
CANADA / JUDGMENT

R. v. Bryan

2005 BCCA 285

COURT

British Columbia Court of Appeal

DECIDED

20 May 2005

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2005 BCCA 285 R. v. Bryan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Bryan,

2005 BCCA 285

Date: 20050520

Docket: CA031385

Between:

Regina

Appellant

And

Paul Charles Bryan

Respondent

And

Attorney General of Canada

Intervenor

Before:

The Honourable Chief Justice Finch

The Honourable Madam Justice Rowles

The Honourable Madam Justice Saunders

A.I. Nathanson

Counsel for the Appellant

D.J. Jordan, Q.C. and

R.W. Sieg

Counsel for the Respondent

S.D. Frankel, Q.C. and

P.R. La Prairie

Counsel for the Intervenor

Place and Date of Hearing:

Vancouver, British Columbia

2 May 2005

Place and Date of Judgment:

Vancouver, British Columbia

20 May 2005

Written Reasons by:

The Honourable Madam Justice Rowles

Concurred in by:

The Honourable Chief Justice Finch

Dissenting Reasons by:

The Honourable Madam Justice Saunders (Page 34, para. 76)

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Overview

[1] On a summary conviction appeal from the conviction of the respondent under s. 329 of the Canada Elections Act, S.C. 2000, c. 9, Kelleher J. held that s. 329 is contrary to s. 2(b) of the Canadian Charter of Rights and Freedoms and cannot be saved by s. 1. His reasons for judgment dated 23 October 2003 may be found at (2003), 233 D.L.R. (4th) 745, 2003 BCSC 1499, and [2003] B.C.J. No. 2479 (Q.L.). This appeal is brought, with leave, from the resulting order setting aside the conviction of the respondent on a charge that he contravened s. 329.

[2] Section 329 of the Canada Elections Act provides:

329. No person shall transmit the result or purported result of the vote in an electoral district to the public in another electoral district before the close of all of the polling stations in that other electoral district.

[3] Sections 1 and 2(b) of the Charter provide:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
2. Everyone has the following fundamental freedoms:
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[4] Section 52(1) of the Constitution Act, 1982 reads:

52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

[5] There is no dispute that s. 329 of the Canada Elections Act limits freedom of expression under s. 2(b) of the Charter. The contentious question is whether Kelleher J. erred in finding, on the evidence and material before the trial judge, that the limit imposed by s. 329 could not be justified under s. 1.

[6] In light of the reasoning in *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33, which was decided after the decision under appeal, I am of the view that the evidence and material the Attorney General put before the trial judge in this case was sufficient to establish that s. 329 of the Canada Elections Act was a reasonable limit on freedom of expression under s. 1 of the Charter. I would therefore allow the appeal from the order of Kelleher J., affirm the constitutionality of s. 329, and restore the conviction entered at trial against the respondent.

II. Background

[7] The respondent, Paul Charles Bryan, was charged with contravening s. 329 during the federal general election on 27 November 2000. Prior to trial, the respondent gave notice under s. 8 of the Constitutional Question Act, R.S.B.C. 1996, c. 68, of his intention to challenge the constitutional validity of ss. 329, 495(4) and 500(4) of the Canada Elections Act. Section 495(4)(d) states that a person who contravenes s. 329 is guilty of an offence and s. 500(4) provides that a person who is guilty of an offence under s. 495(4) is liable on summary conviction to a fine of not more than \$25,000.

- [8] Following the respondent's plea, the trial judge, K.A.P.D. Smith P.C.J., heard the respondent's challenge to the constitutionality of the impugned provisions. Pursuant to s. 8(7) of the Constitutional Question Act, the Attorney General of Canada appeared, as intervenor, to defend the legislation.
- [9] Using the framework for analysis found in *R. v. Oakes*, [1986] 1 S.C.R. 103, the trial judge found that while s. 329 infringed the respondent's right to freedom of expression, the section was saved by s. 1 of the Charter. The trial judge's reasons are reported at (2003), 104 C.R.R. (2d) 364, and may be found at 2003 BCPC 39, and [2003] B.C.J. No. 318 (Q.L.).
- [10] At trial, the Attorney General put before the court extracts from Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol. 2 (Ottawa: Minister of Supply and Services Canada, 1991) (Chair: Pierre Lortie), and extracts from the Report of the Chief Electoral Officer of Canada on the 35th General Election entitled *Canada's Electoral System: Strengthening the Foundation* (Ottawa: Chief Electoral Officer of Canada, 1996). As well, the following extracts from Parliamentary Committee debates on adopting staggered voting hours and the publication ban on election results were tendered: Senate Debates, vol. 136, issues 56 & 57 (3 and 4 December 1996) at 1450-1509; 1430 (Hon. Gildas L. Molgat); Senate, Senate Debates (Hansard), vol. 135, issues 62 & 63 (13 and 16 December 1996) at 1030; 1540-1550 (Hon. Gildas L. Molgat); Standing Senate Committee on Legal and Constitutional Affairs, Proceedings, issue 41- Evidence (9 December 1996); Standing Senate Committee on Legal and Constitutional Affairs, Proceedings, issue 43 - Evidence (11 December 1996); Standing Senate Committee on Procedure and House Affairs, 29 Evidence (5 December 1996) at 1108-end; House of Commons, Government Orders, 106 (25 November 1996) at 6648-6642; 6714; House of Commons, Government Orders, 107 (26 November 1996) at 6714; 6721-6724; 6727; 6738; 6753.
- [11] The Royal Commission, generally known as the Lortie Commission, was established in 1989 to inquire into the Canadian electoral system and to present recommendations aimed at improving and preserving the democratic character of federal elections in Canada. One of the matters considered by the Commission was the problem of information imbalance and the premature release of election results. A ban on publishing election results before the polls closed in all voting regions was first enacted in 1938 at a time when election results were communicated by telegraph. Canada has six time zones which cut across the various voting regions of the country. The decreasing efficacy of the publication ban in the face of changing methods of communication prompted the Lortie Commission to consider more effective ways in which to limit information imbalance among voters across Canada's various voting regions.

- [12] The research done by the Lortie Commission showed that Canadians felt very strongly about premature release of election results and favoured changes in the voting hours to eliminate the problem. The Commission's recommendation was to stagger voting hours so as to reduce considerably although not completely eliminate the possibility of some election results being published before all of the polls were closed.
- [13] The Lortie Commission stopped short of recommending that the voting hours be staggered in such a way as to eliminate any possibility of publication of voting results before the polls in all voting regions were closed because of the practical problems a complete "stagger" would create for election workers and party representatives who help to ensure that democratic procedures and practices are followed. Other proposals, such as delaying the count in eastern Canada until polls closed in Alberta and British Columbia, extending the voting period to two days, and using different election hours in each time zone, were rejected because of their potential to defeat other important electoral practices and objectives.
- [14] When Parliament passed the Canada Elections Act in 2000, the thrust of the recommendations of the Lortie Commission regarding staggered voting hours were adopted and the publication ban on election results was retained.
- [15] A table showing the staggered voting hours under the Canada Elections Act is set out below.

