ELECTION POLLS, FREEDOM OF SPEECH AND THE CONSTITUTION

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I. INTRODUCTION

During an election period, the public and more particularly, the registered voter, is subjected to a barrage of information generated from a variety of sources. He may receive campaign literature, attend all candidate meetings and read of, as well as view on television, campaign events. He may be assailed by a number of partisan political broadcasts on television and radio. In addition to this cacophony of campaign rhetoric are the election polls. Newspapers, radio and television invariably report the results of the latest election poll measuring the public's support of particular parties, leaders and issues. The taking and publishing of election polls has generated considerable debate in the printed media and has also caused a number of politicians to suggest restrictions in this regard.[1] Currently no jurisdiction in North America has legislation which restricts this activity.[2] However, the recent trend of governmental reliance upon poll taking to determine the priorities of government[3] (thus demonstrating an acceptance of the validity of the poll process), and the fear that poll results may unduly interfere with the democratic process[4] may inspire legislators to restrict public access to election poll results. This prospect raises the question of whether there exists in Canada a constitutional guarantee protecting the right to take and publish election polls.

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[1] REPORT OF THE COMMITTEE ON ELECTION EXPENSES (Barbeau A. Chairman 1966), at 51 recommended a ban on the publication of poll results during any pre-election period. In the Ontario legislature, a private member's resolution was introduced by M.L.A. George Ashe, LEG. ONT. DEB., 31st Leg., 2d sess., No. 48, at 1966 (1978) which asked the government to give consideration to legislation that would prohibit during any provincial election the *publication* or *broadcasting* of all public opinion polls that purport to indicate the standing of any leader, candidate or party or the status of any issue in the election. In Parliament, a private member's bill, Bill C-208, 32nd Parl., 1st sess., 1980 was introduced to amend the Canada Elections Act, R.S.C. 1970 (1st Supp.), c. 14, to prohibit during the fourteen days immediately preceding the time at which the polls are closed the *publication* of the results from any poll on the political opinions of the electors.

[2] The province of British Columbia had the following provision in the Election Act, R.S.B.C. 1979, c. 103, s. 166: "No person, corporation or organization shall, after issue of the writ for any election, take any straw vote which will, prior to the election, distinguish the political opinions of the voters in any electoral district." This section was introduced in 1939 (Provincial Elections Act, S.B.C. 1939, c. 16, s. 164), and was recently repealed by The Election Amendment Act, 1982, S.B.C. 1982, c. 48, s. 29.

[3] Wilson, *Opinion Polls — Their Role in Government*, in BRITANNICA BOOK OF THE YEAR 1971 45 (1971). In the past two years there has been an on-going debate in the Ontario legislature on the proper role of opinion polls.

[4] *See* text accompanying notes 15-19 *infra*.

II. ELECTION POLLS—OBJECTIVES AND OBJECTIONS

A. *The Purpose of Polls*

Before discussing the constitutional validity of any legislative enactment or proposal restricting election polls, it is useful to identify the purposes which election polls serve. It may then be possible to review the arguments advanced in favour of their restriction. Having established the purposes served both by permitting polls and by restricting them, the effect of any legislative proposal can be determined and its constitutionality discussed.

A non-partisan election poll, that is, one which is not sponsored by any political group and which is intended to be published, may serve three identifiable groups simultaneously: the electorate, the candidate and the media.

1. *The Electorate*

An election poll is intended to inform the electorate as to how others view the election, permitting the voter to assess, from a non-partisan source, the relative strength of the parties. It is "one of the few sources of information available. . . which is not designed to persuade [the voter] how he should vote"[5] and can be weighed against other information obtained from political sources. It allows the voter to determine whether those issues he considers important are likewise considered important by others and, correspondingly, which issues are important to others.[6] Furthermore, in an election in which there are more than two serious candidates, polls may assist the voter in deciding which of the leading candidates to support.[7]

2. *The Candidate*

"[T]he polls serve as a means of informing government on the state of opinion concerning matters of political significance. . .".[8] The poll may assist the candidate in the conduct of his campaign by advising him as to whether the issues considered important by him are being brought to the attention of the electorate. It may also advise him as to those issues which the electorate considers important and where he should direct his efforts to get his message across.

A secondary use of polls may be to influence the morale of party workers and supporters. During an election campaign the candidates rely heavily on volunteer support. A positive poll result therefore may

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[5] F. TEER & J. SPENCE, POLITICAL OPINION POLLS 135 (1973).

[6] Katz & Cantril, *Public Opinion Polls*, 1 SOCIOMETRY 155 (1937-38).

[7] *See* text accompanying note 18 *infra*.

[8] *Supra* note 5, at 136.

increase the number of volunteers and raise their spirits. Moreover, the flow of campaign contributions may be directly affected by poll results.[9]

3. *The Media*

Election polls assist the media in two ways. They indicate contemporary concerns and attitudes, satisfying the public's curiosity as to the progression of an election campaign, thereby attracting readers or viewers. Thus, the needs of the media as a commercial enterprise are served. Secondly, polls provide feedback to the media on the state of public opinion at a given time. As a result, the media in its editorial commentary may more confidently refer to the "public opinion" on a particular matter. The polls therefore become information or evidence enabling the media to substantiate its views, thus giving its comments more credibility.

B. *Criticism of Election Polls*

Criticism of election polls generally falls into one of two categories. The first questions the reliability or accuracy of polls; the second, the effect of polls upon the electorate, the candidates and the media. The first category is concerned with the accuracy of the conclusions drawn by the pollsters, not with how the information is used by the consumer. It is therefore criticism directed primarily at poll methodology. The second category is concerned with the uses to which the poll results are put. It thus challenges the value of election polls as a legitimate activity in a democratic society. Each criticism shall be addressed in turn.

1. *Accuracy*

When election polls are criticised as inaccurate or unreliable, it is important to define the standard by which their accuracy is measured. A poll has been compared to a snapshot of a horse race at a given instant of time. The snapshot may indicate who is in the lead but it cannot predict the ultimate winner of the race. However, by taking a number of snapshots over a period of time, it is possible to chart the course of the race and to extrapolate which horse will win. Although poll takers are quick to point out that a poll merely registers opinions on a given date, the public nonetheless measures the validity of the polls by their predictive accuracy. Three rather famous examples of poll inaccuracy, the American presidential elections of 1936 and 1948 and the United Kingdom election of 1970, are situations in which the pollster predicted the winners

[9] For a discussion of the relationship between poll results and campaign contributions, *see* C. ROLL JR. & A. CANTRIL, POLLS, THEIR USE AND MISUSE IN POLITICS (1972), in particular ch. 1.

incorrectly.[10] These errors caused pollsters to review their methodology. The 1936 election demonstrated the need to obtain proper representative samples while the 1948 election showed the necessity of considering shifts in voting trends and of taking poll samples up until the final few days of the election period.

The inaccuracy of poll results reflects the types of problems pollsters may encounter. Was the appropriate sample selected? Were the questions constructed so as to remove any biases? Were the interviews properly conducted? Was the data properly analyzed?

Reputable pollsters will obviously attempt to obtain reliable poll results since their business depends upon the consumers' acceptance of polls as an accurate reflection of the public's opinion. However, some persons may wish to disseminate inaccurate information which may, by reason of its inaccuracy, provide support to certain candidates or issues. Furthermore, the public may wish to be able to judge for itself the accuracy or validity of a poll. This would require the availability of more specific information. The pollsters, recognizing this possibility, have as a result developed a code of practice for opinion polls. The code requires the following information to be included in any reported survey findings: the sampling method adopted, the sample size, the population surveyed, the exact wording of the question, the date of the interviews and how these were conducted, for example in person, by telephone, etc.[11] At least one jurisdiction in the United States has adopted legislation requiring that similar information be filed with the State Board of Election within forty-eight hours after the disclosure of an election poll.[12]

Criticism directed at poll methodology can be negated through self-regulation by pollsters, for example an internal Code of Practice, through the constant improvement in those techniques by which errors are reduced, and through legislation requiring disclosure of certain information. Public access to such information will better enable poll consumers to judge for themselves the validity and reliability of the poll and to handle the information which it is intended to provide. It is therefore submitted that legislation which would ban the taking of

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[10] For a discussion of the two U.S. presidential elections, *see* W. ALBIG, MODERN PUBLIC OPINION 180-82, 213-15, 222-26 (1956). For a discussion of the United Kingdom election, *see* F. TEER & J. SPENCE, *supra* note 5, at 183-202.

[11] A copy of the Code of Practice for Opinion Polls adopted in the United Kingdom is found in F. TEER & J. SPENCE, *supra* note 5, App. B. References to an American code may be found in C. ROLL JR. & A. CANTRIL, *supra* note 9, at 158, 168 n.38. In Quebec, the polling organizations operating within the province have established a set of rules to control media presentation of poll results. *See* H. Whalen, *The Perils of Polling* in POLITICS: CANADA 185 (4th ed. P. Fox 1977).

[12] N.Y. Elec. Law §§3-106 (McKinney 1978), which authorizes the State Board of Elections to adopt a fair campaign code. The rules and regulations of the State Board of Elections includes a fair campaign code, §6201.2 of which regulates the use of public opinion polls. Certain provisions of an earlier fair campaign code were found unconstitutional in Vanasco v. Schwartz, 401 F. Supp. 87 (S.D.N.Y. 1975), *aff'd* 423 U.S. 1041 (1976). However, the provisions relating to public opinion polls were not discussed and therefore must still be considered to be enforceable: Marchi v. Acito, 432 N.Y.S. 2d 908 (App. Div. 1980).

polls or their publication could not be justified upon the basis of methodological inaccuracy. Certainly any legislation prohibiting the publication, but not the actual taking of polls, would acknowledge the validity of this activity by permitting its existence. It would thus be aimed at prohibiting the distribution of such information, presumably upon the basis of the second category of criticism, misuse of poll information. Legislation which would completely ban poll taking may appear to be concerned with poll accuracy. However, the legislators' failure to take into account improved poll techniques or methodology would tend to indicate that such legislation is more concerned with the probable uses to which the poll information will be put.

2. *Use*

The second category of criticism centers upon the alleged unwarranted interference by polls in the democratic process. Although polls may affect each consumer differently, the objection to these effects is premised upon the same concern, namely, that the behaviour which follows upon the release of poll findings is an aberration of the democratic model. Considering each group separately, what are the so-called undesirable effects produced by election polls?

With respect to the *electorate*, polls allegedly have an unwarranted influence on the decision making process exercised by the voter when he makes his electoral decision. At least three phenomena are attributed to polls:

> (1) the "bandwagon effect", occurring when voters decide to cross over to the winning side;
> (2) the "underdog effect", occurring when voters decide to change their support to weaker parties and candidates; and
> (3) the "withdrawal effect" occurring when voters decide not to vote because the polls indicate that the election is a foregone result.[13]

A fourth effect sometimes put forward by pollsters is increased election participation arising from increased electoral awareness.

Unfortunately, there is no conclusive evidence either supporting or refuting any of these propositions. Pollsters such as George Gallup argue that if the "bandwagon" or "underdog" effect did exist, then poll predictions would inevitably be wrong since the actual level of support for particular candidates would either increase or decrease. A somewhat analogous situation may occur when actual election results and computer predictions based upon early returns are broadcast before the polls close. For example, in a national election in the United States, due to the various time zones across the country and the absence of "election results blackout",[14] a voter on the West Coast may have access to the

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[13] H. Whalen, *supra* note 11, at 201.

