OPINION POLLS AND THE PROTECTION OF POLITICAL SPEECH — A COMMENT ON *THOMSON NEWSPAPERS CO.* V. *CANADA (ATTORNEY GENERAL)*

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I. INTRODUCTION

Government interference in the free flow of political information touches at the very heart of our democratic self-conception. The right to full, free, and informed participation in the electoral process is the wellspring of our political liberty, and any legislative prohibition on the open expression of political thoughts and information raises the spectre of manipulation and abuse. For this reason, such restrictions, especially during election campaigns, demand particular scrutiny. Nevertheless, the law has long recognized that elections must not only be free, but also fair.[1] Therefore, the right to vote is amongst the most regulated of all freedoms. The intricate scheme of rules and regulations governing every facet of political participation reflects the well-founded belief that a democracy is only as good as the electoral process which constitutes it.

The constitutional challenge to Parliament's recently enacted restrictions on the dissemination of opinion poll results during election campaigns brings the competing values of political free expression and protection of democratic integrity into sharp relief. In *Thomson Newspapers Co.* v. *Canada (A.G.)*,[2] the Ontario Court of Appeal was called upon to answer fundamental questions about the limits of government regulation on the nature, quantity, and quality of information reaching voters during the campaign process, and to begin developing a comprehensive approach to the adjudication of political expression rights under the *Canadian Charter of Rights and Freedoms*.[3]

Unfortunately, this task arose in the context of a seemingly innocuous limitation on a less-than-beloved form of expression. By itself, the *Canada Elections Act*'s[4] blackout on the publication of opinion polls during the final 72 hours of federal election campaigns presents little threat to the health and vibrancy of our democracy, and is hardly the sort of dictatorial intervention against which the courts are inclined to muster the moral might of the right of free expression. Moreover, these limitations are not a unilateral government initiative, but rather a response to widespread concern and distrust over the increasing role opinion polls are playing in the management and coverage of campaigns. As such, the court's approval of this limitation is hardly surprising and appears to be in accordance with the letter and spirit of the *Charter*.

In this article I discuss the reasoning underlying the Ontario Court of Appeal's decision in *Thomson*, with a focus on its broader implications. I argue that the Court's judgment in *Thomson*, in fact, represents a marked departure from the lofty ideals of political speech protection articulated by the Supreme Court of Canada, and that the framework of analysis adopted by the court in this case is, in fact, a model for the unprincipled suppression of unpopular political speech.

This article examines four interpretative moves underlying this judgment which may permit future courts to sanction far more substantial infringements of political freedom upon expression than the comparatively minor restrictions in this case. First, the court devalues the expression under consideration by failing to adequately consider the

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[1] See e.g., *Hogan v. Careen* (1994), 116 Nfld. & P.E.I.R. 310 (Nfld. S.C.T.D.).

[2] (1996), 138 D.L.R. (4th) 1, 30 O.R. (3d) 350 aff'g (1995), 24 O.R. (3d) 109 (Gen. Div.) [hereinafter *Thomson* cited to D.L.R. at C.A. or cited to O.R. at Gen. Div.], leave to appeal to S.C.C. granted, (File 25593) March 3, 1997.

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

[4] R.S.C. 1985, c. E-2 [hereinafter *Canada Elections Act*].

dynamics of contemporary political participation and the interest of voters as listeners. This leads the court to situate the impugned expression further from the core than a more thoughtful analysis would indicate, inviting an attenuated proportionality inquiry. Second, the court imports the "reasoned apprehension of harm" standard into the sphere of political expression. This allows the court to sanction the suppression of important political information on the basis of little more than popular prejudice. Third, a closer examination suggests that the prevention of the alleged harms to which the prohibition is rationally connected is not itself a permissible purpose under the *Charter*. And fourth, the Court adopts a view of citizens which discounts their ability to function as rational self-governing agents. This behaviouristic approach invites the judiciary to uphold paternalistic interventions in the free exercise of the right to vote.

II. FACTS AND BACKGROUND

While Chief Justice Cooke could once declare that, "the devil himself knoweth not the mind of man,"[5] he lived in an age before pollsters. Polls promise an irresistible insight into the minds of our fellow citizens. They satisfy the fundamental human curiosity to know, and offer politically and economically indispensable information to those individuals and corporations whose fortunes depend on the public mood. Needless to say, polls and politics were made for one another, and polls have become omnipresent — if not omniscient — elements of the electoral landscape. For example, in the 1988 United States Presidential campaign, only one in six news stories contained discussion of substantive issues, whereas fully one third included the results of public opinion polls.[6] The Canadian federal election of the same year was equally poll saturated. Over the course of the seven week campaign, the results of 22 national and 37 local polls were made public. Thirty percent of all television coverage of the election contained some mention of the results.[7]

Given their increasing prevalence and prominence, polls and their effects on voter behaviour have long been the subject of study and debate in academic and political circles. As George Gallup, the father of modern opinion surveying, acknowledges in *The Sophisticated Pollwatcher's Guide*, "[m]any of the doubts about the value of public opinion polls spring from the belief that polls not only report but influence opinion, especially during election campaigns."[8] Although Gallup was understandably opposed to government regulation of poll publication,[9] many politicians and political scientists were of a different mind. Various forms of restrictions on polling and publication were recommended as early as 1966 by the Barbeau Committee on Election Expenses. Calls for formal intervention were subsequently echoed by the government's own *White Paper*

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[5] Sir W. R. Anson, citing Brian C.J., in A.G. Guest, ed. *Principles of the English law of contract and of agency in its relation to contract* (Oxford: Clarendon Press, 1959) at 41. The case referred to is *Anon.* (1477), Y.B. Pasch. 17 Edw. IV, f. I, pl. 2.

[6] S.R. Sunstein, *Democracy and the Problem of Free Speech* (The Free Press: New York, 1993) at 61, citing S. R. Lichter, D. Amundson & R. Noyes, *The Video Campaign* (New York, 1988).

[7] G. Lachapelle, *Polls and the Media in Canadian Elections: Taking the Pulse*, Vol. 16 of Research Studies of the Lortie Commission (Toronto: Dundurn, 1991) at 3.

[8] G. Gallup, *The Sophisticated Pollwatcher's Guide* (Princeton: Princeton Opinion Press, 1972) at 21.

[9] *Ibid.* at 197.

on Election Law Reform in 1986, the 1989 Royal Commission on Electoral Reform (the "Lortie Commission"), and numerous private members' bills at the federal and provincial levels.[10] Of the 90 briefs submitted to the Lortie Commission, 70 percent advocated some regulation of opinion polling during campaign periods.[11] This debate has been repeated in most western democracies, with a wide range of results.[12] Often ill-articulated, the anxiety over the impact of polling is manifested in phrases such as "undue influence"[13] and "distorting effect."[14] At its essence, however, the unease occasioned by the prevalence of polls is a concern as to whether our democratic institutions are being supplanted by a 'pollocracy.'