Poll Closing Hours under the present Act

Province

Time Zone

NFLD

NFLD

8:30

9:00

11:00

11:00

11:00

11:30

NS PEI NB

Atlantic

8:00

8:30

10:30

10:30

10:30

11:00

ONT QUE

Eastern

7:00

7:30

9:30

9:30

9:30

10:00

Man SASK

Central

6:00

6:30

8:30

8:30

8:30

9:00

ALTA

Mountain

5:00

5:30

7:30

7:30

7:30

8:00

BC YK

Pacific

4:00

4:30

6:30

6:30

6:30

7:00

- [16] The first two vertical columns on the table show the provinces and the time zone into which each falls. The balance of the vertical columns shows the time in each zone in relation to the other five zones. The closing time for the polls in each zone is highlighted and cuts diagonally across the table. The table shows, for example, that when the polls close in Newfoundland at 8:30, the time in British Columbia and the Yukon is 4:00. When the polls close in the Maritime provinces at 8:30, the time in Manitoba and Saskatchewan is 6:30 and in Alberta, 5:30.
- [17] By way of example, assuming it takes one-half hour to hand count the ballots in a poll, the election results from the Maritimes, absent the s. 329 publication ban, could be communicated to voters in Alberta about one and one-half hours before the polls close in that province and about two hours prior to the close of polls in British Columbia. In the event that electronic vote counting were adopted in the future, the potential for information imbalance would increase because the delay time in the results being known would probably be shorter.
- [18] In addition to putting the Lortie Report and other material to which I have referred before the trial judge, the Attorney General called as a witness Dr. Robert MacDermid, a political science professor from York University, who had prepared a report on the history of s. 329 of the Canada Elections Act and the perceived rationalization and need to continue the ban. Dr. MacDermid's report was introduced into evidence and he was qualified as an expert witness in the areas of electoral behaviour, the structure and regulation of elections, and statistical analysis in relation to voting behaviour. His qualifications were not challenged by the respondent. In his report, Dr. MacDermid said, in part:

The staggered voting hours put in place in 1996 did not remove the reasons for the ban on the publication of results in western Canada. Staggered polling hours alone could not make this problem go away without imposing very early western closing hours or very late eastern closing hours. In both 1938 and 1996, debates about staggered voting hours raised the twin concerns about the effect very early western poll closing hours might have on voting rates and very late opening and late closing hours might have on eastern poll workers who would be required to

work very late into the evening.

The option of delaying the count or withholding the results of the count were rejected by the government in both 1938 and 1996 because of the possibility of vote-tampering that the delay might allow, because of the added costs for poll workers, because keeping volunteer scrutineers at the poll might be difficult, and because of the belief that counts that were withheld would very likely get out before the official release time.

- [19] The trial judge concluded that the s. 329 ban was "clearly intended to address the information imbalance that can result from early disclosure of Eastern results." He further concluded that "[e]lectoral fairness is so important that the objective of preventing early disclosure is clearly pressing and substantial." As to the reasonableness of the means adopted to achieve the objective, which under the Oakes test involves an assessment of the proportionality of means to ends, the trial judge said:
- [13] Having decided it is reasonable for Parliament to limit freedom of expression I am bound to uphold the legislation unless the chosen means do not constitute a minimal impairment of the freedom. The Royal Commission seems to have recommended everything thought possible to deal with the problem of time zones. The delay in publication is only about two hours and the Ban now applies to only about 11% of the ridings in Canada. The Commission considered delaying either the counting of ballots or the release of results as an alternative to a publication ban. I am in no position to substitute my opinion for that of the Commission.
- [14] In the circumstances the Crown has established that the publication ban is a reasonable limit prescribed by law and demonstrably justified in a free and democratic society.
- [20] In an agreed statement of facts which was filed at trial, the respondent admitted that he made available on an Internet website the election results in electoral districts in Newfoundland and the Maritimes before the polling stations in the electoral districts in British Columbia had closed. The trial judge entered a conviction based on the respondent's admissions of fact which established all the necessary elements of the offence charged.
- [21] The respondent brought a summary conviction appeal to the Supreme Court of British Columbia on the s. 1 Charter issue. Before the appeal judge, the respondent argued that the trial judge had erred in concluding, on the evidence before him, that the impugned provision was aimed at meeting a pressing and substantial concern related to electoral fairness. In the alternative, the respondent argued that the trial judge had erred in holding that the means chosen constituted a minimal impairment of freedom of expression.

[22] The appeal judge agreed with the respondent's submissions. He held that s. 329 had not been shown to have a pressing and substantive objective and thus the limitation on freedom of expression could not be justified under s. 1 of the Charter. Kelleher J. went on to hold that if he were wrong in finding that the ban did not have a pressing and substantive objective, he would nevertheless allow the appeal on the proportionality stage of the Oakes test. In the result, the appeal judge held that s. 329 of the Canada Elections Act was unconstitutional.

III. Grounds of Appeal

[23] In his factum, the Attorney General asserts that the appeal judge erred in:

- (i) holding that there was "no evidence" that s. 329 addresses a pressing and substantial concern;
- (ii) reweighing Dr. MacDermid's evidence, and substituting his assessment of it for that of the learned trial Judge;
- (iii) holding that s. 329 was not directed at a pressing and substantial objective; and
- (iv) holding that the "proportional effect" aspect of the Oakes test had not been satisfied.

[24] The arguments on the first three grounds of appeal concern the nature and sufficiency of the evidence required for the Attorney General to demonstrate that the limits imposed by s. 329 on freedom of expression are reasonable and justifiable in a free and democratic society. The arguments on the fourth ground of appeal concern the appeal judge's analysis under the third branch of the proportionality test in Oakes.