[14] Such a blackout exists in Canada. *See* Canada Election Act, R.S.C. 1970 (1st Supp.), c. 14, s. 105.

voting results on the East Coast and computer predictions of the election outcome before he actually casts his vote. The evidence as to whether such access affects the voters is inconclusive. In one journal it is argued that the "bandwagon" and "withdrawal" effects are very real,[15] whereas in another the suggestion is made that "there is now no evidence which would support the proposition that votes on the West Coast are significantly changed as a result of election day predictions reaching the voters before the polls close".[16] A survey conducted by the National Broadcasting Company similarly found that no significant effects could be traced to broadcasts of election results.[17]

In an election involving more than two "serious" candidates, poll information on the comparative strength of each candidate may affect the outcome. For example, in a poll showing candidate A with forty percent of the electoral support, candidate B with thirty-five percent, and candidate C with twenty percent, persons opposing A and supporting C might consider supporting B to defeat A.[18]

Clearly the evidence of the influence of polls upon voters is equivocal. In short, the issue becomes one of confidence in the electoral process: will the voters exercise their rights responsibly? As the former Prime Minister of England, the Right Honourable James Callaghan, at that time the Home Secretary, stated:

> In any case, a restriction in the publication of these polls implies that people cannot be trusted with the vote and many people outside Parliament would question the right of Parliament to determine what is proper for the electorate to read in helping them to make up their minds, as to for whom they should vote.[19]

The criticism of the effect of election polls upon *candidates* is made in the context of a more general one concerning all opinion polls. It raises a more fundamental issue in the system of representative democracy, namely the extent to which leaders of society should be guided by poll results. Should a leader adopt policies reflecting the views of society as they presently exist or those reflecting his view of what society ought to believe? Some argue that opinion polls tend to undermine the representative system by creating a "bandwagon" effect upon politicians.[20]

[15] Note, *Reporting Election Returns and Computer Predictions: Proposed Regulation*, 50 IOWA L. REV. 1173 (1964-65).

[16] *Elections, Computers and the First Amendment*, 2 COLUM. J.L. & SOC. PROB. 17, at 35 (1966).

[17] This survey is mentioned in F. TEER & J. SPENCE, *supra* note 5, at 133.

[18] Such a situation may have occurred at least once in the U.K., in the Orpington by-election of 1962. The election polls predicted Liberals with 41.8% of the vote, Conservatives with 38.4% and Labour with 19.8%, whereas the actual results were 52.9%, 34.7% and 12.4% respectively. It has been suggested that would-be Labour supporters voted for the Liberal candidate in order to ensure the defeat of the Conservative candidate. This is discussed in F. TEER & J. SPENCE, *supra* note 5, at 133.

[19] 770 H.C. DEB. (Eng.) ser. 5, 44 (1968). The comment was made during a debate on electoral law reform, a proposal of which was a ban on publication of opinion polls in the 72 hours preceding an election. The proposal was not adopted.

[20] For an early criticism of election polls, *see* Editorial, *Straw Ballots*, New York Times, 13 Nov. 1936, at 22, col. 2. For a response to the editorial, *see* Robinson, *Recent*

However, it can also be argued that opinion polls are used by politicians much more selectively, being either adopted or ignored, depending upon the politician's own personal view.[21] In addition, polls may serve "to ensure that pressure groups do not make unwarranted claims of public support".[22]

The variety of uses to which election polls can be put[23] makes it difficult to point to any single criticism beyond the general one outlined above. Certainly politicians have recognized their value, and to a certain extent have attempted to distinguish between the candidate's use of polls and the electorate's use by suggesting a ban, not on the taking of polls, but on their publication. These suggestions have been made at both the federal and provincial level.[24] Such legislation would result in denying to the electorate certain information considered important by the candidates. In a democratic society, any techniques considered acceptable for the candidates, ought also to be available to the electorate. If conduct of the campaign may be influenced by election polls, should not the electorate have access to the same information to decide how to choose its representative?

With respect to the effect of polls upon the *media*, a criticism often arising is media use of poll results as a substitute for election analysis. Rather than analyzing the election by reference to candidates and policies, the media is alleged to prefer to publish the results of a poll without supplying adequate information as to its reliability. It is further argued that the media, by its constant reliance upon polls, contributes to the latter's interference in the democratic process. The alleged undesirable effect of polls upon the electorate is thereby intensified.[25]

The first criticism is directed toward the media and not election polls *per se*. The absence of election polls does not ensure that the media will present a balanced and informed analysis of the campaign. Secondly, if the disclosure of certain information relating to the polling process were required, the mystique surrounding polls might be removed and the ability of the electorate and the media to judge for themselves their accuracy would be improved. As to polls' unwarranted interference with the democratic process, suffice it to say that it is premised upon an unproven hypothesis.

If there is no conclusive, or even persuasive, evidence of the harmful effect of election polls on the democratic process, should there not then be a presumption in favour of permitting them? If freedom of speech is

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Developments in the Straw-Poll Field, 1 PUBLIC OPINION Q. No. 3, at 45 (Jul. 1937), and (No. 4), at 42 (Oct. 1937).

[21] For example, opinion polls on the issue of capital punishment generally indicate approval of some form of capital punishment, yet it has been legislatively abolished in both Canada and the United Kingdom.

[22] *Supra* note 5, at 140.

[23] For example, polls have been used to portray the concerns of the public, to maximize the potential strength of a candidate, to obtain information on the candidate's image, to assess trends and to target the opposition's weaknesses.

[24] *See* note 1 *supra*.

[25] *See* notes 13-17 and accompanying text *supra*.

accepted as a basic tenet of a democratic society, what justification would permit a restriction on a flow of information which has not been demonstrated to be harmful? Although polls may be seen by some as a modern day annoyance which has little, if any, actual value, surely the burden of persuasion must lie on those advocating their restriction or prohibition to demonstrate some evil occurring through their use.

III. THE CONSTITUTIONAL ARGUMENT

In the first part of the article the value of election polls within the framework of a democratic electoral system has been outlined and consideration given to some arguments favouring their restriction or limitation. The question which must now be considered is whether there is a constitutional prohibition against such legislation.

As is often the case, an apparently simple question like this may generate a complex response. To answer it, at least three separate matters must be considered. First, within which legislative jurisdiction does the subject matter of freedom of speech lie? Second, is legislation which bans or restricts the taking or publishing of election polls properly characterized as legislation in relation to freedom of speech? Third, is such legislation inconsistent with the guarantee of freedom of expression contained in the Charter of Rights and Freedoms?[26]

At first blush, one might think only the third question requires an answer. If the Charter guarantees us our freedoms, why be concerned with the issue of distribution of powers? The answer can be found in section 33 of the Charter. It permits both Parliament and the provincial legislatures to opt out of its provisions whereas neither can opt out of the distribution of powers scheme.[27] If the power to legislate with respect to freedom of speech is a matter within exclusive federal jurisdiction or possibly, beyond the jurisdiction of either level of government, then provincial legislation characterized as being in relation to freedom of speech may be struck down as unconstitutional without a court's having to consider the possible infringement of the Charter provisions. It should be emphasized that the Charter does not attempt to alter the pre-existing distribution of powers under the British North America Act[28] but rather imposes a further restriction on both levels of government. In addition, by following the traditional route of the distribution of powers analysis which emphasizes the "pith and substance" of legislation, a tactical advantage may be gained. If the defending parties can successfully show

[26] Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[27] Sub. 33(1) provides as follows:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Section 2 guarantees fundamental freedoms, including freedom of thought, belief and expression.

[28] Now the Constitution Act, 1867: Constitution Act, 1982, Schedule I.

that the legislation in question is not *in relation* to a fundamental freedom, but simply *affects* such freedom, a court may be more willing to acknowledge that any infringement in this regard is of a minor or incidental nature. Thus when a court considers the Charter issue, a *prima facie* presumption in favour of the legislation may have been implicitly drawn. On the other hand, if legislation is found to be an unconstitutional violation of the Charter, a court is unlikely to consider the distribution of powers argument. It may therefore be a matter of tactics whether to put the Charter or the distribution of powers argument forward first.

A. *Distribution of Power Analysis*

1. *Freedom of Speech — What is a Matter?*

Freedom of speech is considered to be a basic freedom contained within the concept of political civil liberties. Political civil liberties are those freedoms associated with the operation of our parliamentary institutions, which make parliamentary democracy both possible and tolerable.[29] In addition to freedom of speech, political civil liberties include freedom of assembly, freedom of association, freedom of the press and freedom of conscience and religion.[30] As well as political civil liberties, three other categories of civil liberties exist: legal,[31] economic[32] and egalitarian.[33]

For the purposes of this article, the discussion of political civil liberties shall be limited to freedom of speech and its relationship to the question of election polls. A complaint often heard is that civil liberties is too nebulous a concept, lacking both form and substance.[34] By focussing upon one particular freedom and analyzing it within the framework of election polls legislation, it should be possible to give some structure to the discussion. In addition, freedom of speech is the paradigm of political

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[29] For the purposes of this article, the author has adopted the classification and definition of civil liberties used by Professor B. Laskin (as he then was) in his article, *An Inquiry into the Diefenbaker Bill of Rights*, 37 CAN. B. REV. 77, at 80-82 (1959).

[30] It may be argued that if political liberties are limited to those political freedoms essential to the effective operation of a political system then freedom of religion ought not to be included within this group as it is not a necessary part of our parliamentary institutions: *see* Le Dain, *Sir Lyman Duff and the Constitution*, 12 OSGOODE HALL L.J. 261, at 319-25 (1974). However, this dispute need not be resolved for the purposes of this article.

[31] Legal liberties are seen to consist of freedom from arrest, search, seizure of property, imprisonment, self-incrimination and unfair adjudication.

[32] Economic liberties are seen to consist of the freedom of private property and contract.

[33] Egalitarian liberties are seen to consist of a claim to equality of access to education, employment, accommodation, and other benefits, and imply, at least, an absence of racial, sexual or other illegitimate criteria of discrimination.

[34] *See, e.g.*, comments of Beetz J. in A.G. Can. v. Dupond, [1978] 2 S.C.R. 770, at 796, 84 D.L.R. (3d) 420, at 438.

liberty. While considerable debate has been generated over political liberties,[35] few prominent cases have arisen. However, those that have, have generally dealt with freedom of speech.[36] Through extrapolation, the courts have determined which legislature has jurisdiction over other political civil liberties by deciding which legislature has jurisdiction over freedom of speech. Finally the concept itself justifies such a select consideration. As stated by Mr. Justice Cardozo, "[O]f freedom of thought and speech. . . one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."[37]

Sections 91 and 92 of the Constitution Act, 1867, which outline the distribution of legislative powers, make no specific reference to civil liberties, political liberties or freedom of speech. However, in interpreting these sections it should be remembered that the power granted to Parliament or the provincial legislatures is the power to make laws in relation to matters coming within the classes of subjects therein enumerated. The question therefore is whether freedom of speech is a matter coming within a particular class of subjects. At least three choices may be postulated. Freedom of speech might be a matter coming within subsection 92(13) or (16), that is property and civil rights in the province or a matter of a merely local or private nature (the provincial matter approach). Secondly, it might be a matter going beyond local concerns, falling within section 91, possibly under the criminal law power in subsection 91(27), or more likely, under the peace, order and good government power (the federal matter approach). Thirdly, it might not be a matter coming within the exclusive jurisdiction of either level of government, but rather might constitute an aggregate of several matters which, depending upon the aspect, may come within federal or provincial competence (the no matter approach). There exists yet a fourth choice, namely that freedom of speech might come within the so-called Implied Bill of Rights argued to be implicitly contained in the Constitution Act, 1867 itself (the Implied Bill of Rights approach).[38]

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[35] THE CANADIAN ABRIDGEMENT, INDEX TO CANADIAN LEGAL LITERATURE (2nd ed. 1973) lists almost a hundred articles relating to civil liberties in the section entitled *Constitutional Law, Civil Liberties.*

[36] *See* cases discussed in this article *infra.*

[37] Palko v. Connecticut, 302 U.S. 319, at 327 (1937).

[38] A fifth choice, posited in D. SCHMIESER, CIVIL LIBERTIES IN CANADA (1964), suggests that civil liberties arise out of natural law and cannot be taken away by positive law. At least one case, Chabot v. School Comm'rs of Lamorandiere, [1957] Que. B.R. 707, 12 D.L.R. (2d) 796 (C.A.) adopted this view. However, although the theory of civil liberties arising out of natural law may have been accepted by some members of the Supreme Court of Canada (*see* comments of Rand J. in Saumur v. City of Quebec, [1953] 2 S.C.R. 299, at 329, [1953] 4 D.L.R. 641, at 670), those members of the Court also acknowledged that these rights may be circumscribed by positive law. The issue then is which legislative authority may circumscribe these rights.