Recommendations to ameliorate the perceived problems ranged from the mandatory publication of methodological information, to the formation of a Polling Commission to monitor polling practices and reporting, to short-term blackouts.[15] In May 1993, the Parliament of Canada responded by amending the *Canada Elections Act* to prohibit the publication of opinion surveys during the final 72 hours of a federal election campaign. Section 322.1 of the *Canada Elections Act* reads that:

> [n]o person shall broadcast, publish or disseminate the results of an opinion survey respecting how electors will vote at an election or respecting an election issue that would permit the identification of a political party or candidate from midnight the Friday before polling day until the close of all polling stations.[16]

Concerns over the constitutionality of these provisions were voiced shortly after their enactment. In "The Blackout of Opinion Polls: An Assault on Popular Sovereignty," J.A. Fraser concluded that the provisions were an unsustainable infringement of section 2(b) of the *Charter*.[17] Obviously of a similar mind, the Thomson and Southam publishing corporations[18] brought an application to have the section declared of no force and effect, arguing that the blackout was an unjustifiable violation of the right to free expression and the right to vote, guaranteed by sections 2(b) and 3 of the *Charter* respectively.

In *Thomson*, the trial judge, Somers J., had the benefit of hearing expert testimony from several of the nation's leading experts on the sociological effects of polling. The applicant newspapers presented affidavits from Professor George Perlin, professor of

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[10] See J. A. Fraser, "The Blackout of Opinion Polls: An Assault on Popular Sovereignty" (1995) 2 M.C.L.R. 365 at 367, citing G. Lachapelle, *supra* note 7 at 31-48.

[11] *Supra* note 7 at 16.

[12] In Turkey, a proposed blackout was declared unconstitutional (see S. Bailey, *infra* note 46 at 515). Denmark, Germany, Great Britain, Ireland Italy and the Netherlands have little or no restrictions. Spain has a five day blackout, France one week, Belgium two weeks, Luxembourg four weeks, and Portugal prohibits survey publication throughout campaigns.

[13] *Thomson* (Gen. Div.), *supra* note 2 at 119.

[14] *Ibid.* at 5.

[15] *Supra* note 7.

[16] *Supra* note 4.

[17] *Supra* note 10. I am in substantial agreement with Fraser's comprehensive analysis, which reflects the reasoning which the Court of Appeal in *Thomson* ought to have followed.

[18] As of January 1997, the Canadian Daily Newspaper Association reported that these conglomerates, controlled by media magnates Ken Thomson (the Second Lord Thomson of Fleet) and Conrad Black, collectively own 41 daily newspapers in Canada. In addition, Black owns Hollinger Inc., which operates an additional 25 dailies, giving Black control over 58 of Canada's 104 dailies comprising 43% of the total national circulation.

political science at Queen's University, and Colin MacKenzie, deputy managing editor of *The [Toronto] Globe and Mail.* In reply, the government tendered opinions from a number of people, including professor Guy Lachapelle, associate professor of political science at Concordia University and author of a research study completed for the Royal Commission on Electoral Reform and Party Financing,[19] as well as former Chief Electoral Officer of Canada, Jean-Marc Hamel. Their testimony concerned five impacts on voter behaviour often attributed to opinion polls: the *bandwagon effect*, which is thought to make polls a form of self-fulfilling prophecy by rallying support for the leading candidate; the *underdog effect* of rallying support for the trailing candidate; a *demotivating effect*, whereby voters abstain from casting their ballots because of a perceived certainty that one candidate will win; a *motivating effect* of making voters aware of an election; and a related *free-will effect* which prompts voters to cast their ballots to prove the polls wrong.[20] It was on the basis of the alleged 'distorting' impact of these effects that the government sought to justify its intervention.

III. THE ONTARIO COURT OF APPEAL'S PROTECTION OF POLITICAL EXPRESSION

A. *Overview of the Judgment*

In a *per curiam* judgment in *Thomson*, Catzman, Carthy and Charron J.J.A. rejected the applicants' arguments. The court focussed its deliberations on the infringement of free expression, and dismissed the claim that the blackout violated the right to vote enshrined in section 3 of the *Charter*. While recognizing that the right to vote includes the right to receive the information necessary to cast an informed vote, the court held that the limited scope and duration of the blackout did not sufficiently undermine voters' abilities to participate fully and meaningfully in a genuine election to engage section 3 of the *Charter*.[21]

Throughout the proceedings, the Crown properly conceded that the blackout infringed section 2(b) of the *Charter*, and confined its efforts to justifying that infringement under section 1 of the *Charter*. Before commencing its section 1 analysis, however, the Court reversed two of Somers J.'s key interpretations as to the scope of the blackout. Significantly, it did so *sui motu*, notwithstanding the Crown's support for both findings in question. First, the Court held that the prohibition enacted by section 322.1 of *Canada Elections Act* covers not just the communication of new survey results, but also those which have previously been published. Second, it held that the blackout extends to all surveys, no matter how informal, including so-called "hamburger polls."[22]

The court accepted the respondent's submission that the impugned provision was enacted for the purpose of preventing the potential harm to the integrity of the electoral process wrought by the publication of late polls whose findings could not be adequately challenged or verified. It was held that section 322.1 of *Canada Elections Act* was rationally connected to the achievement of this end, despite the absence of empirical

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[19] *Supra* note 7.

[20] See *ibid.* and *Thomson* (Gen. Div.) *supra* note 2 at 177.

[21] *Thomson* (Gen. Div.), *supra* note 2 at 135-38; *Thomson* (C.A.), *ibid.* at 8-9.

[22] This term is used to describe highly informal and unscientific surveys, and are thus-named after the marketing device sometimes employed by vendors where certain goods (often food items) are matched to opposing politicians or political parties, and consumers are invited to express their intentions by purchasing one or the other of the designated products.

evidence that harm was occurring. As is the case with many areas of behavioural sociology, the scientific literature on the effects of exposure to opinion polls is imperfect and contradictory, and the fact that several of the predicted effects would counteract one another exacerbates this reality. Finally, the court summarized the state of our knowledge on the actual impact of polls in the following way:

> [t]here is...no empirical evidence as to the extent or nature of the influence of opinion polls upon the voter; nor can it be said with certainty that the impact of opinion polls is undue.[23]

Nevertheless, the court reasoned that the widespread concern over the potentially harmful effects of late-election polls demonstrated a reasoned apprehension of harm, justifying Parliament's intervention.