IV. Discussion

- [25] Once it has been demonstrated that a statutory provision limits a right or freedom protected by the Charter, the onus of proof rests with the party seeking to uphold the constitutionality of the limitation under s. 1: Oakes, at 136-137. The standard of proof to be applied is the balance of probabilities: Oakes, at 137. Proof to the standard of science is not required: Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825 at para. 101.
- [26] In relation to a s. 1 Charter inquiry, courts are entitled to refer to evidence of various kinds, including material Parliament had before it when the statute was enacted, provided it is relevant and not inherently unreliable: R. v. Morgentaler, [1993] 3 S.C.R. 463 at 483.
- [27] There are two parts to the "reasonable limits" test under Oakes. The first is that the objective of the legislative measure which limits the right or freedom protected by the Charter must be of sufficient importance to warrant overriding the constitutionally protected right or freedom. In other words, the object or purpose of the limitation must relate to concerns which are pressing and substantial in a free and democratic society before that object or purpose can be regarded as sufficiently important to justify the limitation on the protected freedom.

- [28] The second part of the Oakes test is that the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justifiable in a free and democratic society. The second part is, in turn, broken into a proportionality test having three elements: (i) the measures in question must be carefully designed to achieve the objective in question and must not be arbitrary, unfair or based on irrational considerations; (ii) the means should impair as little as possible the right or freedom in question; and (iii) there must be proportionality between the effects of the measures and the objective that has been identified as being of sufficient importance to limit a right or freedom. Even if the objective is pressing and substantial and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of deleterious effects of a measure, the measure will not be justified by the purposes it is intended to serve. Put another way, the more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified.
- [29] The Oakes test has been considered and refined in a number of subsequent Supreme Court of Canada decisions. The Oakes test cannot be approached as a formalistic "test" uniformly applicable in all circumstances; rather, it should be applied flexibly, to take into account the context in which the limitation on the rights or freedoms arises: *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469 at 1489-90. For that reason, having regard to the historical, social and political context in which the limitation or infringement of a right or freedom exists or operates is generally essential to a s. 1 analysis.
- [30] In argument before us, counsel referred us to a number of Supreme Court of Canada decisions in which a legislative provision had limited freedom of expression and a justificatory analysis was required to determine if the provision could be saved under s. 1 of the Charter. Those cases included *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Sharpe*, [2001] 1 S.C.R. 45; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519; and *Harper v. Canada (Attorney General)*, *supra*.
- [31] Those cases hold that the core value with respect to freedom of expression is the search for political, artistic and scientific truth, the protection of individual autonomy and self-development and the promotion of public participation in the political process. State action limiting such values must be subjected to "a searching degree of scrutiny". This standard of scrutiny is not to be applied in all cases, however. When the form of expression impinged lies further from the "core" values of freedom of expression, a lower standard of justification under s. 1 has been applied: *RJR-MacDonald*, *supra*.

- [32] Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to the special features of the expression in question. The decisions in *Libman v. Quebec (Attorney General)*, *Thompson Newspapers Co. v. Canada (Attorney General)*, *Sauvé v. Canada (Chief Electoral Officer)*, and *Harper v. Canada (Attorney General)*, all supra, consider political speech in the context of exercising voting rights.
- [33] In *Thomson Newspapers Co. v. Canada (Attorney General)*, supra, at para. 87, Bastarache J. said:

The analysis under s. 1 of the Charter must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes* requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a Charter right.

[Underlining added.]

- [34] In *Harper v. Canada (Attorney General)*, supra, the respondent brought an action for a declaration that ss. 323(1) and (3), 350 to 360, and 362 of the Canada Elections Act were of no force or effect for infringing ss. 2(b), 2(d) and 3 of the Charter. The trial judge concluded that ss. 350 and 351 were in prima facie violation of ss. 2(b) and 2(d) and that neither was justified under s. 1 of the Charter. The court of appeal upheld that result but the Supreme Court of Canada reversed. The most contentious issue, and the one on which the Supreme Court was divided in opinion, concerned the constitutionality of ss. 350 and 351. Section 350 limits third party election advertising expenses to \$3,000 in a given electoral district and to \$150,000 nationally. Section 351 prohibits individuals or groups from splitting or colluding for the purposes of circumventing the third party limits. Sections 352 to 357, 359, 360 and 362 are ancillary provisions requiring third parties to identify themselves in all election advertising and to meet certain registration and financial requirements.
- [35] Section 323, which was also under constitutional attack in *Harper*, prohibits anyone from knowingly transmitting election advertising on election day. The Supreme Court of Canada was unanimous in upholding the polling day election advertising ban in s. 323 for the reasons given by Bastarache J. (McLachlin C.J.C. concurring at para. 47).
- [36] Central to the determination of the third party advertising issue was "the nature and sufficiency of the evidence required for the Attorney General to demonstrate that the limits imposed on freedom of expression are reasonable and justifiable in a free and democratic society" (at para. 75). That is one of the main issues in the appeal before us.

[37] In *Harper*, the constitutionality of the third party advertising provisions in the Canada Elections Act was upheld. Bastarache J., for the majority, considered and applied the principles developed in *Thomson Newspapers*, supra, concerning the nature and sufficiency of the evidence required when Parliament adopts a regulatory regime to govern the electoral process and the constitutionality of that regime is challenged. He began his analysis by observing that where the nature of the evidence required is at issue, an analysis of the contextual factors of the matter require consideration (at para. 76):

The context of the impugned provision determines the type of proof that a court will require of the legislature to justify its measures under s. 1; see *Thomson Newspapers*, at para. 88. As this pivotal issue affects the entire s. 1 analysis, it is helpful to consider the contextual factors at the outset.

[Underlining added.]

[38] One of the four contextual factors considered in *Harper* was the nature of the harm to which the impugned provisions were directed. Under the heading: "The Nature of the Harm and the Inability to Measure It", Bastarache J. stated (at paras. 77-78):

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

This Court has, in the absence of determinative scientific evidence, relied on logic, reason and some social science evidence in the course of the justification analysis in several cases; see *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 503; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 768 and 776; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 137; *Thomson Newspapers*, supra, at paras. 104-7; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2. In *RJR-MacDonald*, the Court held, in the absence of direct scientific evidence showing a causal link between the advertising bans and a decrease in tobacco consumption/use, that as a matter of logic advertising bans and package warnings lead to a reduction in tobacco use; see paras. 155-158. *McLachlin J.* held, at para. 137, that:

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

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

[39] The third factor Bastarache J. considered was "Subjective Fears and Apprehension of Harm". The following observations, found at para. 82 of his reasons, are pertinent to the kind of harm Parliament sought to address by retaining the s. 329 ban:

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

[Underlining added.]

[40] The fourth factor to be considered was "The Nature of the Infringed Activity: Political Expression". Putting spending limits on third party advertising curtailed political expression and political expression warrants a very high degree of constitutional protection. The aim of the provision at issue in Harper was to strike a balance between free expression through political advertising and an election process that ensures fair participation. The discussion of this contextual factor by Bastarache J. (at para. 87) is apposite here:

Under the egalitarian model of elections, Parliament must balance the rights and privileges of the participants in the electoral process: The difficulties of striking this balance are evident. Given the right of Parliament to choose Canada's electoral model and the nuances inherent in implementing this model, the Court must approach the justification analysis with deference. The lower courts erred in failing to do so (Paperny J.A., at para. 135). In the end, the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement of expenses, reflects a political choice, the details of which are better left to Parliament.

