Pell J.'s observation could not be more apt: "[s]peech without effective communication is not speech but an idle monologue in the wilderness"; see *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), at p. 415.

21 This is the perspective from which we must approach the question whether the limitation on citizen spending is justified. It is no answer to say that the citizen can speak through a registered political party. The citizen may hold views not espoused by a registered party. The citizen has a right to communicate those views. The right to do so is essential to the effective debate upon which our democracy rests, and lies at the core of the free expression guarantee. That does not mean that the right cannot be limited. But it does mean that limits on it must be supported by a clear and convincing demonstration that they are necessary, do not go too far, and enhance more than harm the democratic process.

(2) <u>The Law's Objective: Is It Pressing and Substantial?</u>

22 Under this head we consider the reasons given by the Attorney General to justify limiting the right of citizens to freely express themselves on political issues during the election period. The Attorney General states that the objective of the legislation is to promote fair elections.

23 In more concrete terms, the limits are purported to further three objectives: first, to favour equality, by preventing those with greater means from dominating electoral debate; second, to foster informed citizenship, by ensuring that some positions are not drowned out by others (this is related to the right to participate in the political process by casting an informed vote); third, to enhance public confidence by ensuring equality, a better informed citizenship and fostering the appearance and reality of fairness in the democratic process.

24 These are worthy social purposes, endorsed as pressing and substantial by this Court in *Libman*, *supra*, at para. 47:

> Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions so that election discourse is not dominated by those with access to greater financial resources.

25 The Alberta courts in this case found that the stated objective was not pressing and substantial. We cannot accept that conclusion for two reasons. First, as discussed, this Court has clearly found it to be pressing and substantial in *Libman,* in so doing expressly rejecting the earlier Alberta decision in *Somerville v. Canada (Attorney General)* (1996), 184 A.R. 241 (C.A.). Second, the Alberta courts, with respect, posed the wrong question. They asked whether the evidence proved a pressing and substantial reason to impose limits on citizen spending existed. But the proper question at this stage of the analysis is whether the Attorney General has asserted a pressing and substantial objective. Whether the objective is furthered falls to be considered at the proportionality

analysis which inquires into rational connection, minimal impairment and whether the benefit conferred (if any) outweighs the significance of the infringement.

26 Common 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; see *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 38. A theoretical objective asserted as pressing and substantial is sufficient for purposes of the s. 1 justification analysis; see *Thomson Newspapers*, *supra*, at para. 38; *Harvey*, *supra*, at para. 38; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 191; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 281; *Edmonton Journal*, *supra*, at pp. 1343-45.

27 Thus we find that the Attorney General has asserted a pressing and substantial objective.

C. *Proportionality*

(1) Rational Connection

28 The first inquiry in determining whether the infringement is proportionate to the harm done is whether there is a rational connection between the infringing measure and the pressing and substantial objective that the infringement is said to serve. In this case, the question is whether the limits on citizen spending are rationally connected to ensuring electoral fairness in the sense of giving citizens an equal voice in elections, informing the public on electoral issues and preserving public confidence in the electoral system.

29 The Attorney General has offered no evidence to support a connection between the limits on citizen spending and electoral fairness. However, reason or logic may establish the requisite causal link; see *Sharpe*, *supra*; *R. v. Butler*, [1992] 1 S.C.R. 452. In *Thomson Newspapers*, *supra*, the Court accepted as reasonable the conclusion that polls exert significant influence on the electoral process and individual electoral choice. More to the point, in *Libman*, *supra*, the Court concluded that electoral spending limits are rationally connected to the objective of fair elections. While some of the evidence on which this conclusion was based has since been discredited, the conclusion that limits may in theory further electoral fairness is difficult to gainsay.

30 Nevertheless, the supposition that uncontrolled spending could favour the messages of wealthier citizens or adversely affect the ability of less wealthy citizens to become informed on electoral issues is not irrational, particularly in a regime where party spending is limited. It follows that spending limits may, at least in principle, promote electoral fairness.

31 The real question in this case is not whether there exists a rational connection between the government's stated objectives and the limits on citizens imposed by the *Canada Elections Act*. It is whether the limits go too far in their incursion on free political expression.

(2) Minimal Impairment

32 The question at this stage is whether the legislation infringes the right to free expression in a way that is measured and carefully tailored to the goals sought to be

achieved. The "impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160. The difficulty with the Attorney General's case lies in the disproportion between the gravity of the problem — an apprehended possibility of harm — and the severity of the infringement on the right of political expression.

33 It is impossible to say whether an infringement is carefully tailored to the asserted goals without having some idea of the actual seriousness of the problem being addressed. The yardstick by which excessive interference with rights is measured is the need for the remedial infringement. If a serious problem is demonstrated, more serious measures may be needed to tackle it. Conversely, if a problem is only hypothetical, severe curtailments on an important right may be excessive.

34 Here the concern of the Alberta courts that the Attorney General had not shown any real problem requiring rectification becomes relevant. The dangers posited are wholly hypothetical. The Attorney General presented no evidence that wealthier Canadians — alone or in concert — will dominate political debate during the electoral period absent limits. It offered only the hypothetical possibility that, without limits on citizen spending, problems could arise. If, as urged by the Attorney General, wealthy Canadians are poised to hijack this country's election process, an expectation of some evidence to that effect is reasonable. Yet none was presented. This minimizes the Attorney General's assertions of necessity and lends credence to the argument that the legislation is an overreaction to a non-existent problem.

35 On the other side of the equation, the infringement on the right is severe. We earlier reviewed the stringency of the limits. They prevent citizens from effectively communicating with their fellow citizens on election issues during a campaign. Any communication beyond the local level is effectively rendered impossible, and even at that level is seriously curtailed. The spending limits do not allow citizens to express themselves through mail-outs within certain ridings, radio and television media, nor the national press. Citizens are limited to 1.3 percent of the expenditures of registered political parties. This is significantly lower than other countries that have also imposed citizen spending limits. It is not an exaggeration to say that the limits imposed on citizens amount to a virtual ban on their participation in political debate during the election period. In actuality, the only space left in the marketplace of ideas is for political parties and their candidates. The right of each citizen to have her voice heard, so vaunted in *Figueroa*, *supra*, is effectively negated unless the citizen is able or willing to speak through a political party.

36 On this point, this case is indistinguishable from *Libman*, *supra*, where the Court held that the spending limits imposed on citizens in the course of a referendum campaign did not satisfy the requirement of minimal impairment. The Court held that the legislature in a case such as this must try to strike a balance between the right to free expression and equality among the citizens in expressing their views. The limits imposed failed to meet the minimal impairment test in the case of individuals and groups who could neither join nor affiliate themselves with the national committees. The Court stated that the restrictions were so severe that they came close to being a total ban and that better, less intrusive alternatives existed. The situation is precisely the same here.

37 In *Libman*, *supra*, at para. 63, the Court stated that "[i]t can be seen from the evidence that the legislature went to considerable lengths, in good faith, in order to adopt means that would be as non-intrusive as possible while at the same time respecting the objective it had set." Here, too, Parliament's good faith is advanced, said to be evidenced by the ongoing dialogue with the courts as to where the limits should be set. But as in *Libman*, good faith cannot remedy an impairment of the right to freedom of expression.

38 There is no demonstration that limits this draconian are required to meet the perceived dangers of inequality, an uninformed electorate and the public perception that the system is unfair. On the contrary, the measures may themselves exacerbate these dangers. Citizens who cannot effectively communicate with others on electoral issues may feel they are being treated unequally compared to citizens who speak through political parties. The absence of their messages may result in the public being less well informed than it would otherwise be. And a process that bans citizens from effective participation in the electoral debate during an election campaign may well be perceived as unfair. These fears may be hypothetical, but no more so than the fears conjured by the Attorney General in support of the infringement.

39 This is not to suggest that election spending limits are never permissible. On the contrary, this Court in *Libman* has recognized that they are an acceptable, even desirable, tool to ensure fairness and faith in the electoral process. Limits that permit citizens to conduct effective and persuasive communication with their fellow citizens might well meet the minimum impairment test. The problem here is that the draconian nature of the infringement — to effectively deprive all those who do not or cannot speak through political parties of their voice during an election period — overshoots the

perceived danger. Even recognizing that "[t]he tailoring process seldom admits of perfection" (*RJR-MacDonald*, *supra*, at para. 160), and according Parliament a healthy measure of deference, we are left with the fact that nothing in the evidence suggests that a virtual ban on citizen communication through effective advertising is required to avoid the hypothetical evils of inequality, a misinformed public and loss of public confidence in the system.

(3) Proportionality

40 The same logic that leads to the conclusion that the Attorney General has not established that the infringement minimally impairs the citizen's right of free speech applies equally to the final stage of the proportionality analysis, which asks us to weigh the benefits conferred by the infringement against the harm it may occasion.

41 Given the unproven and speculative nature of the danger the limits are said to address, the possible benefits conferred by the law are illusory. The smaller the danger, the less the benefit conferred. Yet the infringement is serious. It denies the citizen the right of effective political communication except through a registered party. The denial is made all the more serious because political expression lies at the heart of the guarantee of free expression and underpins the very foundation of our democracy. The measures may actually cause more inequality, less civic engagement and greater disrepute than they avoid. In the absence of any evidence to the contrary, it cannot be said that the infringement does more good than harm.