Clearly not of a mind to entertain a detailed consideration of the numerous alternative measures which the government could potentially have adopted to achieve its stated end of avoiding the damage wrought by misleading polls, the court gave short shrift to the question of minimal pre impairment, concluding that:

> ...rules are necessary, and as opinion surveys have emerged as commonplace in the election process, Parliament has identified the potential for distortion and unfairness and has adopted modest restraints as a safeguard.[24]

At trial, Somers J. undertook an extensive review of polling regulation in other western democracies, and found the Canadian approach to be in line with the "general trend towards a short blackout."[25] This no doubt bolstered the Court of Appeal's comfort in its final characterization of the blackout pursuant to section 322.1 of *Canada Elections Act* as a "limited restraint...which is not overly intrusive" in a free and democratic society.[26]

B. *The Contextual Approach to Free Expression Infringements — Listeners' Rights and the New Politics*

The spectrum of human conduct involving expressive activity is limitless.[27] The Supreme Court of Canada, in recognition of this fact, has steadily gravitated towards a contextually driven treatment of section 1 justification, one which explicitly recognizes that "not all expression is equally worthy of protection."[28] The court has defined the topography of free expression in terms of a central core of values surrounded by an

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[23] *Thomson* (C.A.), *supra* note 2 at 3.

[24] *Ibid.* at 11.

[25] *Thomson* (Gen. Div.), *supra* note 2 at 124-26.

[26] *Thomson* (C.A.), *supra* note 2 at 12.

[27] For an example of judicial recognition of the breadth of expressive content in human behaviour see *Reference Re Criminal Code ss. 193 & 195 (1)(c)*, [1990] 1 S.C.R. 1123.

[28] *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at 246-247, 71 D.L.R. (4th) 68 [hereinafter *Rocket*] and *R.J.R.-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199-404 citing *Rocket* at 280 and 330, 127 D.L.R. (4th) 1 [hereinafter *R.J.R.-MacDonald* cited to S.C.R.] This manifestation of the contextual approach to freedom of expression originated with the decision of Wilson J. in *Edmonton Journal* v. *Alberta (A.G.)*, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577 [hereinafter *Edmonton Journal* cited to S.C.R.].

expansive realm of expressive behaviour, diminishing in importance as it departs further from the centre. The trinity of values comprising that centre has been identified as the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process.[29] To contextualize the analysis, the court must decide how closely the impugned expression is connected to these values. In the vast majority of cases the courts' determination as to the infringed expression's relative value to society and its proximity to the 'core' of free expression values prefigures the outcome of the rights claim. Therefore, it is crucial to the integrity of the *Charter* that the courts carefully and critically assess the nature of the expression which the government seeks to curtail, and its potential importance for individual citizens.

At the heart of the *Charter*'s commitment to freedom of expression lies the belief that this liberty is, "indispensable to the operation of a democratic form of government."[30] The intimate connection between freedom of expression and the institutions of democracy has secured a place of privileged protection for political speech in Canadian rights jurisprudence.[31] The Supreme Court of Canada's seminal pronouncement on the subject in *Edmonton Journal* makes this point clear:

> [i]t is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinion about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.[32]

1. *The Importance of Polls to Listeners*

In *Thomson*, the court stated that while opinion polls may be said to be about politics, "they are not themselves political."[33] While this characterization would appear to situate the publication of public opinion polls near the heart of section 2(b)'s protection, it nevertheless reveals a profound misapprehension on the part of the court.

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[29] *Irwin Toy* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927, 25 C.P.R. (3d) 417 [hereinafter *Irwin* Toy cited to S.C.R.]. This is the Court's adaptation of Thomas Emerson's conceptualization of the justifications of free expression as described in *Towards a Theory of the First Amendment* (New York: Random House, 1966) at 3.

[30] T. Emerson, *ibid.* at 10.

[31] In *Reference Re Alberta Legislation*, [1938] S.C.R. 100, 2 D.L.R. 81 [hereinafter cited to S.C.R.], the earliest Canadian case dealing with freedom of political expression, Duff C.J.C. wrote at 133 that, "[i]t is axiomatic 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."

[32] *Supra* note 28 at 1336, Cory J.. This passage has been quoted at least twenty times since 1989, and is itself a further refinement of Cory J.'s previous musings on the question while a justice of the Ontario Court of Appeal in *R. v. Kopyto* (1987), 62 O.R. (2d) 449 at 462, 47 D.L.R. (4th) 213.

[33] *Thomson* (Gen. Div.), *supra* note 2 at 135. While the Court of Appeal failed to address the relative importance of opinion poll information with respect to democratic free speech values, it ultimately reached the same conclusion and can therefore be taken to have agreed with the trial judge, in principle.

To create a dichotomy between descriptive and prescriptive political speech is to focus falsely on the speaker, effectively excluding the listeners' perspective.

The *Charter*'s commitment to protect the individuals on both ends of any expressive transaction is well established in the section 2(b) jurisprudence. In *Edmonton Journal*, for example, the Supreme Court of Canada reiterated its previous observation that, "freedom of expression protects listeners as well as speakers."[34] Subsequent to the release of the Court of Appeal's judgment in *Thomson*, the Supreme Court of Canada revisited the issue of listener interests when considering the constitutionality of a publication ban under section 466(1) of the *Criminal Code* in *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*. Writing for the Court, LaForest J. addressed the relationship between the press and listeners' rights:

> [t]hat the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the *raison d'être* of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press.[35]

Although this reasoning takes place in the context of access to court proceedings, it can be readily analogized to the political realm, and reinforces the dominant place of the listener in instrumentalist theories of free expression. While Somers J.'s judgment nominally recognizes the public's interest in receiving as much accurate electoral information as possible,[36] both he and the Court of Appeal failed to adequately consider the importance of polling information from a voter's point of view.

During an election, voters are exposed to three general categories of information: (i) *factual* information about the candidates, such as their backgrounds, experiences, personal attributes, and the like; (ii) *partisan* information from the candidates and their supporters detailing their respective principles, platforms, and promises, as well as comparisons of relative strengths and weaknesses; and (iii) *analytical* information, usually supplied by pollsters or pundits, concerning the accuracy and popularity of candidates and their positions, as well as their relative chances for success. On the basis of these three elements, voters are expected to formulate opinions and cast informed votes.

Electoral free speech, encompassing the first two categories, stands at the very pinnacle of section 2(b)'s protection.[37] The court in *Thomson*, however, seems to have placed analytical information on a slightly lower tier of protection. A more careful examination of the voter's perspective suggests that this distinction is not tenable. The reasonable and rational voter, which must be the court's theoretical benchmark for analysis, is deluged with both partisan and analytical information during the course of an election campaign. Though often presented as assertions of fact, much of this

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[34] *Edmonton Journal*, *supra* note 28 at 1339, citing *Ford* v. *Quebec (A.G.)*, [1988] 2 S.C.R. 712 at 767, 54 D.L.R. (4th) 577.