[Underlining added.]

[41] In Harper, Bastarache J. concluded that the contextual factors supported a deferential approach to Parliament in the determination of the justification issue. Given the difficulties inherent in measuring the harm caused by third party advertising, he held that "a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient" (at para. 88).

[42] Bastarache J. went on to consider whether the objective sought to be achieved by the provision was pressing and substantial (at paras. 91-103); whether a rational connection existed between the infringement and the benefit the provision aimed to achieve (at paras. 104-109) and whether the impugned provisions impaired the right to freedom of expression as little as possible (at paras. 110-118). At the final stage of the Oakes analysis, he applied the proportionality test (at paras. 119-121).

[43] While the restriction on freedom of expression imposed by s. 329 of the Canada Elections Act differs in purpose from the restrictions imposed by the third party advertising sections in Harper, it seems to me that the analysis in Harper must serve as a guide in the determination of whether, on the evidence and material before the trial judge, s. 329 could properly be found to be directed at a pressing and substantial objective.

V. Reasons of the trial and appeal judges on the question of whether s. 329 of the Canada Elections Act is a reasonable limit on freedom of expression.

[44] The trial judge found that the objective of s. 329 of the Canada Elections Act is to preserve electoral fairness by ensuring that all citizens have equal access to information on which to base their voting decisions. He further concluded that the objective was sufficiently pressing and substantial to warrant a ban on premature disclosure of election results. In finding s. 329 a reasonable limit on freedom of expression, the trial judge first noted that as a matter of common sense, it can be said that publication of results from elsewhere in an electoral district where the polls are still open could affect voters who have yet to cast their ballots:

[9] Common sense tells me there could be undesirable consequences from the early disclosure of results particularly if they show an unexpected sweep for a particular party. Individuals could decide not to vote because their favoured party is either secure or in a hopeless position. Voters who had not intended to vote might change their minds and cast a ballot. People are entitled to vote strategically. Strategic voting means a supporter of Party A actually votes for Party B in the hope of preventing the election of the candidate for Party C. Knowing Eastern results prior to the closure of local polls would give the voter information on which to have her decision to vote strategically which was not available to other citizens. The Crown uses the term information imbalance to describe the whole situation of some voters having more information than others. That description seems reasonably accurate.

[45] The trial judge went on to state:

[10] The Applicant takes the position that while common sense can be applied in determining whether early disclosure of results can adversely affect voting there must be some actual evidence supporting that position. This appears to be a correct statement of the law.

[11] The Crown did call Dr. MacDermid, a Political Science Professor from York University. In effect Dr. MacDermid presented a most interesting paper on section 329 of the Canada Elections Act. The paper along with Dr. MacDermid's testimony does present evidence that early disclosure of Eastern results can reduce voter turnout in the West. The evidence comes from studies of voting patterns in the United States. The elections of 1964, 1972 and 1980 are the main ones examined. No study postulates a large reduction. The percentage change given ranges from zero to a maximum drop of about 5%. The studies indicate that the larger reductions in turnout are most likely to occur when the media have made an early call of the results in the East. There is every reason to conclude that in this country the early disclosure of results would have a similar effect subject to an observation. The US studies involve Presidential Election years. The voting is for President, also for members of Congress and

commonly for Voter Initiatives which are placed on the ballot. It is reasonable to think that the Western voter, disappointed with the apparent result of the Presidential race, would still wish to express an opinion on the other issues. The conclusion is that if anything, the drop in voter turnout observed in the US would be magnified here. Most Canadians are simply voting for the party of choice and not on other issues.

- [12] To state the obvious it is vital in a democracy that as many people as possible be encouraged to vote. The process must be fair and citizens must surely have equal access to information on which to base their electoral decisions. Section 329 is clearly intended to address the information imbalance that can result from early disclosure of Eastern results. Electoral fairness is so important that the objective of preventing early disclosure is clearly pressing and substantial.

- [46] Before the appeal judge, the respondent argued that:

[T]here was no evidence before the trial judge that established that it is necessary to maintain the publication ban. That is because, in the Canadian context, there is no evidence that an information imbalance, simpliciter, has an impact on voter turn out or voter choice or that it leads to unfairness in elections.

The essence of the respondent's argument, as the appeal judge put it, was that "preventing informational imbalance cannot be a pressing and substantial objective if the fact that some voters have an informational advantage does no harm to the democratic process."

- [47] In allowing the appeal, the appeal judge held that there was no evidence before the trial judge to show that an information imbalance is a pressing and substantial concern or that early release of election results from Newfoundland and the Maritime provinces has any effect on voter behaviour in the other provinces. In reviewing Dr. MacDermid's evidence, the appeal judge took the witness to have agreed with suggestions put in cross-examination that publication of election results cannot have any effect without a media "call". In his evidence Dr. MacDermid had attempted to extrapolate from the American experience the potential effects of information imbalance on voting. In cross-examination, Dr. MacDermid agreed that what really had affected U.S. voter turnout was a projection from the media as to the outcome of the vote. In an apparent reference to the evidence of the U.S. experience, the appeal judge stated that "Dr. MacDermid's evidence was premised on the assumption that results from the ridings in Atlantic Canada could indicate who would or would not form the government. Yet Dr. MacDermid agreed in cross-examination that the ridings in Atlantic Canada cannot determine the outcome of the election."

- [48] The appeal judge also referred to the Lortie Commission Report, noting that the Report considered early transmission of election results to be a problem. However, the appeal judge went on to say that the Report:

[36] recognized that the prohibition on transmitting results was not stopping voters in western Canada from getting eastern results. It found that the most pressing concern was ensuring that voters in the west did not hear results from Quebec and Ontario before the polls closed, since these two provinces have the potential to determine who will form the government. Therefore, it looked for a solution that ensured that voters in the west would not know which party formed the government before the polls closed. The Commission was considering the various options on the assumption that Parliament would no longer need the ban on early publication of results. This measure was not effective and one of the Commission's goals was to find an alternative."