42 Having had the advantage of reviewing the reasons of Bastarache J., we believe it is important to make three observations. First, whether or not citizens dispose

of sufficient funds to meet or exceed the existing spending limits is irrelevant. What is important is that citizens have the capacity, should they so choose, to exercise their right to free political speech. The spending limits as they currently stand do not allow this. Instead, they have a chilling effect on political speech, forcing citizens into a Hobson's choice between not expressing themselves at all or having their voice reduced to a mere whisper. Faced with such options, citizens could not be faulted for choosing the former.

43 Second, it is important to recognize that the spending limits do not constrain the right of only a few citizens to speak. They constrain the political speech of all Canadians, be they of superior or modest means. Whether it is a citizen incurring expenditures of $3001 for leafleting in her riding or a group of citizens pooling 1501 individual contributions of $100 to run a national advertising campaign, the *Charter* protects the right to free political speech.

44 Finally, even it were true that spending limits constrained the political speech rights of only a few citizens, it would be no answer to say, as suggests Bastarache J., at para. 112, that few citizens can afford to spend more than the limits anyway. This amounts to saying that even if the breach of s. 2(*b*) is not justified, it does not matter because it affects only a few people. *Charter* breaches cannot be justified on this basis. Moreover, one may question the premise that only a few people are affected by the spending limits. Indeed, if so few can afford to spend more than the existing limits, why, one may ask, are they needed?

II. The Anti-Circumvention Provisions

45 Section 351 is designed to prevent a citizen group from circumventing the spending limits imposed in s. 350 by either splitting into two or more groups, or by joining with another group to incur election advertising expenditures exceeding the imposed limits. It provides:

> **351.** A third party shall not circumvent, or attempt to circumvent, a limit set out in section 350 in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the limit or acting in collusion with another third party so that their combined election advertising expenses exceed the limit.

46 This provision is too closely bound up with s. 350 to survive on its own. Under the doctrine of severance, "when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared"; see *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 696. Moreover, "[t]o refuse to sever the offending part, and therefore declare inoperative parts of a legislative enactment which do not themselves violate the Constitution, is surely the more difficult course to justify"; see *Schachter*, at p. 696. But, as Lamer C.J. has explained, at p. 697 (citing *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.), at p. 518), the heart of the matter is

> whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

Parliament cannot be assumed to have enacted s. 351 independently of the citizen election spending limits in s. 350; see *Schachter*, at p. 711. The section is keyed to the spending limits and has no other purpose. For this reason, s. 351 is invalid.

III. The Polling Day Blackout

47 The Attorney General concedes that the blackout on polling day election advertising imposed by s. 323 infringes s. 2(*b*) of the *Charter*. The blackout is directed at political speech — the core purpose of the freedom of expression — and restricts political speech in both aim and effect, creating an unqualified ban preventing candidates, political parties and citizens from issuing election day advertising through the close of polls. However, we agree with Bastarache J. that the infringement of s. 2(*b*) is justified as a reasonable measure in a free and democratic society under s. 1 of the *Charter*.

IV. The Attribution, Disclosure and Registration Requirements

48 These requirements, variously found in ss. 352 to 357, 359, 360 and 362 of the *Canada Elections Act*, are not keyed to the citizen election spending limits in s. 350. Requiring citizens to register with the Chief Electoral Officer, self-identify on advertisements, and disclose their adherents and the nature of their expenditures serves the interests of transparency and an informed vote in the political process. We agree with Bastarache J. that the infringement that these provisions work on the freedom of expression is saved by s. 1.

V. Conclusion

49 We would allow the appeal in part and answer the constitutional questions as follows:

1. Do ss. 323(1) and (3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Yes with respect to ss. 323(1) and (3), 350, 352 to 357, 359, 360 and 362.

It is not necessary to answer this question with respect to s. 351.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No with respect to s. 350. Yes with respect to ss. 323(1) and (3), 352 to 357, 359, 360 and 362. It is not necessary to answer this question with respect to s. 351.

3. Do ss. 323(1) and (3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 3 of the *Canadian Charter of Rights and Freedoms*?

No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

5. Do ss. 351, 356, 357(3), 359 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

No with respect to ss. 356, 357(3), 359 and 362. It is not necessary to answer this question with respect to s. 351.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

The judgment of Iacobucci, Bastarache, Arbour, LeBel, Deschamps and Fish JJ. was delivered by

BASTARACHE J. —

I. Introduction

50 At issue in this appeal is whether the third party spending provisions of the *Canada Elections Act*, S.C. 2000, c. 9, violate ss. 2(*b*), 2(*d*) and 3 of the *Canadian Charter of Rights and Freedoms*. To resolve this issue, the Court must reconcile the right to meaningfully participate in elections under s. 3 with the right to freedom of expression under s. 2(*b*). This appeal also requires the Court to revisit the principles and guidelines set out in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, in the regulation of elections. Finally, this appeal calls for a consideration of the principles developed in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, about the nature and sufficiency of evidence required when Parliament adopts a regulatory regime to govern the electoral process.

II. Judicial History

A. *Alberta Court of Queen's Bench* (2001), 93 Alta. L.R. (3d) 281

51 The trial judge, Cairns J., divided the impugned provisions of the Act's third party electoral advertising regime into four broad categories: spending limits; the attribution, registration and disclosure requirements; the election day advertising blackout; and the off-shore contributions ban. He concluded that the spending limits found in ss. 350 and 351 infringed ss. 2(*b*) and 2(*d*) of the *Charter* and could not be saved under s. 1. Not only did Cairns J. find s. 350 void for vagueness (para. 216), he also found that the Attorney General of Canada had not adduced sufficient evidence to establish that the objective of the limits — electoral fairness — was pressing and substantial. According to Cairns J., there was no actual evidence on the record before him of third party spending leading to a disproportionate influence upon the electorate. Nor was there any evidence that third party spending had dominated the electoral discourse (para. 261). In his view, the Court's decision in *Libman*, *supra*, did not determine any of the issues before him (para. 193). In particular, Cairns J. placed little weight on the findings of the Royal Commission on Electoral Reform and Party Financing ("Lortie Commission"), which concluded that third party spending limits were necessary to promote and preserve electoral fairness (*Reforming Electoral Democracy* (1991), vol. 1 ("Lortie Report")). He took the position that the Commission's recommendations regarding third party spending were of little value as they relied primarily on a preliminary study by Richard Johnston ("The Volume and Impact of Third Party Advertising in the 1988 Election" (1990) ("Johnston Report"), concluding that third party advertising had an impact on the outcome of the 1988 federal election.

Johnston later changed his position based on the final statistical analysis of his study (R. Johnston et al., *Letting the People Decide: Dynamics of a Canadian Election* (1992)).

B. *Alberta Court of Appeal* (2002), 14 Alta. L.R. (4th) 4

52 The Court of Appeal dismissed the appeal. Paperny J.A., writing for the majority, also allowed the cross-appeal and struck down ss. 323, 350 to 357, 359, 360 and 362 of the Act on the basis that the provisions "must all stand or fall together as part of the same design" (para. 193). Berger J.A. dissented. While the spending limits infringed s. 2(*b*), they were reasonable and demonstrably justified under s. 1. In his opinion, the enactments were an appropriate legislative response to the judicial guidance provided by this Court in *Libman*, *supra*.

III. Relevant Statutory Provisions

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

> **323.** (1) No person shall knowingly transmit election advertising to the public in an electoral district on polling day before the close of all of the polling stations in the electoral district.
>
> (2) The transmission to the public of a notice of an event that the leader of a registered party intends to attend or an invitation to meet or hear the leader of a registered party is not election advertising for the purpose of subsection (1).
>
> (3) For the purpose of subsection (1), a person includes a registered party and a group within the meaning of Part 17.
>
> **350.** (1) A third party shall not incur election advertising expenses of a total amount of more than $150,000 during an election period in relation to a general election.

(2) Not more than $3,000 of the total amount referred to in subsection (1) shall be incurred to promote or oppose the election of one or more candidates in a given electoral district, including by

(*a*) naming them;

(*b*) showing their likenesses;

(*c*) identifying them by their respective political affiliations; or

(*d*) taking a position on an issue with which they are particularly associated.

(3) The limit set out in subsection (2) only applies to an amount incurred with respect to a leader of a registered party or eligible party to the extent that it is incurred to promote or oppose his or her election in a given electoral district.

(4) A third party shall not incur election advertising expenses of a total amount of more than $3,000 in a given electoral district during the election period of a by-election.

(5) The amounts referred to in subsections (1), (2) and (4) shall be multiplied by the inflation adjustment factor referred to in section 414 that is in effect on the issue of the writ or writs.

351. A third party shall not circumvent, or attempt to circumvent, a limit set out in section 350 in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the limit or acting in collusion with another third party so that their combined election advertising expenses exceed the limit.

352. A third party shall identify itself in any election advertising placed by it and indicate that it has authorized the advertising.

353. (1) A third party shall register immediately after having incurred election advertising expenses of a total amount of $500 and may not register before the issue of the writ.

(2) An application for registration shall be sent to the Chief Electoral Officer in the prescribed form and shall include

(*a*) the name, address and telephone number of

(i) if the third party is an individual, the individual,

(ii) if the third party is a corporation, the corporation and the officer who has signing authority for it, and

(iii) if the third party is a group, the group and a person who is responsible for the group;

(*b*) the signature of the individual, officer or person referred to in subparagraph (*a*)(i), (ii) or (iii), respectively, as the case may be;

(*c*) the address and telephone number of the office of the third party where its books and records are kept and of the office to which communications may be addressed; and

(*d*) the name, address and telephone number of the third party's financial agent.

(3) An application under subsection (2) must be accompanied by a declaration signed by the financial agent accepting the appointment.