(a) *Provincial Matter Approach*

The provincial matter approach has as its foundation the judgment of Mr. Justice Kerwin in *Saumur v. City of Quebec*.[39] This case involved a city by-law forbidding the distribution of tracts or other written materials in the streets without the permission of the Chief of Police. Saumur, a Jehovah's Witness, challenged the by-law because it purported to prohibit the Witnesses from distributing religious tracts. Although unsuccessful before the Quebec courts, Saumur was ultimately successful before the Supreme Court of Canada. However, because of the varied reasoning of the members of the Court, it is difficult to extract the precise ratio from the judgment.[40] Although freedom of religion was the political liberty upon which Saumur mainly relied, he also argued that the by-law violated both freedom of speech and of the press.[41] As a result, some members of the Court did express their views as to which jurisdiction has legislative authority over freedom of the press.[42]

Mr. Justice Kerwin was the only member of the Court to hold that freedom of the press is a civil right in the province under subsection 92(13). It is respectfully submitted however that this interpretation is wrong. The phrase "civil rights" in subsection 92(13) was not intended to apply to those liberties now collectively referred to as civil rights. Rather it was intended as a "compendious description of the entire body of private law which governs the relationships between subject and subject, as opposed to the law which governs the relationships between the subject and the institutions of government".[43] Mr. Justice Kellock in *Saumur* explored the historical significance of the phrase "civil rights in the province" to show that it did not apply to freedom of religion or the freedom of the press. In *Switzman v. Elbling*[44] Mr. Justice Rand drew a distinction between "freedom or civil liberties" and "civil rights",[45]

[39] *Supra* note 38.

[40] *See* Laskin, *supra* note 29, at 116-17 where the author states:

> In truth, the *Saumur* case presented no clear majority view on exclusive power to legislate in relation to civil liberties. . . . The awkward result of the case was that while six justices denied provincial competence at least in some circumstances, five justices affirmed provincial competence, at least in some circumstances; and while four justices affirmed federal competence in some circumstances, five justices denied federal competence at least in some circumstances; and yet only three justices denied any federal power while four justices denied any provincial power.

[41] For the purpose of the argument presented in this article, freedom of the press may be seen as part of freedom of speech, as stated by Cartwright J. in Globe and Mail Ltd. v. Boland, [1960] S.C.R. 203, at 208, 22 D.L.R. (2d) 277, at 281: "The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher." Freedom of the press or media may be broader than freedom of speech in that it may entail the use of the media for dissemination of news and opinions and thus, may not be merely limited to freedom of speech.

[42] Kerwin, Rand, Kellock, Locke, Cartwright and Fauteux JJ.

[43] P. HOGG, CONSTITUTIONAL LAW OF CANADA 297 (1977).

[44] [1957] S.C.R. 285, 7 D.L.R. (2d) 337.

[45] *Id.* at 305, 7 D.L.R. (2d) at 357.

rejecting the notion that the phrase "civil rights" in subsection 92(13) relates to civil liberties. In an article written by Professor B. Laskin (as he then was),[46] the author discusses the history of the phrase "property and civil rights" and demonstrates that it was not intended to apply to political freedom. Thus to the extent that the proposition that "freedom of speech is a matter exclusively within provincial legislative authority" is dependent upon the *Saumur* case, the proposition stands on a shaky foundation.

(b) *The No Matter Approach*

A second possible method for resolving this issue is the no matter approach adopted by Mr. Justice Cartwright (and concurred in by Fauteux J.) in *Saumur*. His Lordship concluded that freedom of the press and of religion are not separate subject matters committed exclusively to either Parliament or the provincial legislatures. Rather they are within the competence of Parliament in some aspects and within the competence of the provinces in others. This interpretation effectively denies the independent existence of a matter called "freedom of speech" with the result that political liberties are to be seen as "parasitic appendages to legislation dealing with matters otherwise within the competence of the enacting legislature".[47] In effect, this theory endorses the view that if a matter in question has a variety of aspects, so that it may be affected by a large number of legislative enactments, it has no independent existence but is rather a conglomerate of matters. Consequently, this theory would deny that legislation could ever be enacted for the sole purpose of restricting freedom of speech. However, both the premise and the result are false. It is an established rule of constitutional law that legislation may be in relation to a particular matter but affect other subject matters.[48] The fact that a provincial law may affect freedom of speech[49] does not *ipso facto* imply that it is not a distinct subject matter.[50] The premise therefore of Mr. Justice Cartwright's theory is unproven. Moreover, in *Saumur* seven justices of the Supreme Court in fact held that the by-law was in relation to freedom of speech or religion. Furthermore, in the case of *Switzman*,[51] which considered the constitutional

[46] *Supra* note 29, at 114-16.

[47] *Id.* at 118.

[48] For a list of examples and authorities, *see* P. HOGG, *supra* note 43, at 81-82 especially n. 21.

[49] For an example of a provincial law which affects freedom of speech, *see* Oil, Chem. and Atomic Workers Union v. Imperial Oil Ltd., [1963] S.C.R. 584, 41 D.L.R. (2d) 1 (discussed in text accompanying note 186 *infra*), where the majority of the Court characterized the provincial legislation in question as being in relation to labour relations which may incidentally affect freedom of speech.

[50] Conversely, the fact that a law affects freedom of speech does not necessarily establish freedom of speech as a separate subject matter: *see* the comments of Beetz J. in *Reference re* Anti-Inflation Act, reproduced in the text accompanying notes 62 and 63 *infra*.

[51] *Supra* note 44.

validity of the Quebec Padlock Law that made it illegal to use a house for the propagation of communism or bolshevism by any means whatsoever, three members of the Supreme Court characterized the legislation as an attempt to control the thought processes of the individual by restricting the flow of information available to him.[52] It is thus conceivable that legislation may be enacted which is aimed solely at restricting certain political freedoms.

Although Mr. Justice Cartwright's view appears unsound, it has gained considerable strength from the recent decision of the Supreme Court in *Attorney-General of Canada v. Dupond*.[53] This case involved a Montreal street by-law prohibiting the holding of an assembly, parade or gathering on the public domain of the city for a period of thirty days. The by-law was challenged as being legislation in relation to criminal law or alternatively, in relation to the fundamental freedoms of speech, of assembly, of association, of the press or of religion. Mr. Justice Beetz, speaking for a majority of the Court, upheld the by-law.[54] With respect to fundamental freedoms, His Lordship stated:

> 1. None of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation.
> 2. None of those freedoms is a single matter coming within exclusive federal or provincial competence. Each of them is an aggregate of several matters which depending on the aspect, come within federal or provincial competence.[55]

These two propositions may be interpreted in a manner consistent with the view that fundamental freedoms are within the exclusive jurisdiction of Parliament or the provincial legislatures. This can be done by interpreting proposition number two to mean that fundamental freedoms may be "affected" by legislation in relation to other subject matters; for example, freedom of speech is affected by provincial legislation relating to defamation or slander, and by federal criminal legislation relating to sedition.[56] The propositions could be restated as follows:

> 1. All fundamental freedoms are subject to some limitations.
> 2. The legislative authority to limit freedoms may reside in either the federal Parliament or the provincial legislatures depending upon the subject matter of the restriction, for example criminal law (sedition) or tort law (defamation) respectively.

If this is what Beetz J. meant by his two propositions,[57] then *Dupond* does not really progress beyond the earlier case law. However, because

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[52] Rand, Kellock and Abbott JJ.

[53] *Supra* note 34.

[54] The judgment of Beetz J. was concurred in by Martland, Ritchie, Judson, Pigeon and DeGrandpré JJ. Laskin C.J.C. dissented (Spence and Dickson JJ. concurring) and held that the by-law was in relation to criminal law; the dissent therefore did not have to deal with the fundamental freedoms argument advanced by the respondent.

[55] *Supra* note 34, at 796-97, 84 D.L.R. (3d) at 339.

[56] Criminal Code, R.S.C. 1970, c. C-34, ss. 60-63.

[57] For a discussion of this case and its possible effects on the theory of Implied Bill of Rights, *see* Finley, Comment, 45 SASK. L. REV. 137 (1980-81).

he apparently questions the very existence of fundamental freedoms,[58] and refers to subsection 5(3) of the Canadian Bill of Rights,[59] criticized by some as Parliament's concession of its legislative jurisdiction over political civil liberties, it is more likely that Beetz J. was adopting a view similar to that expressed by Cartwright J. in *Saumur*. Unfortunately he does not elaborate upon his propositions nor does he indicate the authorities upon which he is relying. When he discusses fundamental freedoms, he does not refer to any case authority other than *Reference re Alberta Legislation*[60] which, it is submitted, is in contradiction to the proposition stated by him.[61]

However, Mr. Justice Beetz does suggest that these freedoms are an aggregate of several matters and not a single matter. The language used is similar to that used by him in *Reference re Anti-Inflation Act* where he stated that "the "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction".[62] The test adopted by His Lordship in that case to determine whether something was a new subject matter was stated as follows:

> However, this was done (adding new matters to the federal list of powers) only in cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enabled Parliament to touch on provincial matters had also to be taken into consideration before they were recognized as federal matters. . . .[63]

There is some difficulty in applying these criteria. As stated by Professor Abel in his article discussing this decision, the final result of Mr. Justice Beetz's analysis is to "supply the absence of criteria by wholly illusory criteria".[64] Mr. Justice Beetz does not indicate why incorporation of companies for objects other than provincial, the regulation and control of aeronautics and of radio, and the development of a National Capital Region are clear instances of distinct subject matters. This is left to speculation.[65] The difference between a new subject matter and an

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[58] *Supra* note 34, at 796, 84 D.L.R. (3d) at 438, where he states, "I find it exceedingly difficult to deal with a submission couched in such general terms. What is it that distinguishes a right from a freedom and a fundamental freedom from a freedom which is not fundamental?"

[59] Canadian Bill of Rights, R.S.C. 1970, App. III, sub. 5(3) reads, "The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada."

[60] [1938] S.C.R. 100, [1938] 2 D.L.R. 8 [hereafter cited as *Alberta Press* case].

[61] *See* text accompanying notes 77-91 *infra*.

[62] *Reference re* Anti-Inflation Act, [1976] 2 S.C.R. 373, at 458, 68 D.L.R. (3d) 452, at 524 [hereafter cited as *Anti-Inflation* case].

[63] *Id.*

[64] Abel, *The Anti-Inflation Judgement: Right Answer to the Wrong Question*, 26 U. TORONTO L.J. 409, at 430 (1976).

[65] In his judgment in the *Anti-Inflation* case, Beetz J. refers to an article by Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation*, 53 CAN. B. REV. 597 (1975) in which Professor Lederman suggests, at 606, a test similar

aggregate of existing matters would appear to be a question of degree and not of kind. Yet, as this is seemingly the test, one ought to try to apply it to fundamental freedoms.

Does freedom of speech have a degree of unity making it "indivisible, an identity. . . distinct from provincial matters and [of] a sufficient consistence to retain the bounds of form"? Or is it "totally lacking in specificity. . . so pervasive that it knows no bounds and its recognition as a federal head of power would render most provincial powers nugatory"?[66] A difficulty encountered when considering freedom of speech as a subject matter is that generally legislation is enacted, not to preserve or encourage it, but rather to restrict it. Freedom of speech exists independently of legislation prescribing it. "Political liberties find their legal existence in the absence, in general, of any absolutely restricting legislation and in judicial interpretations of legislation that seek to achieve compatibility with such liberties. . .".[67] It is that "residual area of natural liberty remaining after the makers of the common law and the statute law have encroached a little by creating inconsistent duties. . .".[68] As stated by Chief Justice Duff:

> The right of public discussion is, of course, subject to legal restrictions; those based upon consideration of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned.[69]

Although this approach might suggest that freedom of speech is too pervasive and lacking an identity or consistency, both the judges and the jurists who have considered the matter conceded that there is "an essential core of the area of freedom of expression that must be preserved from legal encroachment if our national democratic Parliament is to have the motive power of a free public opinion that is for it the breath of life".[70] The principle of free speech is basic to the principle of self-government. The keystone of our political liberty is freedom of discussion.[71] It is this concept which gives freedom of speech the unity and identity needed for its recognition as a distinct subject matter. Mr. Justice Rand stated that "freedom of discussion in Canada, as a subject matter of legislation, has a unity of interest and significance extending equally to every part of the

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to the one adopted by Mr. Justice Beetz: "[T]he new subject should also have an identity and unity that is quite limited and particular in its extent." He then applies this test to the subject matter of aeronautics to explain why it came within the "peace, order and good government clause". The reason suggested was that, technologically and industrially, aviation has a factual unity as a transportation system and the implications of transportation as a force of life and in the development of Canada makes provincial boundaries frustrating or irrelevant in relation to the legal regulations necessary.