* * *

[39] The Commission's preferred solution was to stagger voting hours. Parliament adopted this solution when it enacted the new Canada Elections Act in 2000, though it did not adopt the precise hours the Commission recommended. Both the recommended and the adopted voting hours would allow results from the 32 Atlantic ridings to be available to voters in the rest of Canada before their polls closed. The Commission did not see a difficulty with releasing the results from Atlantic Canada, stating at volume 2, page 84 of its Report that:

We have concluded that the release of some election results before polls close in the West - specifically, results from the 32 seats in Atlantic Canada - would not constitute a major problem so long as other results from eastern Canada were not available until after the polls closed in the West.

It did not recommend retaining the restriction in what was then s. 328 on publishing results in areas where polls were not yet closed.

[49] In overturning the decision of the trial judge, the appeal judge said:

[40] The trial judge did not explicitly state what he found was the objective of s. 329. With respect to s. 329, he said at paragraph 12 of the February 11, 2003 judgment that it "is clearly intended to address the information imbalance that can result from early disclosure of Eastern results." He went on to conclude that electoral fairness is sufficiently important to render the objective of preventing early disclosure "clearly pressing and substantial".

[41] With respect, there is no evidence to support a finding that preventing an informational imbalance that could result from early disclosure of the election results from Atlantic Canada is a pressing and substantial objective.

* * *

[44] the evidence does not show that preventing an information imbalance is a pressing and substantial concern. There was no evidence before the trial judge of any effect on voter behaviour. The evidence of Dr. MacDermid was that an information imbalance could have harmful effects: it could reduce voter turnout, it could influence how citizens vote by causing strategic voting, it could cause "bandwagon" voting, and it could cause "underdog"

voting. But the evidence does not show that any of these harmful effects occurs in the context of staggered voting hours. There is no evidence of reduced turnout where any early results information relates to no more than 11% of the ridings. Similarly, strategic voting, "underdog" voting or "bandwagon" voting occurs where the likely outcome of the election is known from the results published from another part of the country. As noted above, the 32 ridings in Atlantic Canada cannot determine the likely outcome of the election, a point that Dr. MacDermid admitted in cross-examination.

- [45] This is not a case where one can apply common sense to what is known in order to find that the Attorney General has met its burden under s. 1, as was sanctioned by the Supreme Court of Canada in *RJR-MacDonald Inc.*, supra. Dr. MacDermid's own informed opinion when questioned on cross-examination goes against the Attorney General's position and does not provide an adequate basis from which to draw a common sense inference.
- [46] For those reasons, I conclude that there is no pressing and substantial objective. The trial judge erred in deciding that the Crown had justified the infringement of the appellant's freedom of expression because the weight of the evidence is overwhelmingly in favour of the opposite conclusion.
- [50] On the second part of the Oakes test, the appeal judge concluded that the law is rationally connected to its objective for "[i]f the objective is to prevent the informational imbalance created by transmitting election results from Atlantic Canada to the west, banning these transmissions is an entirely rational way to fulfil that objective." He further concluded that the "minimum impairment aspect of the Oakes test" was met. However, the appeal judge was of the view that "the salutary effects of the legislation do not outweigh the deleterious effects because the legislation, in effect, has virtually no salutary effects". The appeal judge stated that he had reached that conclusion "for the same reasons cited above in the discussion of the pressing and substantial concern stage of Oakes." In the result, the appeal judge set aside the respondent's conviction and entered an acquittal.

VI. Did the appeal judge err in finding that the Attorney General had not met the onus of showing that the object or purpose of s. 329 of the Canada Elections Act was pressing and substantial?

- [51] In my respectful view, the appeal judge erred in requiring that there be direct evidence from which it could be inferred that there was some adverse effect on voting behaviour if the election results from one part of the country were known before the polls closed in other parts of Canada. As Bastarache J. stated in *Harper* (at para. 77), the legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case. This is a case in which social science evidence of harm was inconclusive in relation to changes in voting behaviour as a result of premature disclosure of election results but there could be no uncertainty about the nature of the problem Parliament meant the ban to address, that is, the perception of electoral unfairness based on information imbalance.

- [52] The context of the impugned provision determines the type of proof a court will require to justify the measure under s. 1 of the Charter: Harper at para. 75.
- [53] Section 329 is contained in Part 16 of the Canada Elections Act entitled "Communications". While the wording of the section has changed somewhat, the substance of the provision has remained unchanged since its enactment in 1938. The s. 329 publication ban, which is effectively limited to less than three hours on election day, now operates in conjunction with the staggered voting hours and is aimed at ensuring that all voters go to the polls with the same information.
- [54] The choice Parliament made in adopting staggered voting hours and retaining the s. 329 ban on premature publication of election results has much to do with perception and voter confidence in the electoral regime. In its Report, the Lortie Commission made reference to its research into the concerns of the public with respect to voter information imbalance, at 84:

Our research indicated that Canadians feel very strongly about pre-mature release of election results and favour changes in voting hours to eliminate the problem. In a national survey (Environics 1990), 70 per cent of respondents said this was a problem and 41 per cent called it serious. This was echoed at our public hearings. Most interveners on the issue were from western Canada, but several witnesses from Atlantic Canada also underscored the importance of this issue.

- [55] The Lortie Commission's recommendation to stagger the voting hours was obviously an attempt to accommodate the concerns expressed by Canadians about premature release of election results. The fact that a "complete stagger" of voting hours was considered to be impractical by the Lortie Commission does not undermine the purpose of its recommendation. The s. 329 publication ban on election results is directed to the same objective, that is, eliminating information imbalance as between voters. The purpose of the s. 329 ban is to promote electoral fairness and to preserve public confidence in the electoral system. The fact that enforcement may be difficult does not undermine the objective.
- [56] In this case, social science evidence of actual harm that information imbalance could create was difficult to obtain because the ban had been in place in Canada since 1938 and using studies from other countries without such a ban was problematic. As Dr. MacDermid pointed out in his report, among the democratic nations, it is only Canada, Australia and the United States which face the challenge of multiple time zones in the conduct of national elections. It is difficult to compare the Canadian experience with that of Australia because Australia imposes compulsory voting. A further distinguishing feature of the Australian electoral system is the length of time required for the counting of ballots, given the complexity of the single transferable votes that are cast for the Senate, and the preferential ballots that are cast for the House of Representatives. Dr. MacDermid noted that the tabulation of results in Australia can take weeks. The result is that the problem of voter information imbalance across time zones would not occur in Australia in the same way it

would in Canada.