(4) If a third party's financial agent is replaced, it shall, without delay, provide the Chief Electoral Officer with the new financial agent's name, address and telephone number and a declaration signed by the new financial agent accepting the appointment.

(5) If the third party is a trade union, corporation or other entity with a governing body, the application must include a copy of the resolution passed by its governing body authorizing it to incur election advertising expenses.

(6) The Chief Electoral Officer shall, without delay after receiving an application, determine whether the requirements set out in subsections (1) to (3) and (5) are met and shall then notify the person who signed the application whether the third party is registered. In the case of a refusal to register, the Chief Electoral Officer shall give reasons for the refusal.

(7) A third party may not be registered under a name that, in the opinion of the Chief Electoral Officer, is likely to be confused with the name of a candidate, registered party, registered third party or eligible party.

(8) The registration of a third party is valid only for the election period during which the application is made, but the third party continues to be subject to the requirement to file an election advertising report under subsection 359(1).

354. (1) A third party that is required to register under subsection 353(1) shall appoint a financial agent who may be a person who is authorized to sign an application for registration made under that subsection.

(2) The following persons are not eligible to be a financial agent of a third party:

(*a*) a candidate or an official agent of a candidate;

(*b*) a person who is the chief agent, or a registered agent, of a registered party;

(*c*) an election officer or an employee of a returning officer; and

(*d*) a person who is not a Canadian citizen or a permanent resident as defined in subsection 2(1) of the *Immigration Act*.

355. (1) A third party that incurs election advertising expenses in an aggregate amount of $5,000 or more must appoint an auditor without delay.

(2) The following are eligible to be an auditor for a third party:

(*a*) a person who is a member in good standing of a corporation, an association or an institute of professional accountants; or

(*b*) a partnership every partner of which is a member in good standing of a corporation, an association or an institute of professional accountants.

(3) The following persons are not eligible to be an auditor for a third party:

(*a*) the third party's financial agent;

(*b*) a person who signed the application made under subsection 353(2);

(*c*) an election officer;

(*d*) a candidate;

(*e*) the official agent of a candidate;

(*f*) the chief agent of a registered party or an eligible party; and

(*g*) a registered agent of a registered party.

(4) Every third party, without delay after an auditor is appointed, must provide the Chief Electoral Officer with the auditor's name, address, telephone number and occupation and a signed declaration accepting the appointment.

(5) If a third party's auditor is replaced, it must, without delay, provide the Chief Electoral Officer with the new auditor's name, address, telephone number and occupation and a signed declaration accepting the appointment.

356. The Chief Electoral Officer shall maintain, for the period that he or she considers appropriate, a registry of third parties in which is recorded, in relation to each third party, the information referred to in subsections 353(2) and 355(4) and (5).

357. (1) Every contribution made during an election period to a registered third party for election advertising purposes must be accepted by, and every election advertising expense incurred on behalf of a third party must be authorized by, its financial agent.

(2) A financial agent may authorize a person to accept contributions or incur election advertising expenses, but that authorization does not limit the responsibility of the financial agent.

(3) No third party shall use a contribution for election advertising if the third party does not know the name and address of the contributor or is otherwise unable to determine within which class of contributor referred to in subsection 359(6) they fall.

359. (1) Every third party shall file an election advertising report in the prescribed form with the Chief Electoral Officer within four months after polling day.

(2) An election advertising report shall contain

(*a*) in the case of a general election,

(i) a list of election advertising expenses referred to in subsection 350(2) and the time and place of the broadcast or publication of the advertisements to which the expenses relate, and

(ii) a list of all election advertising expenses other than those referred to in paragraph (*a*) and the time and place of broadcast or publication of the advertisements to which the expenses relate; and

(*b*) in the case of a by-election, a list of election advertising expenses referred to in subsection 350(3) and the time and place of the broadcast or publication of the advertisements to which the expenses relate.

(3) If a third party has not incurred expenses referred to in paragraph (2)(*a*) or (*b*), that fact shall be indicated in its election advertising report.

(4) The election advertising report shall include

(*a*) the amount, by class of contributor, of contributions for election advertising purposes that were received in the period beginning six months before the issue of the writ and ending on polling day;

(*b*) for each contributor who made contributions of a total amount of more than $200 for election advertising purposes during the period referred to in paragraph (*a*), subject to paragraph (*b*.1), their name, address and class, and the amount and date of each contribution;

(*b*.1) in the case of a numbered company that is a contributor referred to in paragraph (*b*), the name of the chief executive officer or president of that company; and

(*c*) the amount, other than an amount of a contribution referred to in paragraph (*a*), that was paid out of the third party's own funds for election advertising expenses.

(5) For the purpose of subsection (4), a contribution includes a loan.

(6) For the purposes of paragraphs (4)(*a*) and (*b*), the following are the classes of contributor:

(*a*) individuals;

(*b*) businesses;

(*c*) commercial organizations;

(*d*) governments;

(*e*) trade unions;

(*f*) corporations without share capital other than trade unions; and

(*g*) unincorporated organizations or associations other than trade unions.

(7) If the third party is unable to identify which contributions were received for election advertising purposes in the period referred to in paragraph (4)(*a*), it must list, subject to paragraph (4)(*b*.1), the names and addresses of every contributor who donated a total of more than $200 to it during that period.

(8) An election advertising report shall include the signed declarations of the financial agent and, if different, of the person who signed the application made under subsection 353(2) that the report is accurate.

(9) A third party shall, at the request of the Chief Electoral Officer, provide the original of any bill, voucher or receipt in relation to an election advertising expense that is in an amount of more than $50.

360. (1) The election advertising report of a third party that incurs $5,000 or more in election advertising expenses must include a report made under subsection (2).

(2) The third party's auditor shall report on the election advertising report and shall make any examination that will enable the auditor to give an opinion in the report as to whether the election advertising report presents fairly the information contained in the accounting records on which it is based.

(3) An auditor shall include in the report any statement that the auditor considers necessary, when

(*a*) the election advertising report that is the subject of the auditor's report does not present fairly the information contained in the accounting records on which it is based;

(*b*) the auditor has not received from the third party all of the required information and explanation; or

(*c*) based on the auditor's examination, it appears that proper accounting records have not been kept by the third party.

(4) The auditor shall have access at any reasonable time to all of the documents of the third party, and may require the third party to provide any information or explanation, that, in the auditor's opinion, is necessary to enable the auditor to prepare the report.

362. The Chief Electoral Officer shall, in the manner he or she considers appropriate,

(*a*) publish the names and addresses of registered third parties, as they are registered; and

(*b*) publish, within one year after the issue of the writ, reports made under subsection 359(1).

IV. Issues

54 The following constitutional questions were stated by the Chief Justice:

1. Do ss. 323(1) and (3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Do ss. 323(1) and (3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 3 of the *Canadian Charter of Rights and Freedoms*?

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

5. Do ss. 351, 356, 357(3), 359 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

V. Analysis

A. *Third Party Electoral Advertising Regime*

55 Numerous groups and organizations participate in the electoral process as third parties. They do so to achieve three purposes. First, third parties may seek to influence the outcome of an election by commenting on the merits and faults of a particular candidate or political party. In this respect, the influence of third parties is most pronounced in electoral districts with "marginal seats", in other words, in electoral districts where the incumbent does not have a significant advantage. Second, third parties may add a fresh perspective or new dimension to the discourse surrounding one or more issues associated with a candidate or political party. While third parties are true electoral participants, their role and the extent of their participation, like candidates and political parties, cannot be unlimited. Third, they may add an issue to the political debate and in some cases force candidates and political parties to address it.

56 Third party spending limits in Canada have a long and litigious history. Limits on third party spending, together with limits on candidate and political party spending, were introduced in 1974 in the *Canada Elections Act*, pursuant to the recommendations of the Barbeau Committee (*Report of the Committee on Election Expenses* (1966)). Parliament prohibited all independent election spending that directly promoted or opposed a particular candidate or political party (Lortie Report, *supra*, at pp. 327-28). The constitutionality of this prohibition was successfully challenged in

National Citizens' Coalition Inc. v. Attorney General of Canada (1984), 32 Alta. L.R. (2d) 249 (Q.B.). Although the decision was binding only in Alberta, Elections Canada decided not to enforce the prohibition elsewhere in the country (Lortie Report, p. 332). Following the 1988 federal election, Parliament commissioned another Royal Commission, the Lortie Commission, and ultimately re-enacted third party spending limits; see ss. 259.1(1) and 259.2(2) of the *Canada Elections Act*, R.S.C. 1985, c. E-2. The Alberta Court of Appeal declared these federal limits unconstitutional in *Somerville v. Canada (Attorney General)* (1996), 184 A.R. 241.

57 Parliament enacted new third party spending limits as part of a larger third party electoral advertising regime in the 2000 *Canada Elections Act*. Part 17 of the Act, ss. 349 to 362, creates a scheme that limits the advertising expenses of individuals and groups who are not candidates or political parties. The scheme also requires such expenses to be reported to the Chief Electoral Officer. The regime can be broadly divided into four parts. First, s. 350 limits election advertising expenses to $3,000 in a given electoral district and $150,000 nationally. "[E]lection advertising" is defined in s. 319 of the Act as follows:

> "election advertising" means the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including one that takes a position on an issue with which a registered party or candidate is associated. For greater certainty, it does not include
>
> (*a*) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news;
>
> (*b*) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election;

> (*c*) the transmission of a document directly by a person or a group to their members, employees or shareholders, as the case may be; or
>
> (*d*) the transmission by an individual, on a non-commercial basis on what is commonly known as the Internet, of his or her personal political views.