[66] *Supra* note 62, at 458, 68 D.L.R. (3d) at 524.

[67] *Supra* note 29, at 82.

[68] Lederman, *The Nature and Problems of a Bill of Rights*, 37 CAN. B. REV. 4, at 9 (1959).

[69] *Alberta Press*, *supra* note 60, at 133, [1938] 2 D.L.R. at 107.

[70] Lederman, *supra* note 68, at 9-10.

[71] Denning, *The Spirit of the British Constitution*, 29 CAN. B. REV. 1180, at 1189 (1951).

Dominion".[72] Earlier in the same judgment, he stated:

> Whatever the deficiencies in its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.[73]

Chief Justice Duff in *Alberta Press* held that "the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions".[74] It is thus submitted that freedom of speech has a unity of interest, a distinct identity and a sufficient consistency. Although some limitations upon the exercise of this freedom do exist and are recognized, for example, those regarding public order, decency and protection of private interests, these merely establish the boundaries of free speech. While its existence does not preclude provincial legislation from affecting or restricting it, it does preclude the provinces from enacting legislation aimed at reducing the political liberties of the citizens of Canada.[75]

If the above analysis is accepted and the "provincial matter" and "no matter" choices thereby rejected, then freedom of speech is a distinct subject matter going beyond local concerns. This leaves for consideration the "federal matter" and the "Implied Bill of Rights" approach. A separate discussion of each choice is unnecessary since an analysis of the former will show that it in fact supports the latter.

(c) *Federal Matter and the Implied Bill of Rights*

If freedom of speech is not a "provincial matter" and has an identity as a separate matter, then by application of the gap test, or more accurately, the "no gap" test,[76] the legislative authority governing it would appear to reside with the federal Parliament under the residual

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[72] Switzman v. Elbling, *supra* note 44, at 306, 7 D.L.R. (2d) at 358.

[73] *Id.*

[74] *Supra* note 60, at 133, [1938] 2 D.L.R. at 107.

[75] In two recent Supreme Court decisions, Chernesky v. Armdale Publishers Ltd., [1979] 1 S.C.R. 1067, 90 D.L.R. (3d) 321, and Gay Alliance Toward Equality v. Vancouver Sun, [1979] 2. S.C.R. 435, 97 D.L.R. (3d) 577, Dickson J., in dissenting judgments, commented upon the importance of freedom of the press in Canada. Although the distribution of power over this freedom was not at issue, his comments nonetheless indicate the importance given the concept. In *Chernesky*, at 1096, 90 D.L.R. (3d) at 343-44, he said that "a free and general discussion of public matters is fundamental to a democratic society. . . . Anything which serves to repress competing ideas is inimical to the public interest". In *Gay Alliance*, at 464, 97 D.L.R. (3d) at 598-600, he defined freedom of the press as "that degree of freedom from restraint which is essential to enable proprietors, editors, and journalists to advance the public interest by publishing the facts and opinions without which a democratic electorate cannot make responsible judgments" and further he recognized freedom of the press as "one of our cherished freedoms".

[76] *See* HOGG, *supra* note 43, at 245-46. Essentially, the "gap test" is based upon the premise that there are no lacunae or gaps in the distribution of powers and where a gap seems to appear, the peace, order and good government power fills it.

power of the peace, order and good government clause of section 91. In effect, this amounts to a grant of legislative power by default. To a certain extent, the case law which appears to establish federal authority reflects this assignment by default. The three authoritative cases that appear to establish exclusive federal jurisdiction, *Alberta Press*,[77] *Saumur*[78] and *Switzman*[79] and which have been so interpreted,[80] all involve the question of the *vires* of provincial or provincially-based legislation.[81] Strictly speaking, therefore, they have established only the non-existence of provincial authority to legislate in relation to freedom of speech. However, they may also establish that legislation in relation to the restriction of free speech is beyond the powers of Parliament. An examination of the leading cases is warranted before discussing this interpretation which constitutes the basis of the Implied Bill of Rights theory.

The primary case upon which any discussion of political liberties, not merely freedom of speech, must center is *Alberta Press*.[82] This case involved a provincial bill which would have compelled, at the direction of a government official, publication of rebuttals made by the Social Credit government to any criticism directed at it by a newspaper published in the province. The bill was limited in its application to criticism of the provincial, not federal, government. Thus, there was no overt attempt to interfere with federal parliamentary institutions. When referred to the Supreme Court of Canada, it was held to be *ultra vires* the provincial legislature. Five of the six justices held that the bill was ancillary to and dependent upon another Social Credit enactment which the Court held to be invalid[83] and therefore was invalid by reasons of its dependency.[84] Mr. Justice Cannon held that freedom of speech was a matter within exclusive federal jurisdiction under subsection

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[77] *Supra* note 60.

[78] *Supra* note 38.

[79] *Supra* note 44.

[80] *See, e.g.*, Dionne v. Municipal Court of Montreal, 116 C.C.C. 40, 3 D.L.R. (2d) 727 (Que. C.S. 1956); Koss v. Konn, 36 W.W.R. 100, 30 D.L.R. (2d) 242 (B.C.C.A. 1961).

[81] In *Alberta Press* and in *Switzman* the legislation in question was provincial, whereas in *Saumur* it was a municipal by-law passed pursuant to provincial legislation.

[82] *Supra* note 60.

[83] The Court held that the Alberta Social Credit Act, S.A. 1937, c. 10 was *ultra vires* even though that particular statute had not been referred to the Court. The three bills referred were an Act Respecting the Taxation of Banks, An Act to Amend and Consolidate the Credit of Alberta Regulations Act, and an Act to Ensure the Publication of Accurate News and Information. On appeal, the Privy Council expressed the view that since the Alberta Social Credit Act was repealed prior to the hearing of the appeal, the issue of the validity of the Credit Regulation Bill and the Press Bill was of an academic nature. Therefore the appeal proceeded with respect only to the Bank Taxation Bill and is reported in A.G. Alta. v. A.G. Can., [1939] A.C. 117. For a very interesting, informative and critical discussion of this case, *see* Tollefson, *Freedom of the Press* in *Contemporary Problems of Public Law in Canada* (O. Lang ed. 1968) at 49.

[84] Cannon J. was the only member of the Court who did not decide the case on that basis.

91(27), the criminal law power.[85] However, both the Chief Justice[86] and Mr. Justice Cannon[87] addressed the issue of freedom of speech and freedom of the press.

Chief Justice Duff made some important observations about political liberties. First, he developed his arguments about the existence of such liberties in Canada from the wording of the Preamble, a constitution similar in principle to that of the United Kingdom. Second, he conceded that Parliament had the power to enact legislation to protect the right of freedom of speech. He did not admit to any power, either in Parliament or in the provinces, to legislate in derogation of this right. Third, he appeared to find the power to legislate for the protection of this right in the residuary power under section 91:

> That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from the *British North America Act* as a whole. . . and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.[88]

Fourth, he acknowledged that freedoms are not absolute and that legislation in relation to public order, public decency and the protection of private rights may limit them. However, any such limitation must be qualified. If the limitation imposes "such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada", then it is *ultra vires*.

Yet, it must be recognized, as it has been,[89] that this case is not

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[85] *Alberta Press, supra* note 60, at 146, [1938] 2 D.L.R. at 120. He stated:
The Federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion. These subjects were matters of criminal law before Confederation, have been recognized as criminal matters and have been expressly dealt with by the Criminal Code.

[86] *Id.* at 133, [1938] 2 D.L.R. at 107:
There can be no controversy that such institutions (Parliament) derive their efficacy from the free public discussion of affairs, from criticism and answer and counter criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals.

[87] *Id.* at 145-46, [1938] 2 D.L.R. at 119:
Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest.

[88] *Id.* at 133-34, [1938] 2 D.L.R. at 107-08.

[89] *See* Laskin, *Comment*, 14 ALTA. L. REV. 135, at 136 (1976). The Chief Justice is reported to have said: "And I don't really wish to subtract from what he (Professor Tarnopolsky) said about the *Alberta Press* case, but insofar as it represents a decision on the allocation of legislative powers and the relation of such power to civil liberties, and to political liberties, it must still be gauged or assessed."

conclusive of the issue since Chief Justice Duff's comments were by way of *obiter*.[90]

Mr. Justice Cannon alone decided the case upon the basis that the provincial legislation was an interference with freedom of the press. However, the basic propositions put forward by Duff C.J.C. and Cannon J. regarding the Canadian parliamentary system, and the justices' reliance upon the words "constitution similar in principle to that of the United Kingdom" in the Preamble to the Constitution Act, 1867 have been relied upon and referred to in a number of cases[91] as establishing the basis for the existence of political liberties in Canada, regardless of which level of authority has the power to restrict such rights. It is fair to say that these comments have become the *raison d'etre* for the continued references to this case.

In the 1950's, two cases from Quebec gave the Supreme Court an opportunity to clarify the issue of legislative authority over civil liberties. Although some members of the Court did express their views, the answer nonetheless remained unclear.

The first opportunity arose in *Saumur*.[92] As indicated earlier,[92a] no clear statement by the Court on the issue of fundamental freedoms can be discerned. However, three members of the Court held the by-law prohibiting distribution of written materials in the street without the consent of the police chief to be legislation in relation to censorship, characterizing it as an attempt to limit freedom of discussion. Mr. Justice Rand relied on the Preamble to the Constitution Act, 1867 as indicating a system of government with a freely elected Parliament, that is a "government resting ultimately on public opinion reached by discussion and the interplay of ideas".[93] He referred to the judgments of Duff C.J.C. and Cannon J. in *Alberta Press* and admitted that while provincial legislation could affect free speech, such legislation had to be sufficiently definite and precise to indicate its subject matter. Mr. Justice Kellock characterized the by-law as being in relation to the thought process of those who used the streets. Referring to Duff C.J.C.'s judgment in *Alberta Press*, he held the by-law to be legislation in relation to a subject matter going beyond the jurisdiction conferred by any of the heads of section 92. Mr. Justice Locke characterized the by-law as intending to censor the distribution of written publication in the city of Quebec. As did Rand and Kellock JJ., he referred to Duff C.J.C.'s judgment in *Alberta Press* and stated that he agreed with it in its entirety. Thus the by-law was characterized as going beyond local concern and as such, beyond the heads of power in section 92. None of the three justices

[90] *Supra* note 60, at 132, [1938] 2 D.L.R. at 106. "This (the ancillary nature of the legislation) is sufficient for disposing of the question referred to us but, we think, there are some further observations upon the Bill which may be properly made".

[91] *See also* R. v. Burnshine, [1975] 1 S.C.R. 693, at 703, 44 D.L.R. (3d) 584, at 591 (Martland J.); A.G. Can. v. Dupond, *supra* note 34, at 795, 84 D.L.R. (3d) 420, at 438 (Beetz J.); *Gay Alliance*, *supra* note 75, at 464, 97 D.L.R. (3d) at 598 (Dickson J.).

[92] *See* text accompanying note 39 *supra* for an account of the relevant facts.

[92a] *See* note 40 *supra*.