- [57] Similarly, extrapolation of the American experience to the Canadian election context cannot be achieved with any precision. Dr. MacDermid noted several significant differences between Canadian and American election practices. Canadian federal election procedures are a matter of federal jurisdiction, and therefore apply uniformly across Canada. National elections in the United States are governed by the separate procedures set out by individual states and there is no uniformity as between states. Exit polls, which are effectively banned in Canada by s. 328 of the Canada Elections Act, are conducted in the United States and are relied upon by the television networks in the prediction of the election winners. As well, ballots in United States elections are cast not only for president, but also for "under card races" for Congress and Senate positions. These differences limit the usefulness of the studies in the United States which discuss the effect of information imbalance on voters in the absence of a publication ban.
- [58] Regardless of whether anything much in the way of useful social science evidence could be drawn from the studies in the United States, it cannot be successfully argued that the Lortie Commission was without evidence to support its recommendation that the voting hours across Canada ought to be staggered. The very point of Parliament adopting staggered voting hours was to avoid what the Lortie Commission had ascertained through its hearings and inquiries - the perception of electoral unfairness that information imbalance as between voters would bring.
- [59] In my opinion, when the s. 329 publication ban is seen as having the same purpose or objective as the staggered voting hours, that is, to eliminate the information imbalance that can result from disclosure of results before all of the polls have closed, the respondent's argument concerning the lack of evidence to support the ban falls away.
- [60] One of the contextual factors referred to in Harper was the apprehension of harm in relation to the electoral process. While the Lortie Commission Report stated that the availability of election results in Newfoundland and the Maritimes before the close of the polls in western Canada was not of "great concern", assuming staggered voting hours were in place, it was clearly open to Parliament to decide what measures to adopt in meeting public concerns about the information imbalance. Parliament chose to implement the solution of staggered voting hours but also chose to maintain the publication ban on election results. Public perception of electoral fairness is obviously critical in a democracy. Given the extent of the public concern the Commission had identified about voter information imbalance, Parliament's choice to leave the ban in place appears to me to be unremarkable.
- [61] In determining that the Attorney General had failed to demonstrate by the evidence adduced that the objective of the s. 329 ban was pressing and substantial, it appears to me that the appeal judge overlooked the findings of the Lortie Commission about the very large percentage of Canadians who had expressed concern about information imbalance coupled with perceptions of electoral unfairness. In my opinion, this was not a case in which

scientific proof of harm was required to justify the limitation on freedom of expression. What was required, and what the trial judge had before him, was evidence from which it could be inferred that there was a reasoned apprehension of harm to the legitimacy of the electoral regime if the publication ban, aimed at preventing information imbalance, was not continued.

- [62] I note as well that McLachlin C.J.C., for herself and Major J, dissenting on the third party spending issue in *Harper*, agreed that the promotion of electoral fairness was a pressing and substantial objective. Her observations respecting the characterization of electoral fairness as a pressing and substantial concern are instructive in the present context (at para. 26):

Common sense dictates that promoting electoral fairness is a pressing and substantial objective in our liberal democracy, even in the absence of evidence that past elections have been unfair; see *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 38. A theoretical objective asserted as pressing and substantial is sufficient for purposes of the s. 1 justification analysis; see *Thomson Newspapers*, supra, at para. 38; *Harvey*, supra, at para. 38; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 191; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 281; *Edmonton Journal [Edmonton Journal v. Alberta (Attorney General)]*, [1989] 2 S.C.R. 1326], at pp. 1343-45.

- [63] Two of the other important contextual factors that need to be considered in this case are the nature of the expression the s. 329 ban limits and the period of time during which the ban operates. I agree with the appeal judge's description of the type of expression being limited by the ban as falling "at the margins of political speech". The ban in issue here is directed at information about election results and is intended to operate for only a brief period. The nature of the expression to which the ban applies and the brief time period in which the ban operates does not limit participation in political debate.

- [64] It is convenient to note here that the respondent submitted that the ban in s. 329 is now obsolete because the advent of such things as satellite and cable television and the Internet makes enforcement difficult, if not impossible. He referred to some passages in the Lortie Commission Report to support his argument. In my view, difficulty in enforcement of the publication ban is irrelevant to the constitutional question. Many criminal and quasi-criminal offences are difficult to enforce but that does not mean that Parliament ought not to make them offences. The fact that the ban may be violated does not logically lead to the conclusion that the information imbalance between voters the ban seeks to remedy is not pressing and substantial. I would not accede to the argument that the relative ease by which the ban may be violated demands its constitutional demise.

- [65] In my view, the application of the reasoning in *Harper* permits no conclusion other than that the objective of s. 329 of the Canada Elections Act is pressing and substantial.

Has the "proportional effect" aspect of the Oakes test been satisfied?

[66] In undertaking the analysis under s. 1 of the Charter, the court must take into account both the nature of the infringed right and the specific values the state relies on to justify the infringement. To be reasonable and demonstrably justifiable, the impugned measures must impair the infringed right or freedom as little as possible. *RJR-MacDonald Inc.*, supra, at para. 160, sets out the appropriate standard:

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

[67] In *Lavigne v. Ontario Public Services Employees Union*, [1991] 2 S.C.R. 211 at 296, Wilson J. said that a failure to satisfy the minimal impairment test will be found only if there are measures "clearly superior to the measures currently in use". See also *Libman v. Quebec (Attorney General)*, supra, at para. 62.

[68] In some cases where the operation of an impugned provision is in the furtherance of a particular objective, neither the benefit nor the relationship between the benefit and the infringement may be scientifically measurable. In such cases, it may be appropriate to proceed under the rational connection inquiry on the basis of logic and reason: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, *R. v. Sharpe*, supra, *Sauvé v. Canada (Chief Electoral Officer)*, supra, and *Harper v. Canada (Attorney General)*, supra.

[69] In this case, the Attorney General submits that the appeal judge erred in determining that the deleterious effects of the provision outweighed its salutary effects. He argues that the ban imposes, at most, a two-and-a-half hour delay in the publication of polling results, and that this effect is relatively minor. The Attorney General further submits that the deleterious effects of s. 329 are slight, given that the ban applies to expression that is not true political discourse. I agree with those submissions.

[70] The salutary effect of the provision is the promotion of fairness in the electoral process. This effect is achieved through the prohibition of premature dissemination of polling results, which prevents voters in one part of the country from having knowledge of, and being influenced by, events occurring elsewhere. Section 329 helps ensure that voters are treated equally on election day. An additional salutary effect is the prevention of distribution of inaccurate information, and the effect this might have on voters who have yet to cast their ballots. The important underlying effect is the maintenance of public confidence in the electoral process.