Thus, the limits do not apply to third party advertising prior to the election period or to advertising which promotes an issue that is not associated with a candidate or political party. The second part of the regime is closely related to s. 350 as it prohibits individuals or groups from splitting or colluding for the purposes of circumventing the election advertising limits. Third, the attribution, registration and disclosure provisions (ss. 352 to 357, 359, 360 and 362) require a third party to identify itself in all of its election advertising and, under certain circumstances, to appoint financial agents and auditors who are required to record expenses, to register with, and to report to the Chief Electoral Officer who, in turn, makes this information available to the public. Finally, although s. 323 is not strictly part of the third party electoral advertising regime, third parties are also subject to the advertising blackout on polling day.

58 Therefore, while the regime is internally coherent, it is evident that its constituent parts stand on their own. Indeed, in the absence of advertising expense limits, the attribution, registration and disclosure provisions become increasingly important by shedding light on who is involved in election advertising. Accordingly, the constitutionality of each set of provisions must be considered separately. The Court of Appeal erred in considering them globally.

59 This case represents the first opportunity for this Court to determine the constitutionality of the third party election advertising regime established by Parliament.

This Court has however previously considered the constitutionality of limits on independent spending in the regulation of referendums in *Libman, supra*.

B. *Libman v. Quebec (Attorney General)*

60 In *Libman*, the Court was asked to determine the constitutionality of the independent spending limits set out in Quebec's referenda legislation, the *Referendum Act*, R.S.Q., c. C-64.1. The impugned provisions of the *Referendum Act* circumscribed groups' or individuals' participation in a referendum campaign by requiring that they join the national committee supporting their position or by affiliating themselves with it. Only the national committees and the affiliated groups were permitted to incur "regulated expenses", which were effectively advertising expenses. Mr. Libman did not wish to endorse either position advocated by the national committee. Rather than supporting the "yes" or "no" position, Mr. Libman advocated in favour of abstaining from the vote. Mr. Libman argued that the impugned provisions infringed his rights to freedom of political expression and freedom of association because they restricted campaign expenditures conducted independently of the national committees.

61 The Court agreed that the limits on independent spending set out in the *Referendum Act* were not justified. The Court did, however, endorse spending limits as an essential means of promoting fairness in referenda and elections which the Court held were parallel processes: *Libman*, at para. 46. The Court, relying on the Lortie Report, endorsed several principles applicable to the regulation of election spending generally and of independent or third party spending specifically. They include (at paras. 47-50):

> [1] 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 the freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard [equal dissemination of points of view].
>
> [2] Spending limits are also necessary to guarantee the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties [free and informed vote]. . . .
>
> [3] For spending limits to be fully effective, they must apply to all possible election expenses, including those of independent individuals and groups [application to all-effectiveness of spending limits generally]. . . .
>
> [4] The actions of independent individuals and groups can [either] directly or indirectly support one of the parties or candidates, thereby resulting in an imbalance in the financial resources each candidate or political party is permitted. . . . "At elections, the advocacy of issue positions inevitably has consequences for election discourse and thus has partisan implications, either direct or indirect: voters cast their ballots for candidates and not for issues" [issue advocacy vs partisan advocacy]. . . .
>
> [5] It is also important to limit independent spending more strictly than spending by candidates or political parties. . . . [O]wing to their numbers, the impact of such spending on one of the candidates or political parties to the detriment of the others could be disproportionate [application to all-effectiveness of spending limits generally]. [Emphasis added.]

62 The Court's conception of electoral fairness as reflected in the foregoing principles is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society. This model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation; see C. 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. Thus, the egalitarian model promotes an electoral process that requires the wealthy to be prevented

from controlling the electoral process to the detriment of others with less economic power. The state can equalize participation in the electoral process in two ways; see O. M. Fiss, *The Irony of Free Speech* (1996), at p. 4. First, the State can provide a voice to those who might otherwise not be heard. The Act does so by reimbursing candidates and political parties and by providing broadcast time to political parties. Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well. In Canada, electoral regulation has focussed on the latter by regulating electoral spending through comprehensive election finance provisions. These provisions seek to create a level playing field for those who wish to engage in the electoral discourse. This, in turn, enables voters to be better informed; no one voice is overwhelmed by another. In contrast, the libertarian model of elections favours an electoral process subject to as few restrictions as possible.

63 The current third party election advertising regime is Parliament's response to this Court's decision in *Libman*. The regime is clearly structured on the egalitarian model of elections. The overarching objective of the regime is to promote electoral fairness by creating equality in the political discourse. The regime promotes the equal dissemination of points of view by limiting the election advertising of third parties who, as this Court has recognized, are important and influential participants in the electoral process. The advancement of equality and fairness in elections ultimately encourages public confidence in the electoral system. Thus, broadly speaking, the third party election advertising regime is consistent with an egalitarian conception of elections and the principles endorsed by this Court in *Libman*.

64 In determining the constitutionality of the third party advertising regime, the lower courts failed to follow this Court's guidance in *Libman*. First, they did not give

any deference to Parliament's choice of electoral model. Second, they discarded the findings of the Lortie Commission on the basis of the Johnston Report. Discarding the Lortie Commission's findings led the lower courts to the conclusion that there was no evidence that the objectives of the impugned measures were pressing and substantial. Respectfully, the lower courts erred in doing so. I will deal with the question of the nature and sufficiency of the evidence justifying the third party advertising regime as well as the deference owed to Parliament in adopting a scheme to govern the electoral process in the s. 1 analysis below.

65 I consider first the constitutionality of each discrete set of provisions regulating third party advertising.

C. *Election Advertising Expense Limits*

(1) Freedom of Expression

66 The appellant rightly concedes that the limits on election advertising expenses infringe s. 2(*b*) of the *Charter*. Most third party election advertising constitutes political expression and therefore lies at the core of the guarantee of free expression. As discussed below, in some circumstances, third party election advertising may be less deserving of constitutional protection where it seeks to manipulate voters.

(2) The Right to Vote

67 The respondent also alleges that s. 350 infringes the right to vote protected by s. 3 of the *Charter* on the basis that it guarantees a right to unimpeded and unlimited

electoral debate or expression. The respondent effectively equates the right to meaningful participation with the exercise of freedom of expression. Respectfully, this cannot be. The right to free expression and the right to vote are distinct rights; see *Thomson Newspapers*, *supra*, at para. 80. The more appropriate question is: how are these rights and their underlying values and purposes properly reconciled?

68 The purpose of s. 3 was first considered in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158. McLachlin J. (as she then was), in concluding that s. 3 does not require absolute equality of voting power, held that the purpose of s. 3 is effective representation. She explained, at p. 183:

> It is my conclusion that the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative. . . . [Emphasis in original.]

The Court has confirmed that effective representation is the purpose of s. 3 on several occasions; see *Haig v. Canada*, [1993] 2 S.C.R. 995; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Thomson Newspapers*, *supra*; and *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37.

69 The right to effective representation is, however, more than just a right to be effectively represented in Parliament. As L'Heureux-Dubé J. concluded in *Haig*, *supra*, at p. 1031, the right to vote also includes the "right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate" (emphasis

added). The Court expounded on this broader conception of the purpose of s. 3 in *Figueroa*.

70 The right to play a meaningful role in the electoral process under s. 3 of the *Charter* implicates a right of meaningful participation in that process. Meaningful participation is not limited to the selection of elected representatives. As Iacobucci J. explained in *Figueroa*, at para. 29:

> It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses. In each instance, the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process. [Emphasis added.]

Greater participation in the political discourse leads to a wider expression of beliefs and opinions and results in an enriched political debate, thereby enhancing the quality of Canada's democracy.

71 This case engages the informational component of an individual's right to meaningfully participate in the electoral process. The right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner. For a voter to be well informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party. The citizen must also be able to consider opposing aspects of issues associated with certain candidates and political

parties where they exist. In short, the voter has a right to be "reasonably informed of all the possible choices": *Libman*, at para. 47.

72 The question, then, is what promotes an informed voter? For voters to be able to hear all points of view, the information disseminated by third parties, candidates and political parties cannot be unlimited. In the absence of spending limits, it is possible for the affluent or a number of persons or groups pooling their resources and acting in concert to dominate the political discourse. The respondent's factum illustrates that political advertising is a costly endeavour. If a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be drowned out; see *Libman*, *supra*; *Figueroa*, *supra*, at para. 49. Where those having access to the most resources monopolize the election discourse, their opponents will be deprived of a reasonable opportunity to speak and be heard. This unequal dissemination of points of view undermines the voter's ability to be adequately informed of all views. In this way, equality in the political discourse is necessary for meaningful participation in the electoral process and ultimately enhances the right to vote. Therefore, contrary to the respondent's submission, s. 3 does not guarantee a right to unlimited information or to unlimited participation.

73 Spending limits, however, must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters. Spending limits which are overly restrictive may undermine the informational component of the right to vote. To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented.

74 The question, then, is whether the spending limits set out in s. 350 interfere with the right of each citizen to play a meaningful role in the electoral process. In my view, they do not. The trial judge found that the advertising expense limits allow third parties to engage in "modest, national, informational campaigns" as well as "reasonable electoral district informational campaigns" but would prevent third parties from engaging in an "effective persuasive campaign" (para. 78). He did not give sufficient attention to the potential number of third parties or their ability to act in concert. Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome. In fact, such an understanding of "meaningful participation" would leave little room in the political discourse for the individual citizen and would be inimical to the right to vote. Accordingly, there is no infringement of s. 3 in this case and no conflict between the right to vote and freedom of expression.