[93] *Id.* at 330, [1953] 4 D.L.R. at 671.

expressly held that the legislative power over freedom of speech resided in Parliament. As stated by Mr. Justice Kellock:

> Whether the learned Chief Justice was of the opinion that the legislation in question in that case [referring to Duff's judgment in the *Alberta Press* case] was incompetent to parliament as well as to a provincial legislature, it is not necessary to consider. It was clearly, [in] the opinion of the learned Chief Justice, beyond provincial competence.[94]

An opportunity to consider freedom of speech again arose in *Switzman v. Elbling*.[95] This case raised the issue of the constitutional validity of the Quebec "Padlock Act", legislation prohibiting the use of property or the publication of any material for the purpose of propagating communism or bolshevism.[96] The Supreme Court, by a majority of eight to one, held the legislation to be *ultra vires* the province. Five members of the Court held the legislation to be in relation to criminal law[97] and not in relation to the use of property.[98] Three members of the Court held the Act to be in relation to freedom of speech and therefore beyond the competence of the provinces. As stated by Mr. Justice Rand:

> The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities. . . .
> . . . .
> Whatever the deficiencies in its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.
>
> *But public opinion, in order to meet such a responsibility demands the condition of a virtually unobstructed access and to the diffusion of ideas. . . .* Under that government [parliamentary government], the freedom of discussion in Canada, as a subject matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. . . .
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> Bearing in mind that the endowment of parliamentary institutions is one and entire for the Dominion. . . that Legislatures and Parliament are permanent features of our constitutional structure, and that the body of discussion is indivisible, apart from the incidence of criminal law and civil rights, and incidental effects of legislation in relation to other matters, the degree and nature of its regulation must await future consideration; for the purposes here it is sufficient to say that it is not a matter within the regulation of a Province.[99]

In a separate judgment, Mr. Justice Kellock concurred with Mr. Justice Rand. Neither justice expressly held that the right to legislate in relation to freedom of speech was a federal matter, merely that it was

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[94] *Id.* at 354, [1953] 4 D.L.R. at 694.

[95] *Supra* note 44.

[96] Formally entitled An Act to Protect the Province Against Communistic Propaganda, R.S.Q. 1941, c. 52, ss. 3 and 4.

[97] Kerwin C.J.C. and Locke, Cartwright, Fauteux and Nolan JJ.

[98] Taschereau J., in dissent, held that the legislation was in relation to property and therefore valid under sub. 92(13) of the B.N.A. Act.

[99] *Supra* note 44, at 305-07, 7 D.L.R. (2d) at 357-59.

not a matter within the provincial heads of power under section 92.[100]

Mr. Justice Abbott adopted a similar analysis. He found the legislation to be in relation to the suppression of communism and held that the right of "free expression of opinion and criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours".[101] His Lordship went on to say:

> The *Canada Elections Act*, the provisions of the *British North America Act* which provide for Parliament meeting at least once a year and for the election of a new parliament at least every five years, and the *Senate and House of Commons Act*, are examples of enactments which make specific statutory provisions for ensuring the exercise of this right of public debate and public discussion. Implicit in all such legislation is the right of candidates for Parliament or for a Legislature, and of citizens generally, to explain, criticize, debate and discuss in the freest possible manner such matters as the qualifications, the policies, and the political, economic and social principles advocated by such candidates or by the political parties or groups of which they may be members.
>
> This right cannot be abrogated by a Provincial Legislature, and the power of such Legislature to limit it, is restricted to what may be necessary to protect purely private rights, such as for example provincial laws of defamation. It is obvious that the impugned statute does not fall within that category. . . . Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of the opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.[102]

These three cases have resulted in the adoption of the proposition that the federal Parliament has exclusive jurisdiction to legislate in relation to politicial liberties. Yet only one of the justices, Cannon J., actually so held while another justice, Abbott J., expressly stated that it was beyond the power of both Parliament and the provincial legislatures to abrogate the right of freedom of speech.[103] The other justices did not express an opinion. Given this "silence", why should the view that the power to legislate in relation to political liberties is an exclusively federal power prevail over the view that such freedoms are beyond the legislative authority of either jurisdiction?

Whether political freedoms are constitutionally protected, apart from the Charter, from abrogation by either level of government is essentially a debate concerning the legislative supremacy of the Canadian

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[100] *Id.* at 307, 7 D.L.R. (2d) at 359. He stated: "[F]or the purposes here it is sufficient to say that it is not a matter within the regulation of a Province."

[101] *Id.* at 326, 7 D.L.R. (2d) at 370.

[102] *Id.* at 327-28, 7 D.L.R. (2d) at 371.

[103] A view which Abbott J. reiterated in Oil, Chemical and Atomic Workers Int'l Union, Local 16-601 v. Imperial Oil Ltd., [1963] S.C.R. 584, at 600, 41 D.L.R. (2d) 1, at 5.

parliamentary institutions, both at the federal and provincial level. With respect to the United Kingdom, this concept means that Parliament has the power "to make or unmake any law whatever".[104] The Parliament of the United Kingdom is competent to pass any type of legislation on any subject matter it so desires. The concept of legislative supremacy has been brought to Canada through the Constitution Act, 1867 and its judicial interpretation. The Privy Council stated that "it would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada".[105] However, that statement is slightly inaccurate; a more accurate statement being that of Mr. Justice Rand in *Murphy v. C.P.R.*:

> It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself; . . .[106]

A listing of these express and implied limitations is contained in Professor Laskin's article.[107] The express limitations are in respect of the following: education under section 93; the use of the English and French languages in Quebec; the tenure of judges of the provincial superior courts under section 99; an annual session of Parliament under section 20;[108] the five-year limit on the duration of Parliament under section 50 and subsection 91(1);[109] money bills under sections 53 and 54; annual legislative sessions in Ontario and Quebec under section 86; the office of the Lieutenant-Governor under subsection 92(1);[110] the "free trade" provision of section 121; and the tax immunity of Dominion and provincial land or property under section 125. The implied limitations relate to: the prohibition of interdelegation of legislative powers as between Parliament and the provincial legislature;[111] the inability of either Parliament or any provincial legislature to preclude actions in the courts challenging the validity of some piece of legislation;[112] and the inability of the provincial legislature (and possibly Parliament) to exclude completely the supervisory power of superior courts over inferior tribunals in matters of jurisdiction.[113]

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[104] A. DICEY, THE LAW OF THE CONSTITUTION 39 (10th ed. 1965).

[105] A.G. Ont. v. A.G. Can., [1912] A.C. 571, at 581, 3 D.L.R. 509, at 511.

[106] [1958] S.C.R. 626, at 643, 15 D.L.R. (2d) 145, at 153.

[107] *Supra* note 29, at 100.

[108] *Repealed by* Canada Act, 1982, U.K. 1982, c. 11 and *replaced by* Constitution Act, 1982, s. 5.

[109] *See* Constitution Act, 1982, s. 4.

[110] *See* Constitution Act, 1982, s. 41.

[111] A.G.N.S. v. A.G. Can., [1951] S.C.R. 31 [1950] 4 D.L.R. 369 (1950).

[112] B. LASKIN, CANADIAN CONSTITUTIONAL LAW 96 (4th ed. 1975); Amax Potash Ltd. v. Gov't of Sask., [1977] 2 S.C.R. 576 (1976), 71 D.L.R. (3d) 1; *Reference re* Debt Adjustment Act, 1937 (Alberta), [1943] A.C. 356, [1943] 2 D.L.R. 1.

[113] Crevier v. A.G. Que., 38 N.R. 541, 127 D.L.R. (3d) 1 (S.C.C. 1981). *See* HOGG, *supra* note 43, at 138-39 for a discussion of this point and for further references. Another possible implied limitation relates to extra-territorial legislation or legislation which is excessively broad or vague: *see Hogg, id.* at 200.

Should the inability of either Parliament or the provinces to curtail civil liberties fundamental to democratic institutions be added to the list? Many objections have been raised to this. First, it is argued that the basis for the Implied Bill of Rights is found in the Preamble to the Constitution Act, 1867 and a preamble does not have legislative force.[114] However, two responses to this are possible. The basis for the argument does not derive solely from the Preamble but rather from the definition of Parliament contained in section 17 of the Constitution Act, 1867 and the express provision for its continued existence.[115] The Preamble is used to assist in interpreting the phrase "Parliament", by implying an institution similar in principle to that of the United Kingdom. The concept of freedom of speech therefore derives not from the Preamble itself but from those provisions of the Constitution Act, 1867[116] expressly guaranteeing the continued existence of those institutions which like the parliamentary institutions of the United Kingdom, are predicated upon freedom of speech. A somewhat similar use of the Preamble and section 17 of the Constitution Act, 1867 was made in *Reference re Legislative Authority of the Parliament of Canada* in relation to the Upper House.[117] The Court held that the "continued existence of the Senate as part of the federal legislative process is implied in the exceptions provided in subsection 91(1)".[118] The Court went on to say that "to make the Senate a wholly or partially elected body would affect a fundamental feature of that body".[119] This would not be in keeping with the Preamble which refers to a constitution similar in principle to that of the United Kingdom where the Upper House is not elected. Thus the use of the Preamble either independently of, or concurrently with, other sections of the Constitution Act, 1867 in establishing implied limitations upon the powers of Parliament has been recently and conclusively affirmed.

A second objection is the apparently anomalous practice of establishing constitutional limitations upon Canadian parliamentary institutions by reference to a system of government possessing in law an omnipotent legislature. With respect to this objection, it must be emphasized that what was created in Canada was a system similar, but not identical, to that of the United Kingdom and one in which those institutions considered essential were given constitutional protection. In this way the concept of legislative supremacy was made subservient to the idea of democratic self-government. As such, those matters necessary for the maintenance of democratic self-government ought to prevail over concepts such as legislative supremacy which, as indicated earlier, is of limited application in Canada.

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[114] LASKIN, *supra* note 112, at 900.22.

[115] Ss. 20, 50, sub. 91(1), now *replaced by* Constitution Act, 1982, ss. 4, 5, 38-48.

[116] Ss. 11, 17, 20, 50 and 91(1).

[117] [1980] 1 S.C.R. 54, 102 D.L.R. (3d) 1 [hereafter referred to as the *Senate Reference*].

[118] *Id.* at 73, 102 D.L.R. (3d) at 15.

[119] *Id.* at 77, 102 D.L.R. (3d) at 18.

Essentially the argument concerning a constitutional guarantee of political liberties depends upon the acceptance of the philosophy expressed by Duff C.J.C., and Rand and Abbott JJ. as to the role these freedoms serve. Their logic dictates that political civil liberties must prevail over any legislation aimed at their destruction, regardless of the source, in order to preserve the fundamental features of the democratic process. To deny the logical conclusion of their arguments is to deny the validity of their premises. If these are not accepted then the views expressed by Mr. Justice Cartwright and Mr. Justice Beetz, that there is no matter labelled freedom of speech, only legislation which affects freedom of speech, must inevitably be adopted.

2. *Characterization of the Legislation*

If the "no matter" approach of Cartwright J. is rejected and the "Federal matter" or the "Implied Bill of Rights" view is adopted instead, the next step in any discussion of provincial or federal legislation restricting election polls is "characterization".[120] The process of characterization is, as Professor Hogg says, an attempt to "identify the dominant or most important characteristic of the challenged law".[121] Professor Lederman suggests that "a rule of law for the purposes of the distribution of legislative power is to be classified by that feature of its meaning which is judged *the most important one* in that respect".[122] In so doing, the courts have adopted a variety of criteria, including the purpose of the legislation[123] and sometimes, its effect.[124] Yet ultimately the decision is, as Hogg states, "one of policy and it must be guided by a concept of federalism".[125]

Given the need for characterization, the question which would be put to the court would be whether provincial (or federal)[126] legislation banning or restricting election polls is legislation in relation to freedom of speech or some other subject matter. What "subject matters" spring to mind?

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[120] It is arguable that the first step in any constitutional case ought to be the identification of the "matter" of the legislation and the second step, the assignment of the "matter" to one of the "classes of subjects". This is the reverse of the approach taken in this article where an attempt is first made to determine the existence of a "matter" called freedom of speech. It is hoped that the earlier discussion on freedom of speech identifying the important values served by this concept will be of assistance in determining the "matter" of any legislation.