- [71] In identifying the salutary effects of the provision, it is important to reiterate that only a reasonable apprehension of harm is required at the justification stage of the analysis in cases of this nature (Harper, at para. 88). The Attorney General is not required to prove that information as to the election results in Atlantic Canada would have an impact on voter behaviour in the West. A reasoned apprehension of such harm to the electoral process by information imbalance will suffice.
- [72] Such an apprehension of harm supports the conclusion that the impugned provision has the salutary effect of promoting electoral fairness. The common sense analysis set out above is not insufficient; actual evidence that the provision has salutary effects is not required: Harper. Whether or not the evidence given by the expert supports or detracts from the proof of the salutary effects is immaterial. On the basis of a reasoned analysis alone, the Crown has demonstrated on a balance of probabilities that s. 329 has the salutary effects articulated by the trial judge. These salutary effects may be summarized as the preservation of an information balance among voters across the country and the protection of electoral fairness.
- [73] When the deleterious effect of a short moratorium on the exercise of the right to freedom of expression is balanced against the salutary effects of preserving an information balance among voters across the country and promoting the perception of electoral fairness, it appears to me that the salutary effects have more weight and that the proportionality test is therefore met.

VII. Conclusion

- [74] For the reasons stated, I am of the opinion that the limitation on freedom of expression caused by s. 329 of the Canada Elections Act is demonstrably justified in a free and democratic society.
- [75] Accordingly, I would allow the appeal, set aside the order of the appeal judge and affirm the constitutional validity of s. 329 of the Canada Elections Act. It follows that the conviction entered at trial must be restored.

"The Honourable Madam Justice Rowles"

I Agree:

"The Honourable Chief Justice Finch"

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [76] I have had the benefit of reading in draft the reasons for judgment of my colleague Madam Justice Rowles. With respect, I see the matter differently, and would dismiss the appeal.
- [77] The statutory provision in issue is s. 329 of the Canada Elections Act:

329. No person shall transmit the result or purported result of the vote in an electoral district to the public in another electoral district before the close of all of the polling stations in that other electoral district.
- [78] The freedom infringed by that provision is s. 2(b) of the Canadian Charter of Rights and Freedoms:
2. Everyone has the following fundamental freedoms:
- b. freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- [79] Section 1 of the Charter provides:
1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
- [80] The issue is whether s. 329 is a reasonable limit upon freedom of expression as may be demonstrably justified in a free and democratic society. In my view, the answer is no.
- [81] The issue falls to be decided under the analytical framework described in *R. v. Oakes*, [1986] 1 S.C.R. 103. The learned trial judge concluded that s. 1 saves s. 329 from a declaration of constitutional invalidity. The learned summary conviction appeal judge concluded otherwise. He found that s. 329 does not have a pressing and substantial objective, and that there is not proportionality between the effects of s. 329 in limiting the freedom and the objective of s. 329 because the section's salutary effects does not outweigh its deleterious effects.
- [82] In my view, it is sufficient to discuss the latter factor identified by the summary conviction appeal judge for I consider it tilts against the constitutional validity of the provision.
- [83] The third step of the proportionality issue identified in *Oakes* was described by the Supreme Court of Canada in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569:
- [38] . . . there must be proportionality both between the objective and the deleterious effects of the statutory restrictions.
- [84] The question, as correctly noted by the summary conviction appeal judge, involves weighing the effects of the provision.
- [85] The convenient place to start is with an assessment of the salutary aspects of the provision. The provision, although addressed to the publisher of information, is intended to limit the opportunity for any voters to have, before their ballots are cast, information that other voters did not have. It is, I think, correctly assessed by Madam Justice Rowles, as intended to promote electoral fairness and directed to both the actual behaviour of voters and the perceptions of voters.

- [86] Electoral fairness is an important objective and measures that further electoral fairness are, by definition, of benefit. The significance of electoral fairness was discussed by McLachlin C.J.C. for herself and Major J. in *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33, as part of her analysis of the degree to which the objective of the provision there under consideration was pressing and substantial:
- [26] Common sense dictates that promoting electoral fairness is a pressing and substantial objective in our liberal democracy, even in the absence of evidence that past elections have been unfair; see *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 38. A theoretical objective asserted as pressing and substantial is sufficient for purposes of the s. 1 justification analysis; see *Thomson Newspapers* [(1998), 1 S.C.R. 877], at para. 38; *Harvey*, *supra*, at para. 38; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 191; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 281; *Edmonton Journal*, *supra*, at pp. 1343-45.
- [87] In general terms, the value of equal access to information has been recognized by the Supreme Court of Canada. In his majority opinion in *Harper* considering whether the objective of a provision that banned transmission of advertising on polling day was pressing and substantial, Bastarache J. commented on the provision of information to voters:
- [132] The advertising blackout provision seeks to advance two objectives. First, it seeks to provide commentators and others with an opportunity to respond to any potentially misleading election advertising (Cairns J., at para. 303). To the extent that voters may be misled by third party advertising, this is a pressing and substantial objective. Berger J.A., in dissent, identified a second pressing and substantial objective (para. 283). The blackout rule ensures that electors in different parts of the country have access to the same information before they go to the polls.
- [133] The blackout period is rationally connected to preventing voters from relying on inaccurate information. It provides a period within which misleading advertising may be assessed, criticized and possibly corrected. This achieves a broader objective, discussed throughout: informed voting. The blackout period is also rationally connected to ensuring that all voters receive the same information where possible. The blackout period would preclude an election advertisement appearing in Western Canada after the polls had closed in Eastern Canada.
- [88] It is, however, not sufficient to identify the benefits only in general terms when considering proportionality of the salutary and deleterious effects of a provision. The question is, I think, the degree of benefit gained through the section in comparison to the degree of detriment.
- [89] A ban on publication of election results until all polls are closed has been a feature of Canadian election law since 1938. It seems simply to have been continued when the voting hours were changed in 2000, without Parliament considering its present day utility.