(3) The Section 1 Justification Applicable to the Infringement of Freedom of Expression

75 The central issue at this stage of the analysis is the nature and sufficiency of the evidence required for the Attorney General to demonstrate that the limits imposed on freedom of expression are reasonable and justifiable in a free and democratic society. The Attorney General of Canada alleges that the lower courts erred in requiring scientific proof that harm had actually occurred and, specifically, by requiring conclusive proof that third party advertising influences voters and election outcomes, rendering them unfair.

76 This is not the first time the Court has addressed the standard of proof the Crown must satisfy in demonstrating possible harm. Nor is it the first time that the Court has been faced with conflicting social science evidence regarding the problem that Parliament seeks to address. Indeed, in *Thomson Newspapers*, *supra*, this Court addressed the nature and sufficiency of evidence required when Parliament adopts a regulatory regime to govern the electoral process. The context of the impugned provision determines the type of proof that a court will require of the legislature to justify its measures under s. 1; see *Thomson Newspapers*, at para. 88. As this pivotal issue affects the entire s. 1 analysis, it is helpful to consider the contextual factors at the outset.

(a) *Contextual Factors*

(i) The Nature of the Harm and the Inability to Measure It

77 The legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case. Where the court is faced with inconclusive or competing social science evidence relating the harm to the legislature's measures, the court may rely on a reasoned apprehension of that harm.

78 This Court has, in the absence of determinative scientific evidence, relied on logic, reason and some social science evidence in the course of the justification analysis in several cases; see *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 503; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 768 and 776; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 137; *Thomson Newspapers, supra*, at paras. 104-7; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2. In *RJR-MacDonald*, the Court held, in the absence of direct scientific evidence showing a causal link between advertising bans and

a decrease in tobacco consumption/use, that as a matter of logic advertising bans and package warnings lead to a reduction in tobacco use; see paras. 155-58. McLachlin J. held, at para. 137, that:

> Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view.

In *Thomson Newspapers*, the evidence as to the influence of polls on voter choice was uncertain. Nevertheless, the majority of the Court concluded, as a matter of logic assisted by some social science evidence, that the possible influence of polls on voter choice was a legitimate harm that Parliament could seek to remedy, and was thus a pressing and substantial objective; see paras. 104-107.

79 Similarly, the nature of the harm and the efficaciousness of Parliament's remedy in this case is difficult, if not impossible, to measure scientifically. The harm which Parliament seeks to address can be broadly articulated as electoral unfairness. Several experts, as well as the Lortie Commission, concluded that unlimited third party advertising can undermine election fairness in several ways. First, it can lead to the dominance of the political discourse by the wealthy (Lortie Report, *supra*, at p. 326; Professor Peter Aucoin's evidence, at Cairns J.'s paras. 60-61). Second, it may allow candidates and political parties to circumvent their own spending limits through the creation of third parties (Lortie Report, at p. 15; Professor Frederick James Fletcher and Chief Electoral Officer, at Cairns J.'s para. 62). Third, unlimited third party spending can have an unfair effect on the outcome of an election (Lortie Report, at pp. 15-16). Fourth, the absence of limits on third party advertising expenses can erode the confidence of the

Canadian electorate who perceive the electoral process as being dominated by the wealthy. This harm is difficult, if not impossible, to measure because of the subtle ways in which advertising influences human behaviour; the influence of other factors such as the media and polls; and the multitude of issues, candidates and independent parties involved in the electoral process. In light of these difficulties, logic and reason assisted by some social science evidence is sufficient proof of the harm that Parliament seeks to remedy.

(ii) Vulnerability of the Group

80 Third party spending limits seek to protect two groups. First, the limits seek to protect the Canadian electorate by ensuring that it is possible to hear from all groups and thus promote a more informed vote. Generally, the Canadian electorate "must be presumed to have a certain degree of maturity and intelligence"; see *Thomson Newspapers, supra*, at para. 101. Where, however, third party advertising seeks to systematically manipulate the voter, the Canadian electorate may be seen as more vulnerable; see *Thomson Newspapers*, at para. 114.

81 The members of the second group protected by the legislation are candidates and political parties. The appellant argues that the provisions seek to ensure that candidates and political parties have an equal opportunity to present their positions to the electorate. As discussed in *Figueroa*, *supra*, at para. 41, all political parties, whether large or small, are "capable of acting as a vehicle for the participation of individual citizens in the public discourse that animates the determination of social policy". Thus, regardless of their size, political parties are important to the democratic process. Nevertheless, neither candidates nor political parties can be said to be vulnerable.

(iii) Subjective Fears and Apprehension of Harm

82 Perception is of utmost importance in preserving and promoting the electoral regime in Canada. Professor Aucoin emphasized that "[p]ublic *perceptions* are critical precisely because the legitimacy of the election regime depends upon how citizens assess the extent to which the regime advances the values of their electoral democracy" (emphasis in original). Electoral fairness is key. Where Canadians perceive elections to be unfair, voter apathy follows shortly thereafter.

83 Several surveys indicate that Canadians view third party spending limits as an effective means of advancing electoral fairness. Indeed, in *Libman*, *supra*, at para. 52, the Court relied on the survey conducted by the Lortie Commission illustrating that 75 percent of Canadians supported limits on spending by interest groups to conclude that spending limits are important to maintain public confidence in the electoral system.

(iv) The Nature of the Infringed Activity: Political Expression

84 Third party advertising is political expression. Whether it is partisan or issue-based, third party advertising enriches the political discourse (Lortie Report, *supra*, at p. 340). As such, the election advertising of third parties lies at the core of the expression guaranteed by the *Charter* and warrants a high degree of constitutional protection. As Dickson C.J. explained in *Keegstra*, *supra*, at pp. 763-64:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy.

> Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.

85 In some circumstances, however, third party advertising will be less deserving of constitutional protection. Indeed, it is possible that third parties having access to significant financial resources can manipulate political discourse to their advantage through political advertising. In *Thomson Newspapers, supra*, at para. 94, the majority of the Court explained:

> [U]nder certain circumstances, the nature of the interests (i.e., a single party or faction with a great preponderance of financial resources) of the speakers could make the expression itself inimical to the exercise of a free and informed choice by others.

There is no evidence before the Court that indicates that third party advertising seeks to be manipulative. Nor is there any evidence that third parties wish to use their advertising dollars to smear candidates or engage in other forms of non-political discourse. Nevertheless, the danger that political advertising may manipulate or oppress the voter means that some deference to the means chosen by Parliament is warranted.

86 The Attorney General of Canada argues that although the impugned provisions limit the political expression of some, the provisions enhance the political expression of others. This Court explored this dichotomy in *Libman, supra*, at para. 61:

> . . . the legislature's objective, namely to enhance the exercise of the right to vote, must be borne in mind. Thus, while the impugned provisions do in a way restrict one of the most basic forms of expression, namely political expression, the legislature must be accorded a certain deference to enable it to arbitrate between the democratic values of freedom of expression and

> referendum fairness. The latter is related to the very values the Canadian *Charter* seeks to protect, in particular the political equality of citizens that is at the heart of a free and democratic society. The impugned provisions impose a balance between the financial resources available to the proponents of each option in order to ensure that the vote by the people will be free and informed and that the discourse of each option can be heard. To attain this objective, the legislature had to try to strike a balance between absolute freedom of individual expression and equality among the different expressions for the benefit of all. From this point of view, the impugned provisions are therefore not purely restrictive of freedom of expression. Their primary purpose is to promote political expression by ensuring an equal dissemination of points of view and thereby truly respecting democratic traditions. [Emphasis added.]

Further, by limiting political expression, the spending limits bring greater balance to the political discourse and allow for more meaningful participation in the electoral process. Thus, the provisions also enhance a second *Charter* right, the right to vote.

87 Under the egalitarian model of elections, Parliament must balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters. Advertising expense limits may restrict free expression to ensure that participants are able to meaningfully participate in the electoral process. For candidates, political parties and third parties, meaningful participation means the ability to inform voters of their position. For voters, meaningful participation means the ability to hear and weigh many points of view. The difficulties of striking this balance are evident. Given the right of Parliament to choose Canada's electoral model and the nuances inherent in implementing this model, the Court must approach the justification analysis with deference. The lower courts erred in failing to do so (Paperny J.A., at para. 135). In the end, the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement of expenses, reflects a political choice, the details of which are better left to Parliament.

88 On balance, the contextual factors favour a deferential approach to Parliament in determining whether the third party advertising expense limits are demonstrably justified in a free and democratic society. Given the difficulties in measuring this harm, a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient.

(b) *Limits Prescribed by Law*

89 The respondent argues that the entire third party advertising expense regime is too vague to constitute a limit prescribed by law on the basis that the legislation provides insufficient guidance as to when an issue is "associated" with a candidate or party. Thus, it is unclear when advertising constitutes election advertising and is subject to the regime's provisions. This argument is unfounded. The definition of election advertising in s. 319, although broad in scope, is not unconstitutionally vague.

90 A provision will be considered impermissibly vague where there is no adequate basis for legal debate or where it is impossible to delineate an area of risk; see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 639-40. The interpretation of the terms at issue here must be contextual. It is clear that a regulatory regime cannot by necessity provide for a detailed description of all eventualities and must give rise to some discretionary powers — a margin of appreciation. What is essential is that the guiding principles be sufficiently clear to avoid arbitrariness. While no specific criteria exist, it is possible to determine whether an issue is associated with a candidate or political party and, therefore, to delineate an area of risk. For example, it is possible to discern whether an issue is associated with a candidate or political party from their platform. Where an issue arises in the course of the electoral campaign, the

response taken by the candidate or political party may be found in media releases (Lortie Report, *supra*, at p. 341). Whether the definition is impermissibly broad is a matter for legal debate and is more properly considered at the minimal impairment stage of the justification analysis.