[35] (1996), 139 D.L.R. (4th) 385.

[36] *Thomson* (Gen. Div.), *supra* note 2 at 147.

[37] *Somerville* v. *Canada (A.G.)* (1996), 136 D.L.R. (4th) 205 at 215, 8 W.W.R. 199 (Alta. C.A.) [hereinafter *Somerville* cited to D.L.R.].

information will actually be contradictory or mutually exclusive. For example, to evaluate partisan appeals for support, the voter must weigh past records of the candidate and his or her party against their current promises and claims to a superior vision for society's future within the context of the voter's subjective experience. Analytical information calls for a similar approach. Editorialists offer often contradicting opinions on the candidates' merit and experts examine the feasibility of the candidates' proposed social and economic programmes. When the voter sifts and weighs all of this material, he or she cannot rely upon any absolute truths, but instead must apply logic and intuition to arrive at a personal decision on what to accept and what to reject. As Schauer suggests:

> [i]nherent in the ideal of self-government is the proposition that it is for the people alone to distinguish between truth and falsity in matters relating to broad questions of governmental policy.[38]

The same is true for opinion polls. Just like the Liberals' celebrated 'Red Book' of policies in the 1994 federal election or the editorial endorsements of the *The [Toronto] Globe and Mail*, polls are useful but imperfect information about the election and the potential consequences of the individual voter's participation. For the rational voter, opinion polls, along with the myriad of other political expressions made in the campaign milieu, are simply so much grist for the mill of political decision-making.

In the electoral context, the underlying motivation of the speaker, be it personal and passionate or professional and impartial, is irrelevant. To the listener all such speech is 'about politics,' regardless of whether it is politically motivated or not. The fact that the publication of opinion survey results is not an inherently political act of expression on the part of the media does not make the speech any less political for the listener. The court also failed to consider that opinion surveys can be conceived of as the expression of those citizens whose views the survey reflects. From this perspective, opinion surveys are the expression of political opinions from one group of voters to another, with pollsters and the media acting only as intermediaries.[39] Regardless of which view is taken, the only reasoned conclusion is that opinion poll results are political speech of the first order.

2. *Polls in the Contemporary Political Dynamic*

The Court's examination of context in the *Thomson* case also fails to adequately consider the broader societal context and the ways in which citizens use opinion polls when choosing how to vote. The electoral culture in late twentieth-century Canada is radically different from that found only a generation ago. Citizens are casting off their

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[38] F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) at 38.

[39] In *The Sophisticated Pollwatcher's Guide*, *supra* note 8, George Gallup advances a varient of this argument at 196 when he writes that: "... it is recognized as perfectly proper for well known persons in professional and educational fields to buy newspaper advertising space to try to influence voters to follow their own choices of candidates. Why, then, it could be argued in the courts, is it not equally proper to let the public know what their fellow citizens think, through the medium of polls?"

traditional political allegiances and disavowing the ingrained deference to institutions of authority which were once seen as quintessentially Canadian characteristics. Political scientist Neil Nevitte, who documents this evolution in *The Decline of Deference*, a major study of political values in western democracies, observes that "people are better educated and more interested in politics — while citizen attachments to the traditional vehicles for participation have declined."[40]

Canadians in particular have been identified as "flexible partisans," more likely to be motivated in their voting behaviour by issues and events rather than party affiliations.[41] The trend towards partisan de-alignment and the drop in overall trust in the government has created a need for new kinds of political information. As voters move away from supporting one party or another as a matter of general principle or personal attachment, the likelihood of 'strategic voting,' and the corollary need for information to underwrite strategic choices, increases. Opinion polls are the principal indispensable source of this information — they are the *sine qua non* of the strategic vote.

While the desirability of strategic voting, and the government's right to pass judgment on this question, remain controversial, the trial court in *Thomson* at least recognized the *prima facie* right of citizens to vote strategically.[42] For those voters wishing to exercise this latter right, accurate and up-to-date polling information is essential. Polls conducted closer to the polling date, as an increasing proportion of voters have crystallized their choices, have the greatest capacity to predict the actual outcome. Therefore, by blacking-out polls at the end of the campaign period, the government is depriving citizens who wish to vote 'strategically' of the single most important source of political information available to them in the exercise of their democratic rights. This reality should also have been factored into the court's contextual inquiry, but was omitted. This analysis ultimately leads to the conclusion that regulation of polling results, and other government forays into the realm of behaviour-modification aimed at voters, requires the strictest application of section 1 scrutiny.

Given the privileged position of the listener in political speech, especially where the benefits of a prohibition ostensibly accrue to the public audience at large, the Court's conclusion that the publication of opinion polls deserves less than the utmost protection under the *Charter* is unsustainable. The Court's decision is, however, consistent with the widespread negative perception of opinion polls. Much of the literature surrounding polls implicitly stigmatizes this form of expression, as if consulting opinion polls were the modern equivalent of conferring with soothsayers — a practice befitting only arch-cynics and Shakespearean despots,[43] but not upstanding democrats. In a comment on the possibility for poll regulation in Britain, Suzanne Bailey describes Margaret Thatcher's use of polling information by saying that she, "gave all the appearances of studying the polls as if they were the entrails of ritually slaughtered chickens."[44] This subtle prejudice is present even in the academic literature surrounding polling and its effects relationship

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[40] (Toronto: University of Toronto Press, 1996) at 70.

[41] K. Woodside, "The Decline and Ascent of Political Parties in Canada: The Collapse of the Conservatives and the Rise of Reform," in B. Ginsberg and A. Stone eds., *Do Elections Matter?* (Armonk: M.E. Sharpe, 1996) at 48.

[42] *Thomson* (Gen. Div.), *supra* note 2 at 138.

[43] W. Shakespeare, *Macbeth*, Act I, Scene iii, (Cambridge: Cambridge University Press, 1968) at 6-12.

[44] S. Bailey, "Opinion About Political Opinion Polls" (1987) 137 New Law J. 515 at 515.

to voting efficacy, where 'sincere' voting is juxtaposed against 'sophisticated' (i.e.: polling-informed) voting.[45]

The court's failure to recognize the importance of accurate polling information leads one to conclude that its decision was influenced by polling's negative image. This conclusion is buttressed by its reference to the "general worry" and "widespread concerns" over the impacts of polling and the need to act on this perception despite the absence of empirical evidence to support it.[46] The court's approach in this respect is highly worrisome, as the practice of stigmatizing political speech in this manner to justify its prohibition[47] runs directly contrary to the *Charter*'s mandate of protecting unpopular but politically relevant expression from popular prejudice.