[121] *Supra* note 43, at 80.

[122] Lederman, *Classification of Laws and the British North America Act in Continuing Canadian Constitutional Dilemmas* in THE COURTS AND THE CANADIAN CONSTITUTION 229, at 241 (W. Lederman ed. 1964).

[123] *Id.* at 239.

[124] *See* A.G. Alta. v. A.G. Can., [1939] A.C. 117, [1938] 4 D.L.R. 433; Texada Mines Ltd. v. A.G.B.C., [1960] S.C.R. 713, 24 D.L.R. (2d) 81.

[125] *Supra* note 43, at 87.

[126] For the sake of simplicity, the issue of characterization shall be dealt with by reference to provincial legislation although the same process would be applicable to federal legislation.

Freedom of speech is the first as such legislation would restrict the gathering and dissemination of information. This characterization would apply even if the legislation prohibited only the taking of polls and not their publication. Though this might be regarded merely as a prohibition of activity, nonetheless the purpose of such prohibition is to prevent both access to, and release of, certain information. Obviously, the publication of accurate polls could not be possible if poll taking were forbidden. The action prohibited thus relates to the gathering of information without which freedom of speech is curtailed.

A second subject matter could be provincial elections since the provision may be contained in a provincial act regulating conduct during an election period. The latter topic appears to come under the topic of control of the provincial electoral process. Although no specific class or subject in section 92 of the Constitution Act, 1867 is so entitled, that particular subject matter may fall within subsection 92(1) which concerns the amendment of a province's constitution.[127] The early case of *Re North Perth, Hessin v. Lloyd*[128] possibly suggests that the right of voting is a statutory privilege of a political nature falling within the category, not of civil rights in the province, but of electoral rights in Canada. Although the issue in this case concerned federal election legislation and Parliament's competence in this regard, the Court did concede that the provinces had the power to enact provincial electoral legislation. In *Valin v. Langlois*,[129] Chief Justice Ritchie stated that the provinces had the "exclusive right to deal with, and be the sole judges of, election matters".[130] The right of the provinces to control the electoral process has been acknowledged by the Privy Council, at least in regard to who may vote under subsection 92(1) of the Constitution Act, 1867.[131] Further, it is clear that the legislature is entitled to enact such legislation as it considers appropriate to ensure that the election is conducted free of any undue influence.[132] Yet, at the same time, the courts have consistently recognized the need for freedom of expression on matters of public concern, and the fact that Canadian parliamentary institutions, both federal and provincial, "[d]erive their efficacy from the free public discussion of affairs. . . from the freest and fullest analysis and examination from every point of view of political proposals".[133]

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[127] *Now* Constitution Act, 1982, s. 45.

[128] 21 O.R. 538 (Div'l Ct. 1891), *appeal denied*, n. 1, at 539.

[129] [1880] 3 S.C.R. 1 (1879).

[130] *Id.* at 10.

[131] Cunningham v. Tomey Homma, [1903] A.C. 151. The Privy Council upheld a provision in the B.C. Elections Act which provided that no Chinese, Japanese or Indian shall have his name placed on the register of voters for any electoral district or be entitled to vote at any election.

[132] Brassard v. Langevin, [1877] 1 S.C.R. 145, referred to by Rand J. in Switzman v. Elbling, *supra* note 44, at 307; *see also Re* C.F.R.B. and A.G. Can., [1973] 3 O.R. 819, 38 D.L.R. (3d) 335 (C.A. 1973) discussed *infra* at text accompanying notes 138-39 and notes 158-59.

[133] *Alberta Press*, *supra* note 60, at 133.

Given the two possible subject matters, freedom of speech and provincial election regulation, how would a court decide between the two? Clearly, legislation banning or restricting election polls would stem the flow of information available to the voter, the candidate and the media. However, the fact that it affects freedom of speech is not sufficient. Legislation may be enacted to protect against a perceived evil resulting from the abuse of a freedom.[134] The legitimate protection of the electoral process would appear to support legislation which might in some ways restrict freedom of speech. For example, provisions appear in a number of election acts which prohibit undue influence.[135] In one case, *Re C.F.R.B. and Attorney General of Canada*,[136] a provision in the Broadcasting Act[137] prohibiting a partisan broadcast on the day of, or one day immediately prior to, an election of an M.L.A. was upheld as being a regulatory measure intended to ensure a standard of decent conduct with respect to all elections. Does legislation prohibiting or restricting election polls fall within this category? What purpose is served by such legislation?

As indicated earlier, the objections raised with respect to election polls may be classified into one of two categories: they are inaccurate or misleading, or alternatively, they are an improper influence on the decision-making process of the electorate, candidates and the media. With respect to the first criticism, it is submitted that the province can enact legislation, the aim of which is to improve a poll's reliability through regulatory control. Such legislation could require the disclosure of certain information and of the procedure adopted in conducting the polls, for example, how the sample was chosen, the size of the sample, the wording of the questionnaire, in short, a scheme similar to the self-regulatory one adopted by the pollsters. Further, in light of the *C.F.R.B.* case, a limited prohibition on publication, for example, on the day of or day before the election, might be sustained. However, legislation banning poll taking or the publication of poll results would appear to be more concerned with the uses to which the information is put than with its accuracy. As such, the legislative purpose would appear to be directed toward the second category of criticism, the alleged improper influence of polls.

Initially, legislation directed at an improper influence occurring in the election period might be thought to be valid as legislation in relation to the electoral process. However, with respect to election polls, the assumption that polls exercise an improper influence is questionable. Polls are not intended to cause the voter to react in any particular way. In fact, individual response to the poll is unpredictable. If the purpose of election polls is, as indicated in the introduction, to inform the voter of how other persons view the election and to permit him to determine,

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[134] *See* Bushnell, *Freedom of Expression — The First Step*, 15 ALTA. L. REV. 93 (1977).

[135] *E.g.*, Election Act, R.S.B.C. 1979, c. 103, s. 165; Canada Elections Act, R.S.C. 1970 (1st Supp.), c. 14, s. 69.

[136] *Supra* note 132.

[137] R.S.C. 1970, c. B-11, s. 28.

from a non-partisan source, the relative strength of the parties, no improper influence occurs. Moreover, in a multi-partied electoral system such as that in Canada, this information may be of assistance to the voter.[138]

If the effect of the polls is unproven, then arguably the information provided by them ought not to be available to the electorate or media. However, this approach is at odds with the presumptions basic to a free and democratic society, in which free speech is not merely tolerated but is fundamental. If the effect of polls is unclear, if the presumption supporting prohibition of election polls is contrary to the idea of a democratic system, if the electorate is not viewed as incapable of exercising a free choice, then legislation aimed at prohibiting election polls cannot be supported as legislation in relation to the electoral process. It is more appropriately characterized as intending to suppress information which may assist the electorate in the exercise of its choice. The end result is that such legislation ought to be characterized as being in relation to the suppression of freedom of speech.

B. *Charter of Rights*

If one adopts the view that freedom of speech is a matter within the exclusive legislative jurisdiction of the provinces or of Parliament, or is a matter of concurrent jurisdiction, or that election poll legislation is legislation in relation to the electoral process incidentally affecting freedom of speech, then legislation which prohibits election polls would be *prima facie intra vires*. However, with the enactment of the Charter of Rights[139] a further constitutional challenge to legislation is now possible. The Charter guarantees freedom of expression, including freedom of the press and other media of communication.[140] Under subsection 52(1) of the Constitution Act, 1982, any law inconsistent with the provisions of the Charter is, to the extent of the inconsistency, of no force or effect. Thus, if one is successful in arguing that the prohibition of election polls is a violation of freedom of speech, then such legislation should be struck down as being inconsistent with section 2 of the Charter.

Pending a statement from the Supreme Court of Canada on the interpretation and application of the Charter, any discussion of its effects upon legislation is somewhat speculative. In the absence of existing case authority, the Charter has, at first glance, received a variety of interpretations from both academics[141] and the courts.[142] At the level of the

[138] *Supra* note 18.

[139] Constitution Act, 1982, Part I.

[140] Para. 2(*b*). Fundamental freedoms include the freedom of "thought, belief, opinion and expression, including freedom of the press and other media of communication".

[141] *See, e.g.*, THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, COMMENTARY (W. Tarnopolsky and G.A. Beaudoin, eds. 1982); *The New Constitution and the Charter of Rights, Fundamental Issues and Strategies*, 4 SUP. CT. L. REV. (1982); *The Canadian Charter of Rights and Freedoms*, 61 CAN. B. REV., No. 1 (1983).

[142] A number of annotation and reporting services have been established to report

provincial Superior Court, two trends in interpretation appear to have been adopted:

1. The courts have made reference to the legal interpretation given to Bills of Rights possessed by other jurisdictions, in particular to the American Constitution and the European Convention on Human Rights and Fundamental Freedoms.[143] The importance of such references relates to the issues which the particular cases raise and the analyses used for their resolution. Charter challenges, by their nature, often place society's values in conflict. For example, in cases concerning freedom of speech, the value of uncensored speech must be balanced against the danger or harm created by such speech. Foreign cases indicate the weight or importance attached to these competing values and suggest an approach for their resolution.

2. Where there is existing Canadian judicial authority on an issue raised in a Charter challenge to a statutory provision, the courts will examine it.[144] For example, the presumption of innocence guaranteed in the Charter[145] is analogous to a provision in the Canadian Bill of Rights.[146] Cases decided under the latter have been looked at in the interpretation of the former.[147] However, these pre-Charter decisions are neither binding nor decisive. Indeed, given the constitutional nature of the Charter, they may not even be persuasive. However, their existence must be acknowledged and their relevance argued.

Any attempt therefore to forecast how the Supreme Court of Canada will resolve the question of the right to take and publish election polls requires both a review of foreign jurisprudence and an examination of pre-existing Canadian authority.

1. *Foreign Jurisprudence*

The concept of freedom of expression is protected by most written constitutions. In some, the freedom is stated as an absolute. For example,

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the large number of cases being decided under the Charter, *e.g.*, CANADIAN CHARTER OF RIGHTS ANNOTATED (J.B. Laskin, E.L. Greenspan, J.B. Dunlop, M. Rosenberg eds. 1982); CANADIAN RIGHTS REPORTER (M. Edwardh and C. Ruby eds. 1982).

[143] *See, e.g.*, R. v. Oakes, 40 O.R. 660, 2 C.C.C. (3d) 339 (C.A. 1983), *leave to appeal granted* 2 C.C.C. (3d) 339n (S.C.C. 1983); Quebec Ass'n of Protestant School Bds. v. A.G. Que. (No. 2), 140 D.L.R. (3d) 33 (Que. C.S. 1983); *Re* Southam Inc. (No. 1), 41 O.R. 113, 141 D.L.R. (3d) 341 (H.C. 1983).

[144] *See, e.g.*, *Re* Southam Inc. (No. 1), *id.*; R. v. Oakes, *id.*; *Reference re* s. 94(2) of the Motor Vehicle Act (B.C.), [1983] 3 W.W.R. 756, 19 M.V.R. 63 (C.A.).

[145] Para. 11(*d*), which reads as follows:

> Any person charged with an offence has the right
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> . . . .
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> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[146] R.S.C. 1970, App. III, s. 2 (*f*), which provides that "no law of Canada shall be construed or applied so as to . . . deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. . .".

[147] *E.g.*, R. v. Oakes, *supra* note 143.

the Constitution of the United States reads that: "[c]ongress shall make no law abridging the freedom of speech".[148] In others, freedom of expression is expressly subjected to certain limitations. For example, the European Convention on Human Rights and Fundamental Freedoms[149] provides as follows:

> Everyone has the right to freedom of expression. . . . The exercise of these freedoms. . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.

Although the Charter appears to grant an absolute right to freedom of expression in paragraph 2(*b*), the right may be limited in two ways. First, section 1 of the Charter permits "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Second, the concept has, in Canada, always been limited in its scope. Duff C.J.C. in *Alberta Press* stated that the right of public discussion is subject to legal restrictions "based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned".[150] However, even without these limitations,[151] given the foreign jurisprudence, the concept would appear to require a balancing of interests and a recognition of some limitations.