(c) *Is the Objective Pressing and Substantial?*

91 The overarching objective of the third party election advertising limits is electoral fairness. Equality in the political discourse promotes electoral fairness and is achieved, in part, by restricting the participation of those who have access to significant financial resources. The more voices that have access to the political discourse, the more voters will be empowered to exercise their right in a meaningful and informed manner. Canadians understandably have greater confidence in an electoral system which ultimately encourages increased participation.

92 For the purpose of the s. 1 analysis, however, "it is desirable to state the purpose of the limiting provision as precisely and specifically as possible so as to provide a clear framework for evaluating its importance, and the precision with which the means have been crafted to fulfil that objective"; see *Thomson Newspapers*, at para. 98. More narrowly characterized, the objectives of the third party election advertising scheme are threefold: 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.

93 As discussed, the Attorney General of Canada does not need to provide evidence of actual harm to demonstrate that each objective is pressing and substantial;

see *Butler*, *supra*; *Sharpe*, *supra*; *RJR-MacDonald*, *supra*. The lower courts effectively required scientific proof that, in Canada, the absence of third party spending limits has rendered Canadian elections unfair. The lower courts sought evidence establishing that third party advertising influences the electorate in a disproportionate way (Cairns J., at para. 261; Paperny J.A., at para. 157). To require the Attorney General to produce definitive social science evidence establishing the causes of every area of social concern would be to place an unreasonably high onus on the Attorney General. In this case, the Attorney General adduced sufficient informed evidence of the importance of electoral regulation in our free and democratic society.

94 In this case, the Lortie Report is the central piece of the evidentiary record establishing the possible harm engendered by uncontrolled third party advertising and justifying the limits set by Parliament on the advertising expenses of third parties.

95 As mentioned, the trial judge and the majority of the Court of Appeal discarded the findings of the Lortie Commission on the basis of the Johnston Report matter as the courts had done in *Pacific Press v. British Columbia (Attorney General)*, [2000] 5 W.W.R. 219, 2000 BCSC 248, and *Somerville*, *supra*. In doing so, the trial judge concluded that there was no actual evidence that third party advertising influenced the electorate (para. 261). The majority of the Court of Appeal also placed little weight on the findings of the Lortie Commission and concluded that the remaining evidence was inconclusive (paras. 108 and 114). In my view, the shift in Professor Johnston's empirical conclusion of the effect of third party spending on voter outcome of the 1988 federal election does not undermine the overall persuasiveness of the Lortie Report for several reasons.

96 Johnston's preliminary findings regarding the effect of third party spending on the 1988 federal election were not determinative of the position taken by the Lortie Commission on third party spending generally. It is inconceivable that the findings of a Royal Commission would be based solely on one preliminary report in the presence of numerous other expert reports. Professor Aucoin, the Lortie Commission research director, confirmed that he would still recommend third party spending limits to preserve the fairness of the electoral system (Cairns J., para. 67).

97 Further, Johnston's conclusions in *Letting the People Decide: Dynamics of a Canadian Election*, *supra*, only focus on one component of electoral fairness: the outcome of the election. *Letting the People Decide* does not speak to the impact of third party advertising on the fairness of the electoral process. As discussed, in the context of elections, process is as important as outcome; see *Figueroa*, *supra*, at para. 29 of its report. The Lortie Commission emphasized, at p. 14, that "the right to vote can be politically meaningful and the equality of voters assured only if the electoral process itself is fair". Nor does *Letting the People Decide* speak to the impact of unlimited third party advertising on the confidence Canadians have in their democratic electoral system. On this issue, the Lortie Commission opined that "[t]he integrity of the electoral process must be enhanced if Canadians are to be fully confident that their democratic rights are secure" (Lortie Report, at p. 16). Among other things, integrity of the electoral process requires that political advertising is not perceived as manipulating voters.

98 Finally, *Letting the People Decide* does not address the reasonable possibility that unlimited advertising expenses could, in future elections, impact the outcome of the election. As A. Blais, one of the co-authors of *Letting the People Decide*, noted in evidence:

> The findings of that study indicate that-third party advertising did not have an impact on the vote in one specific instance, the 1988 election. They do not allow us, however, to conclude that third-party advertising will never have an impact in Canadian elections.

The respondent alleges that evidence of the actual pernicious effect of the lack of spending limits in past elections is necessary to establish that the objective is important and that the measures are proportional to the infringement of the rights of third parties. Surely, Parliament does not have to wait for the feared harm to occur before it can enact measures to prevent the possibility of the harm occurring or to remedy the harm, should it occur. As noted earlier, this Court has concluded on several occasions that a reasoned apprehension of harm is sufficient.

99 As the lower courts' conclusions on the respective weight to be attributed to the Lortie Report and *Letting the People Decide* relate to social science evidence, they are entitled to little deference by this Court; see *RJR-MacDonald*, *supra*, at paras. 139-41. For the reasons stipulated above, the findings of the Lortie Commission can be relied upon to establish that third party advertising expense limits are a means to preserve electoral fairness and promote confidence in the integrity of the electoral system. Studies later published in the United States are also relevant in evaluating our own electoral system in a limited way. In the absence of third party advertising expense limits, electoral unfairness is a real possibility. To the extent that the lower courts in *Somerville*, *supra*, and *Pacific Press*, *supra*, gave no weight to the findings of the Lortie Report, they are wrong.

100 In my view, the findings of the Lortie Report can be relied upon in this appeal to determine whether the third party advertising limits are justified. Indeed, this Court has already provided significant guidance in its past jurisprudence on the importance of the following objectives based on the Lortie Report; see *Harvey*, *supra*; *Libman*, *supra*; and *Figueroa*, *supra*.

(i) To Promote Equality in the Political Discourse

101 As discussed, the central component of the egalitarian model is equality in the political discourse; see *Libman*, at para. 61. Equality in the political discourse promotes full political debate and is important in maintaining both the integrity of the electoral process and the fairness of election outcomes; see *Libman*, at para. 47. Such concerns are always pressing and substantial "in any society that purports to operate in accordance with the tenets of a free and democratic society"; see *Harvey*, at para. 38.

(ii) To Protect the Integrity of the Financing Regime Applicable to Candidates and Parties

102 The primary mechanism by which the state promotes equality in the political discourse is through the electoral financing regime. The Court emphasized the importance of this regime in *Figueroa*, at para. 72:

> The systems and regulations that govern the process by which governments are formed should not be easily compromised. Electoral financing is an integral component of that process, and thus it is of great importance that the integrity of the electoral financing regime be preserved.

Accordingly, protecting the integrity of spending limits applicable to candidates and parties is a pressing and substantial objective.

(iii) To Maintain Confidence in the Electoral Process

103 Maintaining confidence in the electoral process is essential to preserve the integrity of the electoral system which is the cornerstone of Canadian democracy. In *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136, Dickson C.J. concluded that faith in social and political institutions, which enhance the participation of individuals and groups in society, is of central importance in a free and democratic society. If Canadians lack confidence in the electoral system, they will be discouraged from participating in a meaningful way in the electoral process. More importantly, they will lack faith in their elected representatives. Confidence in the electoral process is, therefore, a pressing and substantial objective.

(d) *Rational Connection*

104 At this stage of the analysis, the Attorney General "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic"; see *RJR-MacDonald*, *supra*, at para. 153. The lower courts erred by demanding too stringent a level of proof, in essence, by requiring the Attorney General to establish an empirical connection between third party spending limits and the objectives of s. 350. There is sufficient evidence establishing a rational connection between third party advertising expense limits and promoting equality in the political discourse, protecting the integrity of the financing regime applicable to candidates and parties, and maintaining confidence in the electoral process.

(i) To Promote Equality in the Political Discourse

105 To establish that third party advertising expense limits promote equality in the political discourse, the Attorney General must establish, first, that political advertising influences voters, and second, that in the absence of regulation some voices could dominate and, in effect, drown others out.

106 The majority of the Court of Appeal concluded, at para. 114, that the social science evidence of the impact of political advertising on voters was inconclusive. Professor Aucoin (in evidence) elucidated why there was a paucity of conclusive social science evidence:

> [T]here is no prima facie reason, or evidence, for the claim that the advertising of third parties can never have its desired effect. It is advertising like all other advertising: sometimes it works, in the sense that it has its intended effects; sometimes it does not (as in having no effect, or having a negative or perverse effect). As with candidate and political party spending on advertising, there are other factors at work and certain conditions must exist for advertising to have its intended effect. Third parties cannot simply spend on advertising and always expect to have influence, anymore than candidates or parties can expect to "buy" elections.

That political advertising influences voters accords with logic and reason. Surely, political parties, candidates, interest groups and corporations for that matter would not spend a significant amount of money on advertising if it was ineffective. Indeed, advertising is the primary expenditure of candidates and political parties.

107 Where advertising influences the electorate, and those who have access to significant financial resources are able to purchase an unlimited amount of advertising,

it follows that they will be able to dominate the electoral discourse to the detriment of others, both speakers and listeners. An upper limit on the amount that third parties can dedicate to political advertising curtails their ability to dominate the electoral debate. Thus, third party advertising expense limits are rationally connected to promoting equality in the political discourse.