C. *The Reasoned Apprehension of Harm in Political Expression Jurisprudence*

The second troubling aspect of *Thomson* is the court's importation of the reasoned apprehension of harm standard into a case involving core political speech. The 'reasoned apprehension of harm' standard was formulated by Sopinka J. in *R. v. Butler*[48] in order to allow the Court to uphold the obscenity provisions of the *Criminal Code* in the absence of a proven causal link between pornographic materials and harm to women or other disadvantaged groups. Similar reasoning was employed by Dickson C.J.C. to uphold the criminalization of hate-speech in *R. v. Keegstra*,[49] and to allow, in principle, limited constraints on tobacco advertising in *R.J.R.-MacDonald*.[50] Until *Thomson*, however, this doctrine's use had been justified only on the very periphery of free expression, in cases dealing with relatively 'valueless' expression.[51] In these contexts it is arguably justifiable for the court to err on the side of caution and proscribe expression which threatens grievous harms but offers only meagre benefits.[52] Although the 'reasoned apprehension of harm' has been widely criticized for being essentially

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[45] See e.g., D. Felsenthal, *Topics in Social Choice: Sophisticated Voting, Efficacy, and Proportional Representation* (New York: Praeger, 1990).

[46] See *Thomson* (Gen. Div.) *supra* note 2 at 119 and *Thomson* (C.A.) *ibid.* at 3.

[47] J. Cameron, "Abstract Principle v. Contextual Conceptions of Harm: A Comment on *R. v. Butler*" (1992) 37 McGill L.J. 1135 at 1154.

[48] [1992] 1 S.C.R. 452, 2 W.W.R. 577 [hereinafter *Butler* cited to S.C.R.].

[49] [1990] 3 S.C.R. 697 at 776, 2 W.W.R. 1 at 65 [hereinafter *Keegstra* cited to S.C.R.].

[50] *Supra* note 28.

[51] In *Ontario (A.G.)* v. *Dieleman* (1994), 20 O.R. (3d) 229 (Gen. Div.) the court invoked the relevant passage from *Butler* as tangential support for its decision to uphold limit injunctions against picketers at abortion clinics. In that case, however, the rational connection was clearly made out without resort to the "reasoned apprehension of harm" standard (*supra* note 48). Also, in *R. v. Stevens*, [1995] 4 W.W.R. 153, 100 Man. R. (2d) 81 (C.A.) the court cited *Butler* as support for the existence of a pressing and substantial purpose for the *Criminal Code* section on defamatory libel. The rational connection was again made out on separate substantive evidence.

[52] The United States Supreme Court has explained their equivalent doctrine by stating that: "[i]t has been well observed that such (lewd and obscene) utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *(Roth v. United States*, 354 U.S. 476 at 485 (1957), quoting *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 at 572 (1942).

meaningless,[53] it is as least understandable that the court would be loath to unleash a torrent of filth or hatred on society solely because of the lack of certainty in the state of our sociological understanding. Its application in the political context, however, raises the concern that dissenting or divergent views may be stifled on the premise of an unsubstantiated but 'widely held concern' about their potentially harmful effects.

In actual fact, the 'reasoned apprehension of harm' does not describe a conclusion reached through a process of reason, but rather a state of intellectual satisfaction that is an amalgam of reason and human intuition. Although this may appear on its face to violate the principles of enlightened reason which traditionally underpin the liberal rights discourse, such a seemingly subjective standard is not at all out of place in freedom of expression adjudication.[54] Expression is an inherently human act. People express for emotive reasons as often as they do for purely rational ones. A laugh, a poem, a painting — all are expressions of the 'soul' rather than the rational mind. The same holds true for much of what is thought of as political expression. The great oratory of Sir Winston Churchill or Martin Luther King was aimed at the heart as much as it was the mind. Alas, no sociologist has yet to invent a probe to measure the effects of speech on the subconscious or emotional aspects of the individual. It is not surprising, therefore, that judges can, in good conscience, articulate an apprehension of causality in the absence of scientific proof. As has been argued, if strict scientific satisfaction were required to justify any state intrusion into human affairs, the courts and legislatures would be handcuffed when dealing with many areas of pressing social concern.[55]

However, the risk for abuse of the 'reasoned apprehension of harm' doctrine is very real. It can be used, as some have observed in the case of *R. v. Butler*,[56] as a mechanism for the imposition of a 'common sense morality' of the moral majority. It must, therefore, be used with great caution in spheres of expression where the rights of minority speakers[57] may be of particular importance to society. As J.S. Mill wrote:

> [i]f all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[58]

It may also be argued that the "reasoned apprehension of harm" should not be employed to support the suppression of factual information. This is particularly true of information that is capable of being verified scientifically, at least in terms of its quality. The suppression of factual information is inimical to the search for truth which is so often identified as amongst the foundational uses of free expression. The idea of banning 'bad facts' is entirely irreconcilable with the principles of a free and democratic state.

The realm of political speech engages both of these 'caution flags' in relation to the

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[53] See *supra* note 47.

[54] See J.Tussman, *Government and the Mind* (New York: Oxford University Press, 1977), especially chapters I and IV.

[55] See e.g., *Adler v. Ontario*, [1996] S.C.J. No. 110 (QL) at para 218.

[56] See R. Kramer, "*R. v. Butler*: A New Approach to Obscenity Law or Return to Morality Play?" (1993) 35 Crim. L.Q. 77.

[57] In this instance, the term "minority" is used to describe those speakers whose ideas do not enjoy popular support.

[58] J. S. Mill, "On Liberty" in R. B. McCallum ed. *On Liberty and Considerations on Representative Government* (Oxford: Blackwell Political Texts, 1946) at 14.

use of the "reasoned apprehension of harm." Minority opinions are of paramount importance in political speech. Moreover, the information being suppressed in this case is factual in nature, and capable of qualitative verification. Arguably, the government ought not to be able to ban methodologically sound poll results based on a "reasoned apprehension of harm" any more than it ought to be able to ban mention of the federal debt and deficit. Both forms of suppression are the "type of state manipulation of the media [that] smacks of the totalitarianism we used to see in Eastern Europe."[59]

The Alberta Court of Appeal decision in *Somerville*, similar to the facts in *Thomson* is illustrative of the situation where minority political opinions are at risk.[60] The *Somerville* case, similar to the facts in *Thomson*, concerned an attempt to justify restriction on political expression based on a "reasoned apprehension of harm." In *Somerville*, the government sought to uphold severe limitations on the participation of third-parties in election campaigns. In support of this position, the government made the following argument:

> Political parties are of paramount importance in Canadian Parliamentary democracy. Although 'third parties' or 'interest groups' have a role to play, the nature of the system is such that non-participants play a significantly lesser role than political parties and candidates.
>
> Given the paramount position of parties and candidates in the electoral system, the question is the extent to which interest groups can participate financially in elections without significantly undermining the fundamental principles of fairness.[61]

Given the government's position in *Somerville*, it is hard to imagine a more eloquent defence of the *status quo*. This argument is, in reality, little more than a declaration that 'that's the way it is, so that's the way it should stay.' The government sought to justify this position on the basis of its reasoned apprehension of harm that a change to the *status quo* would be harmful. This is an archetypal example of a modern regime attempting to use its legislative power to suppress alterations to the system or balance of power, of which it is the chief beneficiary.