In the United States, the absolute view ascribed to Mr. Justice Black and Mr. Justice Douglas[152] has been rejected in favour of the "balancing test".[153] This requires the court in each case to balance the individual and social interest served by freedom of expression against that served by a regulation restricting it.[154] The court must clearly identify the various public and private interests involved and their respective importance; otherwise the process can easily become a method for rationalizing the dilution of an important freedom.[155] In the area of free

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[148] *U.S. Const.* amend. I.

[149] Arts. 10(1) and 10(2). Similar restrictions can be found in the Constitutions of Antigua and Barbuda, subs. 12(1) and 12(4); Grenada, subs. 10(1) and 10(2); India, subs. 19(1) and 19(2).

[150] *Supra* note 60, at 133, [1938] 2 D.L.R. at 107.

[151] These are discussed in the section entitled *The Canadian Approach infra.*

[152] *See* comments of Black J. in Barenblatt v. United States, 360 U.S. 109, at 141-44 (1959); Konigsberg v. State Bar of Cal., 366 U.S. 36, at 60-69 (1961); Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, at 163-69 (1961); comments of Douglas J. in Speiser v. Randall, 357 U.S. 513, at 536-37 (1958).

[153] *See* comments of Vinson C.J. in American Communications Ass'n v. Douds, 339 U.S. 382, at 399-406 (1950); comments of Frankfurter J. in Dennis v. United States, 341 U.S. 494, at 517-66 (1951).

[154] T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 47-66 (1967).

[155] Kauper, Book Review, 58 MICH. L. REV. 619, at 627 (1958).

speech related to the method of government and to ideas and issues of current political interest, the United States Supreme Court has come close to adopting the absolute view. In the case of *Mills v. State of Alabama*,[156] a provision in the Alabama Corrupt Practices Act made it a crime to "do any electioneering or to solicit any votes. . . in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held".[157] On election day, a local newspaper published an editorial strongly urging the electors to adopt a Mayor-Council form of government. At trial, a demurrer to the complaint was granted on the ground that the statutory provision abridged the constitutional right of freedom of expression. On appeal, the Alabama Supreme Court held the restriction to be a reasonable one. However, the United States Supreme Court reversed this decision. Mr. Justice Black, speaking for the Court, stated:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated and all such matters relating to the political process.[158]

It had been argued that the legislation was reasonable in that it "protects the public from confusing last-minute charges and counter-charges and the distribution of propaganda in an effort to influence voters on an election day; when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until the election is over". The Court expressed doubt as to the relevance of "reasonableness" as a defence to an alleged violation of political expression.[159] It suggested further that the true effect of the law was merely to advance by one day the time at which no reply was possible. It is interesting to compare this decision with that of the Ontario Court of Appeal in the *C.F.R.B.* case,[160] where a radio station was charged with broadcasting a program of partisan nature on the day immediately preceding the election, in violation of the Federal Broadcast Act.[161] The Court rejected a challenge based upon freedom of speech, stating that subsection 28(1) "expounds what right-thinking people in Canada would consider to be a standard of decent conduct with respect to all elections in Canada".[162] The Court appeared implicitly to adopt a "balancing test" without expressly stating the approach they would or did adopt regarding a Bill of Rights challenge. It may be that the Court felt the benefit derived from allowing the electorate a period of personal contemplation, gained

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[156] 86 S. Ct. 1434 (1966).

[157] ALA. CODE, §285 (1940).

[158] *Supra* note 156, at 1437.

[159] *Id.*: "We hold that no test of reasonableness can save a state law from invalidation as a violation of the first amendment. . .".

[160] *Supra* note 132.

[161] R.S.C. 1970, c.B.11, sub. 28(1).

[162] *Supra* note 132, at 827, 38 D.L.R. (3d) at 343.

through one day's respite from partisan campaigning outweighed the danger posed by the inability of the candidates to respond to last minute charges.

The decision in *Mills* was referred to in *Miami Herald Publishing Company v. Tornillo*.[163] This concerned a challenge to a statutory provision[164] granting an electoral candidate, whose personal character or official record had been attacked by a newspaper, the right to demand free publication of any reply he might want to make. It was argued that such legislation enhanced freedom of speech by ensuring a free flow of information to the public. However, the United States Supreme Court held the statute to be unconstitutional. Chief Justice Berger, speaking for the majority, stated that the statute might damper the rigour and limit the variety of public debate since editors might well conclude that the safe course would be to avoid controversy.[165]

The concept of balancing of interests appears to have been adopted by the European Human Rights Commission in its interpretation of the European Convention on Human Rights and Fundamental Freedoms. In *Glimmerveen and Hagenbeek v. Netherlands*[166] an issue arose concerning the conflict between freedom of expression on the one hand, and the concept of racial equality and freedom from discrimination on the other. The applicant in this case subscribed to a philosophy advocating an ethnically homogeneous population. He represented a prohibited political association and had been convicted of distributing leaflets intended to incite racial discrimination, an offence under the Dutch Criminal Code. As a result, he was not permitted to run as a candidate in a local municipal election. The applicant claimed he was denied the right of freedom of expression, contrary to Article 10 of the Convention. Although recognizing that freedom of expression was essential to a democratic society, applying equally to matters which offend, shock or disturb the state as to those which are fully acceptable, the Commission held that the policy advocated by the applicant was one of racial discrimination, prohibited under Article 17.[167] It felt that permission of such expression would be contrary to the text and spirit of the Convention and would contribute to the impairment of other rights and freedoms.

Given American and European authority, it seems some balancing of interests is required in interpreting rights. How would the adoption of this approach affect the matter of election polls? Presumably the

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[163] 94 S. Ct. 2831 (1974).

[164] FLA. STAT. ANN. §104.38 (West 1973).

[165] The decision in *Tornillo, supra* note 163, was recently referred to by the S.C.C. in Gay Alliance Toward Equality v. Vancouver Sun, *supra* note 75. For an analysis of both *Tornillo* and *Gay Alliance* and for a discussion of the concept of freedom of speech, see generally Black, Case Comment, 17 OSGOODE HALL L.J. 649 (1979).

[166] 1979, 4 E.H.R.R. 260.

[167] Art. 17 reads as follows:

> Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

justification for regulation of election polls is the integrity of the electoral process. Legislation may be required to ensure this.[168] Invariably such controls will limit the freedom of expression of some or all individuals. How then does one determine which controls are permissible and which are not?

A "balancing test" requires an identification of the various interests involved. The reasons for restricting election polls must therefore be clearly articulated. If the basis for controls is the alleged inaccuracy of polls, then the legislation should attempt to ensure their accuracy through the stipulation of certain standards. As indicated earlier, the pollsters have themselves adopted standards for this purpose. The disclosure of certain information, for example, the sampling method adopted, the sample size, those surveyed, and the wording of the question may result in more accurate surveys. Such legislation would be narrow in its operation, unconcerned with the content of the information. It would not therefore substantially impair the use of polls and would balance the interests concerned by permitting public access to this kind of information while ensuring a sufficient degree of accuracy. If, however, the concern regarding election polls derives from a presumed "harmful" effect upon the electorate, an effect as yet unproved, then the legislation presumes the public's inability to assess and use such information properly and is an attempt to suppress information for that reason. It would be prohibitive in nature, concerned with content rather than method, and would impair the expression of such information. The most abhorrent aspect of the legislation is its unproved premise. As suggested earlier,[169] the prohibition of election polls may in fact preclude, in a three-party system, a more considered exercise by the electorate of their voting power. What must be emphasized here is the substantial impairment of freedom of speech without the protection of corresponding fundamental societal interest. There is no evidence that an open, honest and fair electoral process is endangered by the taking and publication of election polls. If a "balancing test" is adopted, legislation regulating election polls in order to ensure accuracy and consumer understanding might be valid. However, legislation which prohibited all such polls would not.

2. *A Canadian Approach*

The value of foreign cases may diminish as a uniquely Canadian approach to the interpretation of the Charter is developed. This would entail a consideration of the language of the Charter, in particular the limitation provisions of section 1, and the values of the Canadian society as reflected in our legal jurisprudence.

Both the wording of section 1 and the courts' interpretation of it indicate that the notion of an absolute fundamental freedom has been

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[168] *See* Characterization of Legislation, pp. 538-41 *supra.*

[169] *See* notes 16 and 17 accompanying text *supra.*

rejected.[170] Section 1 itself permits the imposition of certain limits. However, these must meet a three-fold test. They must (1) be demonstrably justifiable in a free and democratic society; (2) be reasonable; and (3) be prescribed by law.[171] Furthermore, the courts have held that the onus of proof with respect to section 1 lies upon the party asserting the constitutional validity of the restriction.[172] In most instances, this onus would fall upon the government. The presumption of constitutional validity found in the "distribution of power" cases[173] has been expressly rejected. The question at hand is whether legislation banning or limiting the publication of election polls, "being prescribed by law", would fit within section 1 by meeting the first two requirements.

In *Quebec Ass'n of Protestant School Boards v. Attorney General of Quebec*, Chief Justice Deschênes indicated that the "demonstrably justifiable" test requires the court to focus on the validity of the legislation's objective.[174] As indicated earlier, the objections to election polls are based upon either their accuracy or inaccuracy or their alleged improper influence on the electoral process. The objectives of the kind of legislation under discussion could simply be the control of election polls or the integrity of the electoral contest. Either objective would appear, *prima facie*, valid. However, the use of the adverb "demonstrably" may indicate an evidential burden requiring the adduction of some evidence, other than counsel's assertions at trial, to demonstrate these objectives.[175] Where the objectives are unclear or

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[170] *E.g.*, in Ontario Film and Video Appreciation Soc'y v. Ontario Bd. of Censors (unreported, Ont. Div'l Ct., 25 Mar. 1983), the Court held that the "fundamental freedoms guaranteed in the Charter are not absolute".

[171] The three-fold test was first put forward by Chief Justice Deschenes of the Quebec Superior Court in Quebec Ass'n of Protestant School Bds. v. A.G. Que. (No. 2), *supra* note 143, at 66 (Que. C.S. 1982). The test proposed was actually four-fold, but the additional criterion put forward, namely "a free and democratic society", is immediately satisfied. The three-fold test has been explicitly followed in Ontario in Ontario Film and Video Association Soc'y v. Ontario Bd. of Censors, *supra* note 170. A similar approach was adopted by Chief Justice Evans in Federal Republic of Germany v. Rauca, 38 O.R. (2d) 705, 141 D.L.R. (3d) 412 (Ont. H.C. 1982).

[172] Quebec Ass'n of Protestant School Bds. v. A.G. Que. (No. 2), *supra* note 143; Ontario Film and Video Association Soc'y v. Ontario Bd. of Censors, *supra* note 170; *Re* Southam Inc. (No. 1), *supra* note 143.

[173] *Re* Southam Inc. (No. 1) *supra* note 143, at 125, 141 D.L.R. (3d) at 348 (Ont. H.C. 1982). For further discussion of this point, *see* Hovius and Martin, *The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada*, 61 CAN. B. REV. 354, at 368-71 (1983). As the article indicates and as some cases illustrate, the courts may still be reluctant to strike down legislation as unconstitutional even if the presumption of constitutionality does not apply; *see, e.g.*, Federal Republic of Germany v. Rauca, *supra* note 171, at 716, 141 D.L.R. (3d) at 424:

> Following the usual presumptive canon of construction of legislative validity courts should be extremely hesitant to strike down those laws unless they clearly violate the constitutional rights and freedoms set out in the Charter, and should be equally reluctant to characterize the limitation as *not* justifiable in a free and democratic society unless it is obviously unreasonable.

[174] *Supra* note 143, at 67.

[175] This was the case in Quebec Ass'n of Protestant School Bds. v. A.G. Que. (No. 2), *supra* note 143.

ambiguous, or where the court is undecided as to their validity, the onus or proof has not been discharged and the legislation should be struck down.