(ii) To Protect the Integrity of the Financing Regime Applicable to Candidates and Parties

108 Third party advertising can directly support a particular candidate or political party. Third party advertising can also indirectly support a candidate or political party by taking a position on an issue associated with that candidate or political party. In effect, third party advertising can create an imbalance between the financial resources of each candidate or political party; see *Libman*, *supra*, at para. 44. For candidate and political party spending limits to be truly effective, the advertising expenses of third parties must also be limited. Indeed, the Lortie Commission concluded that the electoral financing regime would be destroyed if third party advertising was not limited concomitantly with candidate and political party spending (Berger J.A., dissenting, at para. 261). The Commission explained, at p. 327 of the Lortie Report:

> 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 unfair advantage over others not similarly supported. At the same time, candidates or parties who were the target of spending by individuals or groups opposed to their election would be put at a disadvantage compared with those who were not targeted. Should such activity become widespread, the purpose of the legislation would be destroyed, the reasonably equal opportunity the legislation seeks to establish would vanish, and the overall goal of restricting the role of money in unfairly influencing election outcomes would be defeated.

Thus, limiting third party advertising expenses is rationally connected with preserving the integrity of the financing regime set for candidates and parties.

(iii) To Maintain Confidence in the Electoral Process

109 Limits on third party advertising expenses foster confidence in the electoral process in three ways. The limits address the perception that candidates and political parties can circumvent their spending limits through the creation of special interest groups. The limits also prevent the possibility that the wealthy can dominate the electoral discourse and dictate the outcome of elections. Finally, the limits assist in preventing overall advertising expenses from escalating. Thus, third party advertising expense limits advance the perception that access to the electoral discourse does not require wealth to be competitive with other electoral participants. Canadians, in turn, perceive the electoral process as substantively fair as it provides for a reasonable degree of equality between citizens who wish to participate in that process.

(e) *Minimal Impairment*

110 To be reasonable and demonstrably justified, the impugned measures must impair the infringed right or freedom as little as possible. The oft-cited quote from *RJR-MacDonald, supra,* at para. 160, sets out the appropriate standard:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.

Thus, the impugned measures need not be the least impairing option.

111 The contextual factors speak to the degree of deference to be accorded to the particular means chosen by Parliament to implement a legislative purpose; see *Thomson Newspapers*, *supra*, at para. 111. In this case, the contextual factors indicate that the Court should afford deference to the balance Parliament has struck between political expression and meaningful participation in the electoral process. As Berger J.A. in dissent aptly noted, at para. 268, "[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".

112 The Chief Justice and Major J. assert that short of spending well over $150,000 nationally and $3,000 in a given electoral district, citizens cannot effectively communicate their views on election issues to their fellow citizens (para. 9). Respectfully, this ignores the fact that third party advertising is not restricted prior to the commencement of the election period. Outside this time, the limits on third party intervention in political life do not exist. Any group or individual may freely spend money or advertise to make its views known or to persuade others. In fact, many of these groups are not formed for the purpose of an election but are already organized and have a continued presence, mandate and political view which they promote. Many groups and individuals will reinforce their message during an electoral campaign.

113 The nature of Canada's political system must be considered when deciding whether individuals and groups who engage in election advertising will be affected unduly by the limits set out in s. 350. First, as the Court discussed in *Figueroa*, there are

few obstacles for individuals to join existing political parties or to create their own parties to facilitate individual participation in elections. Still, some will participate outside the party affiliations; this explains why the existence of multiple organizations and parties of varying sizes requires Parliament to balance their participation during the election period. Further, the reality in Canada is that regardless of the spending limits in the Act, the vast majority of Canadian citizens simply cannot spend $150,000 nationally or $3,000 in a given electoral district. What prevents most citizens from effectively exercising their right of political free speech as defined by the Chief Justice and Major J. is a lack of means, not legislative restrictions. Contrary to what the Chief Justice and Major J. say at para. 44, I do not suggest that since the breach of s. 2(*b*) only affects a few people, it is therefore justifiable. As discussed, the objective is to ensure the political discourse is not dominated by those who have greater resources. The proper focus is on protecting the right to meaningful participation of the entire electorate. Let me now examine in more detail how this is achieved.

114 Section 350 minimally impairs the right to free expression. The definition of "election advertising" in s. 319 only applies to advertising that is associated with a candidate or party. Where an issue is not associated with a candidate or political party, third parties may partake in an unlimited advertising campaign.

115 The $3,000 limit per electoral district and $150,000 national limit allow for meaningful participation in the electoral process while respecting the right to free expression. Why? First, because the limits established in s. 350 allow third parties to advertise in a limited way in some expensive forms of media such as television, newspaper and radio. But, more importantly, the limits are high enough to allow third parties to engage in a significant amount of low cost forms of advertising such as

computer generated posters or leaflets or the creation of a 1-800 number. In addition, the definition of "election advertising" in s. 319 does not apply to many forms of communication such as editorials, debates, speeches, interviews, columns, letters, commentary, the news and the Internet which constitute highly effective means of conveying information. Thus, as the trial judge concluded, at para. 78, the limits allow for "modest, national, informational campaigns and reasonable electoral district informational campaigns".

116 Second, the limits set out in s. 350 are justifiably lower than the candidate and political party advertising limits, as recommended by the Lortie Commission. As this Court explained in *Libman*, *supra*, at paras. 49-50, the third party limit must be low enough to ensure that a particular candidate who is targeted by a third party has sufficient resources to respond. It cannot be forgotten that small political parties, who play an equally important role in the electoral process, may be easily overwhelmed by a third party having access to significant financial resources. The limits must also account for the fact that third parties generally have lower overall expenses than candidates and political parties. The limits must also appreciate that third parties tend to focus on one issue and may therefore achieve their objective less expensively. Thus, the limits seek to preserve a balance between the resources available to candidates and parties taking part in an election and those resources that might be available to third parties during this period. Professor Fletcher confirmed (in evidence) that the limits set out in s. 350 achieve this goal.

117 The Chief Justice and Major J. rely on the higher ratio of advertising spending limits for citizens to political parties in Britain as compared to Canada as evidence that the Canadian spending limits are too low (para. 8). In my view, this

comparison is inappropriate. The British provisions apply to different categories of advertising and apply over different time periods.

118 Certainly, one can conceive of less impairing limits. Indeed, any limit greater than $150,000 would be less impairing. Nevertheless, s. 350 satisfies this stage of the *Oakes* analysis. The limits allow third parties to inform the electorate of their message in a manner that will not overwhelm candidates, political parties or other third parties. The limits preclude the voices of the wealthy from dominating the political discourse, thereby allowing more voices to be heard. The limits allow for meaningful participation in the electoral process and encourage informed voting. The limits promote a free and democratic society.

(f) *Proportionality*

119 The final stage of the *Oakes* analysis requires the Court to weigh the deleterious effects against the salutary effects.

120 Section 350 has several salutary effects. It enhances equality in the political discourse. By ensuring that affluent groups or individuals do not dominate the political discourse, s. 350 promotes the political expression of those who are less affluent or less capable of obtaining access to significant financial resources and ensures that candidates and political parties who are subject to spending limits are not overwhelmed by third party advertising. Section 350 also protects the integrity of the candidate and political party spending limits by ensuring that these limits are not circumvented through the creation of phony third parties. Finally, s. 350 promotes fairness and accessibility in the electoral system and consequently increases Canadians' confidence in it.

121 The deleterious effect of s. 350 is that the spending limits do not allow third parties to engage in unlimited political expression. That is, third parties are permitted to engage in informational but not necessarily persuasive campaigns, especially when acting alone. When weighed against the salutary effects of the legislation, the limits must be upheld. As the Court explained in *Libman, supra,* at para. 84:

> [P]rotecting the fairness of referendum campaigns is a laudable objective that will necessarily involve certain restrictions on freedom of expression. Freedom of political expression, so dear to our democratic tradition, would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices. Nor would it be much better served by a system that undermined the confidence of citizens in the referendum process. [First emphasis in original; second emphasis added.]

Accordingly, s. 350 should be upheld as a demonstrably justified limit in a free and democratic society.

D. *Section 351: Splitting and Collusion*

122 The respondent alleges that s. 351 infringes the right to free expression, the right to vote and the right to free association. For convenience, I reproduce s. 351:

> **351.** A third party shall not circumvent, or attempt to circumvent, a limit set out in section 350 in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the limit or acting in collusion with another third party so that their combined election advertising expenses exceed the limit.

The primary purpose of s. 351 is to preserve the integrity of the advertising expense limits established under s. 350. Thus, s. 351 is more properly viewed as ancillary to s. 350.

(1) Freedom of Expression

123 Section 351 does not infringe the right to free expression in purpose or effect.

(2) The Right to Vote

124 Section 351 does not violate the right to vote. There is no evidence indicating that the splitting and collusion rules infringe on the right to meaningfully participate in elections. Indeed, the provision enhances the right to vote by enforcing the third party advertising expense limits.

(3) Freedom of Association

125 The splitting and collusion provision does not violate s. 2(*d*) of the *Charter*. Section 2(*d*) will be infringed where the State precludes activity because of its associational nature, thereby discouraging the collective pursuit of common goals; see *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, at para. 16. It is only the associational aspect of the activity, not the activity itself, which is protected; see *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at para. 104.

126 Section 351 does not prevent individuals from joining to form an association in the pursuit of a collective goal. Rather, s. 351 precludes an individual or group from undertaking an activity, namely circumventing the third party election advertising limits set out in s. 350.