The Alberta Court of Appeal dealt with this argument by differentiating between a "reasoned apprehension of harm" and a "mere speculation of harm,"[62] finding that the latter was insufficient to support breaches of political expression and association

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[59] Justice Somers in *Thomson*, *supra* note 2 (Gen. Div.) at 123, citing testimony before the Senate Committee which examined s. 322 of the *Canada Elections Act*.

[60] *Supra* note 37.

[61] Factum of the Attorney-General of Canada, *ibid.* at 234. In essence, the government of Canada was advancing its own conception of how parties, voters, and other citizens ought to interact in an election as *the* legally annointed model of democracy. This is analogous to the government's claim in *Thomson* that it may dictate how voters should use opinion polls [*supra* note 2]. The Alberta Court of Appeal in *Somerville* answered this submission by stating that, "[i]t is the rights of individuals that are constitutionally enshrined. Political parties do not have similar constitutional protection ... ." [*Supra* note 37 at 234] The same may be said of the government's apparent prejudice towards the use of opinion surveys by voters.

[62] *Somerville*, *supra* note 37 at 239. It is interesting to note that the trial judge in *Somerville* accepted the government's argument that a reasoned apprehension of harm would suffice.

rights. It is not at all clear that this is an intelligible distinction. In both *Butler* and *Keegstra* the Court was satisfied to find a rational connection despite an almost complete absence of scientific support for the essential causal link in question.[63] A more plausible explanation would be that the Court was simply demanding a higher quotient of reason in the 'reasoned apprehension' in political speech cases. This would be sound practice. The consequences associated with the risk of the government being 'wrong' and imposing an unwarranted restriction on free expression are far graver in the political context. The reasoned apprehension of harm standard may have a legitimate place in cases concerning marginal expression in which the courts must grapple with the paradoxical nature of liberal democracy: that the freedom which liberates us can be used to harm and even enslave weaker members of our society.[64] This standard, however, has no place in cases in which society stands to lose valuable voices from the marketplace of political ideas which is the nucleus of our democracy.

D. *Rational Connections and Hidden Purposes*

The corollary aspect of contextualization is an assessment of the societal interests advanced by the infringement on expression. In the case of controlling polls, even the staunchest advocates and defenders of opinion polling acknowledge the importance of ensuring the accuracy and quality of polling information reaching citizens. Therefore, it is entirely consistent with the importance of fair elections that the Court of Appeal in *Thomson* accepted that the government had a compelling interest in enacting section 322.1 of the *Canada Elections Act*. The court stated, for example, that:

> [i]t is surely a substantial and pressing objective to respond to widespread perceptions that opinion surveys can be distorting and that response time is needed to avoid that danger, all in aid of creating a level playing field at that critical point in the electoral process when the candidates are about to be selected.[65]

As such, the court had little difficulty accepting the government's submission that the purpose of the blackout is to:

> prevent the distorting effect of public opinion survey results that are released late in an election campaign when there is no longer a sufficient opportunity to respond.[66]

When the rational connection of the blackout to this formulation of the pressing and substantial purpose is analysed, one can discern two fundamental premises underlying the government's defence of the blackout: first, that polls may 'distort' voter behaviour; and second, that scrutiny in the public arena alleviates this problem. On closer examination, however, both of these propositions prove to be pools of logical

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[63] *Butler*, *supra* note 48 at 501-507; *Keegstra*, *supra* note 49 at 767-71.

[64] For a thoughtful examination on the difficulties of reconciling free expression with other aspects of the contemporary liberal vision of society, see O. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder: Westview Press, 1996).

[65] *Thomson* (C.A.), *supra* note 2 at 10.

[66] *Ibid.* at 5.

quicksand rather than firm foundations of principle upon which the infringement of a fundamental freedom should be based.

To begin with, it must be observed that opinion polls, as statistical extrapolations based on human data samples, are not amenable to the concept of 'rightness.' Rather, opinion polls must be thought of in terms of their methodological soundness. The relevant question is whether the pollster has adhered to the scientific methods and controls which permit him or her to extrapolate overall trends within reasonable and repeatable margins of accuracy. This includes such factors as sample size and demographics, the wording and order of the survey's questions, and response rates.[67] Therefore, polls can be thought of as either 'good' or 'bad,' depending on their methodological quality, and the accuracy and detail with which this background information is related to the public.

Second, the Court's reasoning is problematic because the quality of opinion polls is simply not subject to popular discourse in the ordinary sense. Public debate will no more discover the 'truth' about an opinion poll than a discussion by lay-persons as to whether the sky is pale blue, teal, or turquoise will ever reveal its 'true' colour — it is all a matter of interpretation. Therefore, the assumption that polls which have been exposed to scrutiny in the marketplace of ideas are less likely to be 'misleading' is, at best, a dubious concept. The relevant consideration is whether the public has been given sufficient background information on the quality of the poll to be able to interpret the results meaningfully, or to critically assess the interpretation of the results presented by the media.[68] Unfortunately, however, section 322.1 of the *Canada Elections Act* makes no attempt to regulate the quality and consistency of opinion poll reporting, except collaterally though its brief ban of the practice.

With this in mind, it must then be asked what is meant when one suggests that polls may be 'misleading'. The assumption that polls, unless sanctified in some way, might 'mislead' voters can mean one of two things: either we are concerned that voters are *receiving* 'bad' polls, or that voters are *using* 'good' polls in the wrong way. The distinction is real and significant. In the first instance, the government would be seeking to ensure the *quality* of the information reaching voters. In the second instance, it would be attempting to regulate the way in which voters *use* the information. Clearly, the latter is a far greater intrusion into the sphere of free thought and opinion than the former.