If the objective asserted is the preservation of the electoral process, the government ought to be required to demonstrate the nexus between the use of polls and the impairment of electoral integrity. It should be made to show that publication of election polls in some way precludes an open, honest and fair election. To date, there is no empirical evidence supporting this concern. It would therefore be possible to find that no valid objective has been demonstrated as there is an insufficient nexus between the stated goal and the legislative provisions. On the other hand, if the courts accept that polls unduly influence the election process or if the objective is the apparently valid one of control of election polls, the court would then have to consider the "reasonable limits" test.

The "reasonable limits" test requires that the nature of the means adopted to achieve the objectives be examined.[176] If the legislation merely stipulates disclosure requirements, and is not so onerous as to effectively eliminate election polls, then it would appear to be reasonable. In fact, the pollsters have voluntarily begun to adopt such standards. However, if the legislation establishes impossible standards, thereby banning or effectively abolishing polls, then reasonableness is directly in issue.

The methods by which the courts decide upon reasonableness are not entirely clear. While courts are showing some willingness to consider foreign jurisprudence, they must be vigilant to ensure that the Charter is interpreted in light of Canadian experience and expectation.[177] For this reason a consideration of relevant pre-Charter decisions may be important.

The value of prior case law for the resolution of Charter challenges is unclear. Certainly, cases concerning the Canadian Bill of Rights have been considered although these are not determinative. But what of other cases? Are they relevant to Charter issues? For example, suppose Parliament enacted legislation prohibiting the publication of election polls during the week preceding the election. Should the *C.F.R.B.* case,[178] which upheld a forty-eight hour ban on partisan political broadcasts be relied upon? Should the reasoning in *McKay v. The Queen*,[179] which concerned the validity of a municipal by-law prohibiting the display of signs, including election signs, on residential property, be considered?

The status of these cases has not been the subject of much discussion. It has been suggested that cases involving the distribution of legislative power will not be relevant to the issue of a restriction's compliance with the requirements of section 1.[180] For the most part this argument is valid. Usually the distribution of powers analysis does not involve the courts'

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[176] *Id.* at 67 and 71.

[177] *Re* Southam Inc. (No. 1), *supra* note 143.

[178] *Supra* note 132.

[179] [1965] S.C.R. 798, 53 D.L.R. (2d) 532. For further discussion of this case, *see* text accompanying notes 192-95 *infra*.

[180] Finkelstein, *The Relevance of Pre-Charter Case Law for Post-Charter Adjudication*, 4 SUP. CT. L. REV. 267 (1982).

consideration of the merits of the legislation.[181] However, on occasion they have commented upon the wisdom or reasonableness of a statute. Although these comments are by way of *obiter*, they may serve as guidelines in determining the reasonableness of a limitation. For example, in *C.F.R.B.*, the Ontario Court of Appeal stated that the forty-eight hour ban on political broadcasts reflected what "right-thinking people in Canada would consider to be a standard of decent conduct with respect to all elections in Canada".[182]

Three pre-Charter decisions of the Supreme Court of Canada have dealt with one situation which would run afoul of the "reasonable limits" test. Where a restriction effects "such a curtailment of the exercise of the right of public discussion as substantially to interfere with the workings of the parliamentary institutions of Canada", then it is unconstitutional. This test was stated by Chief Justice Duff in *Alberta Press*[183] and applied by Mr. Justice Martland in two subsequent cases, *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*,[184] and *McKay v. The Queen*.[185]

In the *Oil, Chemical and Atomic Workers* case, a provincial statute prohibited a union from making any contribution from union dues for the support of a political party or candidate.[186] The legislation was challenged as being in relation to federal elections, or alternatively, as seeking to curtail those rights essential to the proper functioning of parliamentary institutions. By implication this challenge raises the issue of freedom of speech and reasonable limits. Dealing first with the matter of characterization, the dissenting justices[187] said that the legislation was in relation to the political activity of trade unions and not labour relations. Further, they held that the legislation related to elections, including federal elections and was therefore *ultra vires* the province. Mr. Justice Abbott went one step further, holding this type of legislation, which was intended to regulate contributions made to defray the political and electoral costs, to be *ultra vires* both Parliament and the provinces.[188] The majority of the Court, led by Mr. Justice Martland,[189] characterized the legislation as being in relation to labour relations, a matter clearly within provincial jurisdiction. However, this was not sufficient to dispose of the matter. The trade union argued, relying on the comments of Chief Justice Duff in *Alberta Press*, that the legislation "effects such a curtail-

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[181] *Id.* at 273.

[182] *Supra* note 132, at 827, 38 D.L.R. (3d) at 343.

[183] *Supra* note 60, at 134, [1938] 2 D.L.R. at 108.

[184] [1963] S.C.R. 584, 41 D.L.R. (2d) 1.

[185] *Supra* note 179.

[186] Labour Relations Act, R.S.B.C. 1960, c. 205, subpara. 9(6)(*c*)(i) (*as amended by* S.B.C. 1961, c. 31, s. 5).

[187] Judson, Cartwright and Abbott JJ. Each delivered dissenting reasons but both Cartwright and Abbott JJ. concurred with the reasons given by Judson J.

[188] This view is consistent with his earlier comments in *Switzman*: *see* notes 102 and 103 and accompanying text *supra*.

[189] Taschereau and Fauteux JJ. concurring. Ritchie J. delivered a separate concurring judgment.

ment on the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada". Mr. Justice Martland disagreed:

> The legislation, however, does not affect the right of any individual to engage in any form of political activity which he may desire. It does not prevent a trade union from engaging in political activities. It does not prevent it from soliciting funds from its members for political purposes, or limit, in any way, the expenditure of funds so raised. It does prevent the use of funds, which are obtained in particular ways, from being used for political purposes.[190]

He went on to hold that the province may enact legislation which protects the civil rights of individuals in the province. He held that legislation limiting the use to which membership funds can be put is not a substantial interference with the working of parliamentary institutions.

Similar issues arose in *McKay v. The Queen.*[191] This case concerned a municipal by-law which prohibited the display of signs on residential properties. The Court was asked to consider its application to partisan election signs put up by individual homeowners on their own residential property. These signs urged persons to vote for a particular candidate in a federal election which was then underway. In a rather confusing judgment, Mr. Justice Cartwright, speaking for the majority,[192] held that the by-law ought to be "read down" so as not to apply to federal elections. Although the constitutional validity of the by-law and the supporting provincial legislation were not directly challenged, the Court held that the by-law could not apply to political activities in a federal election since only Parliament can control such conduct. Mr. Justice Martland, speaking for the minority,[193] held that the by-law was legislation in relation to the use of property, only incidentally affecting "the means of propaganda used by an individual or by a political party during a federal election campaign".[194] As the by-law was *prima facie intra vires* the municipality, Mr. Justice Martland also considered the submission that the by-law interfered with the political rights of the appellant. His Lordship referred to the decision in *Oil, Chemical and Atomic Workers* and the test suggested by Duff C.J.C. in *Alberta Press* and stated:

> [A]ssuming it [the test] is a sound proposition of constitutional law... I would not accept the proposition that, because a by-law of general application incidentally prevented a particular form of political propaganda from being used in a particular area, this constituted a substantial interference with the working of the parliamentary institutions of Canada.[195]

Although the test adopted in both *Oil, Chemical and Atomic Workers* and *McKay* was phrased in the terms of "substantial interference with the workings of the parliamentary institutions of Canada", it may

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[190] *Supra* note 184, at 594, 41 D.L.R. (2d) at 12.

[191] *Supra* note 179.

[192] Taschereau C.J. and Abbott, Judson and Spence JJ. concurred with Cartwright J.

[193] Fauteux, Ritchie and Hall JJ. concurred with Martland J.

[194] *Supra* note 179, at 811, 53 D.L.R. (2d) at 544.

[195] *Id.* at 816-17, 53 D.L.R. (2d) at 549.

nonetheless be a useful indicator of the concerns which a court may consider in deciding the "reasonable limits" test of section 1. (The fact that in these cases the context of the test is freedom of speech in an electoral or political contest is especially pertinent.) Since the justification of election polls is similarly dependent upon the political context in which they occur, the "substantial interference" test provides an analogy. Furthermore, it would appear to be a more stringent test, requiring substantial rather than merely unreasonable interference. Should the banning of opinion polls violate this test, it would also violate the reasonableness test.

One factor apparently important to Mr. Justice Martland when applying the test was that the particular activity in question could be carried on in some other fashion. The legislation, therefore, although prohibitive in appearance, was truly regulatory since it applied to only one particular aspect of a more general activity. For example, in *Oil, Chemical and Atomic Workers* the legislation did not prevent the trade union from participating in political activities or from soliciting funds for that purpose. Rather it prevented the unrestricted use of union dues. In *McKay*, the restriction applied only to residential property and did not disallow the display of political signs in an area where there was general commercial advertising. However, even if this line of reasoning is followed, prohibitive legislation banning the taking or publication of election polls would still be invalid. The information provided by polls is unique. They are an attempt to measure scientifically the views of the general public as opposed to a mere generalization, by one particular person or group, of the particular support enjoyed by an issue, candidate or political party. They are not simply a method of conveying political propaganda but instead serve to balance partisan propaganda offered by political parties with an independent interpretation of political activity. Regulation of the conduct through the imposition of standards might be permissible as being regulatory but a total prohibition would not.

Further, the "reasonableness" requirement suggests that a court, when applying section 1, should relate the particular activity under control, for example election polls, to the objective intended, namely an open, honest and fair electoral process. It should judge the potential form of restriction against the freedom asserted, starting from basic principles. If Canadian democracy and parliamentary institutions are founded upon open and free discussion, then any legislation preventing the presentation and discussion of information ought to be seen as *prima facie* unreasonable. If the restriction is necessary for electoral integrity, the proof of which is on the party asserting such need, then the restriction would be reasonable. However, if it cannot be demonstrated to be necessary for the protection of the electoral process, then it should be considered unreasonable. Since the harm alleged with respect to election polls cannot be substantiated, the benefit of the doubt should be exercised in favour of the fundamental freedom of speech. Legislation which would prohibit election polls should be considered to be beyond the jurisdiction of either the federal or provincial legislature.

IV. CONCLUSION

In this article, an attempt has been made to demonstrate the existence in Canada of a constitutional guaranty protecting the right to take and publish election polls. This guaranty may be established by one of two routes, the traditional distribution of powers analysis or the fresh but untried Charter of Rights approach. Although the latter appears more attractive in that the Charter expressly recognizes and guarantees freedom of thought, belief, opinion and expression, it still requires a court to balance competing interests. Further, the very newness of the Charter and the courts' concern for its potential impact may result in the adoption of a very narrow interpretation. The distribution of powers analysis, on the other hand, reflects the traditional judicial approach to matters involving constitutional questions. However, it requires a bold acknowledgement by a court of the Implied Bill of Rights principle, at least, with respect to those civil liberties essential to the maintenance of a democratic system. To date, no court has clearly adopted the Implied Bill of Rights and it may be an unfortunate consequence of an entrenched Charter of Rights that courts will now be less inclined to do so.

Regardless of the method of analysis adopted, the likelihood of establishing a constitutional guaranty depends upon a court's appreciation of the need for, and the obligation to protect, political civil liberties. It also requires the court to recognize, as it should, that a prohibition or an unreasonable restriction of election polls, are unwarranted interferences with freedom of speech. The three seminal cases, *Alberta Press, Saumur* and *Switzman*, recognize the need for "unobstructed access to the diffusion of ideas" for it is the "breath of life for parliamentary institutions". Any restriction of such freedoms should be narrowly construed and demonstrated to be necessary for public order or decency. Some legislative restrictions might therefore be justified, for example, the requirement that poll results be accompanied by certain information which would assist the consumer in judging its accuracy or validity. However, any legislation prohibiting poll taking or publication runs counter to the concept of unrestricted access to ideas.

As a final point, it should be emphasized that freedom of speech generally should not be interpreted as being limited to political free speech. Rather, if the concept is to have any content at all, it must at a minimum include political free speech which forms the foundation for a larger freedom of speech. A constitutional guaranty protecting the right to take and publish election polls can be built upon that foundation and thereby lay the groundwork of a general right to freedom of speech.