127 The trial judge relied on the Court's finding that s. 2(*d*) was infringed in *Libman* to conclude that s. 351 also infringed s. 2(*d*). This is an inappropriate comparison. The referenda legislation in *Libman* effectively forced individuals to associate with an affiliated or national committee to incur regulated expenses. As discussed, this is not the case here. Section 351 exists only as a mechanism to enforce s. 350.

E. *Section 323: Advertising Blackout*

128 Section 323 prohibits anyone from knowingly transmitting election advertising on polling day before the closing of all the polling stations in the electoral district. The prohibition applies for approximately 20 hours (Cairns J., at para. 133), and does not apply to the media (Cairns J., at para. 134).

(1) Freedom of Expression

129 The appellant concedes that s. 323 infringes the right to free expression by prohibiting third parties from advertising on polling day.

(2) The Right to Vote

130 Section 323, like s. 350, engages the informational component of the right to vote. As discussed, the right to meaningful participation in the electoral process includes a citizen's right to exercise his or her vote in an informed manner. Section 323 does not infringe s. 3 of the *Charter* as it does not have an adverse impact on the information available to voters. The ban is of short duration, lasting only 20 hours. Further, the ban does not extend to media organizations. The ban only forecloses advertising from third parties, candidates or political parties. As the trial judge aptly concluded, at para. 134:

> If there is information that voters must have in the time immediately preceding polling day, it can most likely be obtained through the media, who are not covered by the ban. It is difficult to envision that the ban could lead to a deprivation of information such that a voter could not cast a rational and informed ballot.

Accordingly, there is no infringement of the right to vote.

(3) The Section 1 Justification Applicable to the Infringement of Freedom of Expression

131 The provision infringing the right to free expression can be saved under s. 1.

132 The advertising blackout provision seeks to advance two objectives. First, it seeks to provide commentators and others with an opportunity to respond to any potentially misleading election advertising (Cairns J., at para. 303). To the extent that voters may be misled by third party advertising, this is a pressing and substantial objective. Berger J.A., in dissent, identified a second pressing and substantial objective (para. 283). The blackout rule ensures that electors in different parts of the country have access to the same information before they go to the polls.

133 The blackout period is rationally connected to preventing voters from relying on inaccurate information. It provides a period within which misleading advertising may be assessed, criticized and possibly corrected. This achieves a broader objective, discussed throughout: informed voting. The blackout period is also rationally connected to ensuring that all voters receive the same information where possible. The blackout period would preclude an election advertisement appearing in Western Canada after the polls had closed in Eastern Canada.

134 The blackout period is approximately 20 hours in duration in a 36-day campaign period. It only applies to advertising. The trial judge was correct to conclude that the provision is minimally impairing.

135 There is no evidence that the blackout period has had any deleterious effects. Accordingly, the infringement of freedom of expression in s. 323 is demonstrably justified in a free and democratic society.

F. *Sections 352 to 357, 359, 360 and 362: Attribution, Registration and Disclosure*

136 The attribution, registration and disclosure provisions set out several requirements that third parties must meet under certain circumstances. All third parties must identify themselves in any election advertising (s. 352). Third parties who spend $500 or more on election advertising must appoint a financial agent and register with the Chief Electoral Officer (ss. 353 and 354). The financial agent must accept all contributions made during an election period to a third party, and must incur all advertising expenses on behalf of the third party (s. 357). The Chief Electoral Officer

must maintain and publish a registry of third parties (ss. 356 and 362). Third parties that spend $5,000 or more must appoint an auditor (s. 355). All third parties that spend $500 or more must file an election advertising report to the Chief Electoral Officer (ss. 359 and 360). The election advertising report must include the time and place of the broadcast or publication of the advertisement and the expenses associated with them; the amount of contributions for election advertising purposes received in the period beginning six months before the issue of the writ and ending on polling day; the name, address and class of each contributor who contributes $200 or more; and the amount paid out of the third party's own funds for election advertising expenses (s. 359). The Chief Electoral Officer, in turn, must publish the names and addresses of registered third parties and the election advertising reports within one year after the issue of the writ (s. 362).

137 The respondent challenges the various sections of the attribution, registration and disclosure provisions under ss. 2(*b*), 2(*d*) and 3 of the *Charter*. The attribution, registration and disclosure provisions are interdependent. Thus, their constitutionality must be determined together.

(1) Freedom of Expression

138 The attribution, registration and disclosure provisions infringe s. 2(*b*) as they have the effect of limiting free expression. Even where the purpose of the impugned measure is not to control or restrict attempts to convey a meaning, the effect of the government action may restrict free expression; see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976.

139 As discussed, the attribution, registration and disclosure provisions require third parties to provide information to the Chief Electoral Officer. Where a third party fails to provide this information, they are guilty of a strict liability offence under s. 496 and are subject to a fine, imprisonment or any other additional measure that the court considers appropriate to ensure compliance with the Act (ss. 500-501). In this way, the attribution, registration and disclosure obligations have the effect of restricting the political expression of those who do not comply with the scheme.

(2) The Right to Vote

140 The attribution, registration and disclosure provisions do not infringe s. 3 of the *Charter*. As discussed, s. 3 protects the right to meaningfully participate in the electoral process which includes the right to an informed vote. As Professor Aucoin explained in evidence:

> [The attribution, registration and disclosure provisions] advance the objective of an informed vote, an important objective in its own right. Transparency, in short, advances an informed vote. Secrecy does not. With disclosure, voters are made aware of who contributes and who spends in the electoral process and thus who stands behind electoral communications.

Thus, these provisions enhance the right to vote under s. 3.

(3) Freedom of Association

141 The respondent has not provided sufficient argument or evidence to establish that ss. 356, 357(3), 359 or 362 infringe s. 2(*d*) of the *Charter*.

(4) The Section 1 Justification Applicable to the Infringement of Freedom of Expression

142 The attribution, registration and disclosure provisions advance two objectives: first, the proper implementation and enforcement of the third party election advertising limits; second, to provide voters with relevant election information. As discussed, the former is a pressing and substantial objective. To adopt election advertising limits and not provide for a mechanism of implementation and enforcement would be nonsensical. Failure to do so would jeopardize public confidence in the electoral system. The latter objective enhances a *Charter* value, informed voting, and is also a pressing and substantial objective.

143 The registration and disclosure requirements are rationally connected to the enforcement of the election advertising regime. The registration requirement notifies the Chief Electoral Officer of which individuals and groups qualify as third parties subject to the advertising expense limits. The reporting requirement allows the Chief Electoral Officer to determine the extent to which third parties have advertised during an election. These measures enable the Chief Electoral Officer to scrutinize spending more easily. Certain provisions facilitate the supervision of third parties. The appointment of a financial agent or auditor as the designated person accountable for the administration of contributions to the third party advertising expenditures facilitates the reporting process and provides the Chief Electoral Officer with a contact who is responsible for all advertising expenses incurred by the third party. The Chief Electoral Officer is also empowered to request any original bill or receipt of an advertising expense greater than $50.

144 The disclosure requirements add transparency to the electoral process and are, therefore, rationally connected to providing information to voters. Third parties must disclose the names and addresses of contributors as well as the amount contributed by each. The Chief Electoral Officer, in turn, must disclose this information to the public. In conjunction with the attribution requirements, this information enables voters to identify who is responsible for certain advertisements. This is especially important where it is not readily apparent who stands behind a particular third party. Thus, voters can easily find out who contributes and who spends.

145 The attribution, registration and disclosure provisions are minimally impairing. The disclosure and reporting requirements vary depending on the amount spent on election advertising. The personal information required of contributors, name and address, is minimal. Where a corporation is a contributor, the name of the chief executive officer or president is required. The financial information that must be disclosed, contributions and advertising expenses incurred, pertains only to election advertising. The appointment of a financial agent or auditor is not overly onerous. Rather, it arguably facilitates the reporting requirements.

146 The salutary effects of the impugned measures outweigh the deleterious effects. The attribution, registration and disclosure requirements facilitate the implementation and enforcement of the third party election advertising scheme. By increasing the transparency and accountability of the electoral process, they discourage circumvention of the third party limits and enhance the confidence Canadians have in their electoral system. The deleterious effects, by contrast, are minimal. The burden is certainly not as onerous as the respondent alleges. There is no evidence that a contributor has been

discouraged from contributing to a third party or that a third party has been discouraged from engaging in electoral advertising because of the reporting requirements.

VI. Conclusion

147 The appeal is allowed with costs throughout. I would answer the constitutional questions as follows:

> 1. Do ss. 323(1) and (3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?
>
> Sections 323(1) and (3), 350, 352, 353, 354, 355, 356, 357, 359, 360 and 362 infringe s. 2(*b*). In other words, all but s. 351 infringe s. 2(*b*).
>
> 2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
>
> Yes.
>
> 3. Do ss. 323(1) and (3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 3 of the *Canadian Charter of Rights and Freedoms*?
>
> No.
>
> 4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

5. Do ss. 351, 356, 357(3), 359 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

No.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

Appeal allowed with costs, MCLACHLIN C.J. *and* MAJOR *and* BINNIE JJ. *dissenting in part.*

Solicitor for the appellant: Attorney General of Canada, Ottawa.

Solicitors for the respondent: Code Hunter, Calgary.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Quebec.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitors for the interveners Democracy Watch and National Anti-Poverty Organization: Bakerlaw, Toronto.

Solicitors for the intervener Environment Voters, a division of Animal Alliance of Canada: Paterson, MacDougall, Toronto.