Interestingly, the anxieties articulated over the effects of polling rarely focus on the allegation that 'wrong' polls are being disseminated to the public. Rather, as the evidence before the court in *Thomson* shows, the anxiety is focussed almost entirely on the effects of exposure to polling information on the public, *irrespective* of its quality.[69] The logical implication is that the government's true purpose in enacting the blackout was to prevent voters from using opinion polls when deciding how to exercise their right to vote.[70] If this is the case, the government has far overstepped the bounds of section 1 of the *Charter*, as it is a cornerstone of a free and democratic society that an individual

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[67] See D. Broughton, *Public Opinion Polling and Politics in Great Britain* (London: Prentice Hall, 1995) at 34 -83 and G. Lachapelle, *supra* note 7 at 97-101.

[68] The concern over media presentation of polls is expressed by the Lachapelle study, and forms one of the bases for its recommendations. However this concern is conspicuously absent from the reasoning in both the appellate and the lower courts. G. Lachapelle, *supra*, note7 at 111-32, 154-57.

[69] *Thomson* (Gen. Div.), *supra* note 2 at 116-21.

[70] J.A. Fraser, *supra* note 10 at 388.

be allowed to cast his or her vote upon whatever basis conscience, logic, and intuition dictate. The most fundamental tenet of our constitution, as embodied by sections 2(b) and 3 of *Charter*, is that the government cannot legislate how or what citizens may think when deciding how to vote. The principle is perfectly captured by Burt Neuborne when he writes that:

> [w]hen society provides its members with lawful choices, respect for individual dignity compels that the choices be the autonomous expression of individual preference. It is impossible to respect individual autonomy with the left hand while selectively controlling the information available to the individual with the right hand. A purportedly free individual choice premised on a government controlled information flow is a basic affront to human dignity.[71]

More to the point, while the blackout is rationally connected to the aim of preventing late polls from influencing voters at all, this is not the purpose which has been sanctioned by the court. To the contrary, the importance of freedom of expression and information in elections mandates that the legitimate government interest in regulating polls such be interpreted narrowly to include only qualitative controls. It is fundamental to our democratic system that citizens not only have the right to vote, but also the right to decide how to exercise that vote in whatever way they wish.

The Alberta Court of Appeal considered the validity of a similar purpose in *Somerville*. In *Somerville* the government had sought to justify control of third-party expression in election campaigns on the basis of its alleged impact on voters. Discussing the electoral context, the court concluded that, "it follows that there can be no pressing and substantial need to suppress [information] merely because it might have an impact."[72]

Ironically, most of the effects on voter behaviour attributed to opinion polls are precisely those which politicians seek to incite by their own campaign rhetoric. Other forms of political information, as campaign advertising, candidates' debates, party platforms, not to mention conversations with other voters, can all have similar motivating, demotivating, or even alienating effects. Yet no one could seriously suggest that any of these forms of information are objectionable owing simply to their potential to influence voter behaviour. Moreover, with the barrages of simplified statistics and economic information directed at voters, such speech is, by any measure, as likely to be misleading. It is safe to say, however, that any similar attempts at monitoring or curtailing the free exchange of political rhetoric would be met with staunch resistance as antithetical to democracy.[73] Preventing people from being influenced by sound opinion polling information is neither a logical nor democratically legitimate purpose. Ultimately, if people are choosing how, or even whether, to vote based on good

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[71] R.S. Karmel, "The First Amendment and Government Regulation of Economics" (1989) 55 Brooklyn L. Rev. 1 at 37.

[72] *Somerville*, *supra* note 37 at 232.

[73] The only exception to the principle of open and free-wheeling debate is section 264 of the *Canada Elections Act*, *supra* note 4, which makes it an offence to publish a "false statement of fact in relation to the personal character or conduct of a candidate." This prohibition would no doubt pass constitutional muster as an essential safeguard of fairness in the electoral process. Presumably a similar prohibition on the publication of false opinion survey results would be equally defensible.

information, that is all that can be asked of a democracy.

It is no answer for Parliament or the courts to say that a complete ban on opinion polls achieves quality control of a sort by suppressing all suspect polls. While the government has a clear interest in ensuring the quality of information reaching voters during elections, the adoption of complete bans to address qualitative concerns is simply too crude to be dignified under the *Charter*, which demands that only carefully crafted infringements pass section 1 scrutiny.[74] This conclusion is strengthened by the fact that in the political context, unlike with instances of fringe expression such as pornography, the potential loss to society of the 'good' expression unnecessarily censored by a blanket prohibition is significant.[75] Moreover, such a total ban necessarily includes in its ambit 'good' polls. Thus, the court's lackadaisical examination of the logic underlying this infringement has allowed curtailments of expression which advance only impermissible purposes, specifically, control over voters' decision-making process, to slip through the *Charter*'s aegis. [76]

E. *Gratuitous speech suppression and contempt for democracy*

While the Court of Appeal's application of section 1 of the *Charter* is highly unsatisfactory, the most perplexing aspect of its approach to political speech protection in *Thomson* is the decision to include previously published polls and informal surveys in its reading of section 322.1 of *Canada Elections Act*. Neither of these forms of expression will be much missed during the three days that they are outlawed. The significance of their inclusion lies in what this interpretation reveals about the Court's attitude towards freedom of expression and democracy. Put simply, the exclusion is gratuitous, and displays a paternalistic view of Canadian voters.

On its face, the *Canada Elections Act* statute covers all opinion surveys, without exception. Therefore, the literal interpretation adopted by the Court of Appeal

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[74] *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 139.

[75] Although the risk of a justified limitation on fringe expression catching valuable expression in the net of its censorship has not been explicitly enumerated by the Supreme Court of Canada as a factor in determining whether any given limitation is sustainable under section 1 of the *Charter*, a number of judgments clearly take the risk of such collateral damage into consideration. See e.g., the majority reasons in *Butler*, *supra* note 48 at 500, where Sopinka J. emphasized that the obscenity provisions should not be permitted to suppress what R. West describes as "good pornography." [R. West, "The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report" (1987) 4 Am. Bar Found. Res. J. 681 at 696.] See also the dissenting reasons of McLachlin J. in *Keegstra*, *supra* note 49 at 852 and 861 concerning the potential "chilling effects" on debate over contentious, political issues.

[76] Although the avoidance of harm caused by inaccurate late-campaign polls was the only purpose advanced at the Court of Appeal for justification of section 322.1 of the *Canada Elections Act*, a distinct 'quiet repose' rationale has at times been advanced in support of short-term blackouts. This doctrine posits that voters should be given time to reflect in peace on their decision, insulated from constant assail by campaigners and the media. The rest and repose principle raises the interesting question of whether an arbitrary period of quiet reflection is a permissible purpose defensible under section 1 of the *Charter*. If this purpose were to be accepted, a limited blackout which was both content-neutral and form-neutral (in not singling-out opinion polls or any other form of information or opinion) may well be a sustainable infringement of the right of freedom of expression under the *Charter*.

is plausible at this initial level. However, as Somers J. pointed out in *Thomson,* if the goal of the legislation is to control polls that are 'sprung' on the public without sufficient time for scrutiny and reply by the parties whose interests it may prejudice,[77] previously published polls, would, by definition, be outside the scope of the mischief being addressed. Somers J. is undoubtably correct in his conclusion that it would be absurd under conventional principles of statutory construction to draw previously published surveys into the reach of section 322.1 of *Canada's Election Act.*

It must also be remembered that the effect of section 322.1 of the *Canada Elections Act* constitutes a *prima facie* violation of the section 2(b) *Charter* guarantee of freedom of expression. Therefore in order to save the impugned section under section 1, the section 322.1 of the *Canada Elections Act* must be interpreted in a manner that ensures that *all* of its effects are rationally connected to the sanctioned purpose. This aspect of the blackout, however, would be doubly doomed to fail the rational connection test. First, since the vetting of polls is within the domain of experts with access to the methodological structure of the poll, the marketplace of ideas lacks the tools to perform such a function. Second, the inclusion of previously published polls fails the rational connection even on the Court's own 'market verification' theory, for the simple reason that these surveys would already have been 'verified' during their previous public exposure.

A prohibition on republishing previously circulated polls serves no purpose whatsoever. It amounts to the gratuitous censorship of political information. The Court of Appeal's failure to comprehend this is made even more astonishing by the fact that the government itself abandoned this interpretation on appeal. From this one can only surmise that the court is of the opinion that voters are better off without opinion polls during the crucial final days of a campaign, regardless of the accuracy of the polls. Such a position would be entirely inconsistent with the *Charter*'s faith in the dignity and rational free-will of citizens, and the capacity of individuals to shoulder the responsibility of self-government.

The court's inclusion of casual and unscientific surveys (i.e. 'hamburger polls') is an even more egregious violation of common sense and principle. In *Thomson,* Somers J. excluded such surveys from his interpretation of s.322.1 of the *Canada Elections Act,* concluding that the unscientific nature of these activities is patently obvious to all citizens, leaving little or no risk of their being misled by them.[78] This is a view shared by the Lortie Commission.[79] The Court of Appeal, however, reached the astonishing conclusion that:

> [p]arliament may well have concluded that the mischief designed to be addressed by the legislation would be better remedied by a prohibition that extended to the results of *all* public opinion surveys, whether they were unscientific or purportedly scientific. *This is particularly so since survey results obtained in an unscientific manner have a greater potential to be inaccurate and hence distorting in their effect.*[80]

More than any other, this passage captures the paternalism which informs the entire

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[77] *Thomson* (Gen. Div.), *supra* note 2 at 132.

[78] *Ibid.* at 130-31.

[79] *Ibid.* [former emphasis in original; latter emphasis mine].

[80] *Thomson* (C.A.) note 2 at 6.

Thomson judgment. It is sadly consistent with what Richard Moon has identified as the Courts' tendency to take a behavioural view of individuals when conducting its section 1 inquiry in freedom of expression cases.[81] Moon observes that at the initial stage of *Charter* analysis, the courts embrace a generous vision of citizens as rational and moral agents of free-will when defining the scope of free expression. When it comes time to circumscribe those rights under section 1, however, Moon writes that "the Court's faith in the free choice and rational judgment of the individual gives way to fear of manipulation and irrationality."[82]

It is chilling to consider how low an opinion of the populace one must have to conclude that it is incapable of appreciating the relative significance of a 'hamburger poll'. Not only is a publication ban on such surveys unconnected to the aim of ensuring accurate information as a part of fair elections, it is a gross insult to the intelligence of the average citizen, as well as a repudiation of the democratic ideal that individuals are autonomous rational beings capable of responsibly governing themselves. As former British Prime Minister the Rt. Hon. James Callaghan once put it, "[i]f people can't be trusted to read opinion polls, then they can't be trusted to vote."[83] The court's perspective bespeaks an image of the electorate as small, but inquisitive children, having been given the gift of a new toy, freedom of political thought and expression, by a beneficent uncle. Being young and naïve, however, the children cannot be trusted to play responsibly with the toy, so their wise father takes it from them, for their own benefit of course, whenever they look as if they may harm themselves with it. This conception of the body politic is scarcely in accordance with the noble principles of freedom and dignity established by the *Charter*, and cherished in the Supreme Court of Canada's rhetoric on the proper interpretation of expressive liberty. It is one thing to recognize that the freedom of political expression during campaigns must be a "freedom governed by law,"[84] but quite another to say that the government must regulate the content of that expression because citizens lack the rationality to govern themselves.

IV. CONCLUSION

The Ontario Court of Appeal's approach in *Thomson* stands in stark contrast to that taken by the Alberta Court of Appeal in *Somerville*,[85] the only other major appellate decision on *Charter* protection of political expression. In the latter case, restrictions on campaign advertising and third-party spending limits imposed by the *Canada Elections Act* were struck down as impermissible violations of section 2(b) and 2(d) of the *Charter*.[86] Unlike its Ontario counterpart, the Alberta court in *Somerville* applied a strict analysis to the government's purported objectives and chosen means, and found that the infringement of free expression defended by the government not only failed to demonstrate a sufficiently pressing and substantial purpose, but also failed the proportionality test at each and every step. In so doing, the court repeatedly emphasized

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[81] R. Moon, "The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication," (1995) 45 U.T.L.J. 419 at 442.

[82] *Ibid.* at 443.

[83] Quoted in J. Clemens, *Polls, Politics and Populism* (Guildford: Gower, 1983) at 142.

[84] *James* v. *Commonwealth of Australia*, [1936] A.C. 578 at 627, Lord Wright.

[85] *Supra* note 37.

[86] The specific provisions of the *Canada Elections* Act struck down were sections 213, 259.1(1) and 259.2(2).

the dangers of allowing interference in the democratic process and the high onus of justification placed on the government in cases in which it seeks to defend such interference.[87] This approach mirrors more closely the theoretical ideal of speech-protection which permeates the Supreme Court of Canada's freedom of expression jurisprudence and the political philosophy underlying it, and provides the basis for a more vigorous protection of political speech under *Charter*. The government has not appealed its defeat in *Somerville*, but leave to appeal to the Supreme Court of Canada has been granted in the *Thomson* case.[88] It must be hoped that the Court will take up the task of resolving the important questions these decisions raise, and provide a clear national direction as to which paradigm of speech protection is to prevail in the arena of political expression.

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[87] *Supra* note 39 at 215, 218, 226, 228, 229, 231, 240, and 243.

[88] *Supra* note 2.