- [90] In 1938, information could be quickly transmitted only by telegraph and telephone, and the polls in each province closed at the same hour locally. Given Canada's geography, that meant a four and one-half hour time difference between the closing of the polls in Newfoundland and the closing of polls in British Columbia. Population patterns in Canada then were much as they are now, with Ontario and Quebec being home to a large portion of the populace, giving those provinces the bulk of the seats in the House of Commons. Thus it has happened in more than one election that the election is decided while polls are still open in western Canada. The publication ban in issue had the effect of preventing notice of such a result being broadly known in the west while western voters were still heading to their polling stations. However, the polling hours and the vast geography meant that upon the close of polls, the results could immediately be reported and a government announced before any votes were counted in British Columbia. In other words, the publication ban prevented western voters from knowing the result of the election when they voted, but it did not avoid the election being decided before the western voter cast his or her ballot, and the western voter understanding that such was the case.
- [91] Three things have changed since the publication ban was first established in 1938. First, technology has changed. In addition to the telegraph and telephone, and the later developed conventional television, we now have the internet and satellite dishes. Second, in response, I understand, to an initiative of Ms. Terrana, a Member of Parliament from British Columbia, Parliament modified the voting hours, staggering them to reduce the maximum east to west spread in the close of polls to two and one-half hours and, significantly, to reduce the Ontario and Quebec to British Columbia time spread in the close to polls to one-half hour. Third, there is now a Charter of Rights and Freedoms whereby a limitation on freedom of expression may be measured against a constitutional standard.
- [92] There are two aspects of the salutary effects of s. 329: first, as it actually affects the behaviour of voters; and second, as it affects voters' perception of the fairness of the electoral system. Both of these are reduced significantly, perhaps almost entirely, by the change to staggered poll closings. This change means that only the results from the Atlantic provinces, with 11 per cent of the ridings, have a realistic chance of being counted and reported while western polls are still open. Further, changing technology permits many British Columbians to capture the information through a satellite dish, or the internet. Even without Canadians posting information, it is said that material banned in Canada, for example from the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the "Gomery Inquiry"), can be readily accessed by Canadians.
- [93] The summary conviction appeal judge addressed the question of the actual effect upon voters' behaviour. He observed that the evidence of the expert witness called by the Crown, Dr. MacDermid, was that harmful effects on voter behaviour, such as reduced voter turnout and strategic voting, occur "where the likely outcome of the election is known from the results published from another part of the country". My review of his evidence accords with those of the summary conviction appeal judge. There is no indication in the evidence that

voters with knowledge of the election results from at most 11 per cent of the ridings, would affect the behaviour of voters on the other side of the nation.

- [94] The evidence of Dr. McDermid is not inconsistent with the conclusions in the Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol. 2 (Ottawa: Minister of Supply and Services Canada, 1991) (Chair: Pierre Lortie) (the "Lortie Commission"), in which the issue of a publication ban of election results is addressed as part of an examination of voting hours, which were, at the time of the Lortie Commission, uniform across the country. In reaching its recommendation for staggered polling hours (in a form different than adopted by Parliament), the report states at 84:

The Canada Elections Act makes it an offence to publish election results in any area before voting ends in that area. This provision, adopted at the time the telegraph was used to communicate election results, has been rendered obsolete by developments in broadcasting and telecommunications technology, which have made controlling the diffusion of election results more difficult. U.S. border stations can broadcast election results from eastern Canada before viewers or listeners in western Canada have finished voting. It is also impossible to stop results being relayed to the West via telephone or facsimile before the polls close and increasingly difficult to block eastern Canadian television stations carrying election news from being received in the West by satellite or cable.

And at 85:

The challenge is therefore to devise a solution that responds to concerns in western Canada, is fair to different groups and regions, and is not too disruptive for voters or election workers. We believe this can be achieved if we recognize that the basic problem is ensuring that voters in western Canada do not know who will form the government before the polls close there. This means guarding against premature release of election results from Ontario and Quebec, whose 174 constituencies constitute more than half the seats in the House of Commons. We have concluded that the release of some election results before polls close in the West -- specifically results from the 32 seats in Atlantic Canada -- would not constitute a major problem so long as other results from eastern Canada were not available until after the polls closed in the West.

[Emphasis added]

- [95] In the result, the Lortie Commission recommended that the polls in British Columbia close at the earliest hour in Canada, 7:00 p.m., and that most of the country have polls that stay open until 8:30 or 9:30 p.m. Parliament agreed with minor modifications.
- [96] In the absence of social science evidence to the effect that the announcement of election results from 11 per cent of the ridings will affect behaviour, does logic and reason, in conjunction with the evidence we do have, suggest that voters' behaviour will be affected to any real degree by dissemination of Atlantic Canada's results? In my view it does not. Indeed, in my view, Dr. MacDermid's evidence leads me to doubt such a proposition. His evidence is to the effect that even when a voter is told the results of the election before the

close of polls, any resultant behaviour shift is minor. Where the announcement does not include an election "call", logic does not support a conclusion that a shift in voter behaviour will ensue. And the Lortie Commission, having studied the Canadian experience and addressing fairness in the system, did not consider release of some election results before polls close in the west, a problem, on the premise of staggered voting hours. Nor, independent of Dr. McDermid's report or the Lortie Commission report, does it seem to me that a voter would modify his or her behaviour based upon the report of this small number of ridings. In other words, to presume a behavioural effect is to presume an unreasonable voter.

- [97] I conclude that s. 329 is of little effect in advancing electoral fairness through influence on actual behaviour. Nor, in my view, does it appreciably protect the perception of electoral fairness.
- [98] While the summary conviction appeal judge did not address this aspect, I agree with Madam Justice Rowles that perception of fairness is important, for the reasons she states. However, again we look to a reasonable person. I do not consider that there can be a perception of unfairness when there is little chance that a reasonable voter would alter his or her behaviour. What can be perceived as unfair, one may ask, in the reporting of a fact that has no expectation of changing behaviour?
- [99] Nor do I consider that reasonable and rational Canadians on either coast would consider this degree of difference in their knowledge unfair. A country of this breadth necessarily has some lack of symmetry. One example is the difference in voting hours. While a common view in British Columbia might be that British Columbians' voting hours are less convenient and more costly for employers and thus tip the balance against them, it is a natural consequence of the size of the country and a desire to minimize the sense that an election may be over without British Columbian participation, a desire discussed by the Lortie Commission.
- [100] Nor, in my view, does this expression bear the same nature as that considered in Harper. In Harper the expression under review was campaign advertising. In essence, the section under review directed the electronic media campaign to cease across an electoral district at the same time. Unlike the advertising ban in Harper, which concerned publication of persuasive material designed as part of the election campaign, the information here at issue is simply a report of that which has occurred.
- [101] I conclude, therefore, that the salutary effects of the provision are slight.
- [102] I turn then to the deleterious aspects.
- [103] The nature of the expression restricted by s. 329 is, simply, reporting. That is, s. 329 constrains persons from advising other Canadians of "what is" and "what other Canadians already know." And while it is Mr. Bryan, the publisher, who advances his freedoms in this Court in defence to the charge against him, the infringement affects not only his freedom

but also the freedom of those who would access his publication to receive information. For example, in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1340, Cory J. said:

They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court.

And in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, McLachlin J. (as she then was) said at 251:

Moreover, the value served by free expression in the case of professional advertising is not purely the enhancement of the advertiser's opportunity to profit, as was the case in *Irwin Toy [v. Quebec (Attorney General)]*, [1989] 1 S.C.R. 927]. The public has an interest in obtaining information as to dentists' office hours, the languages they speak, and other objective facts relevant to their practice -- information which s. 37(39) prohibits dentists from conveying by advertising. Useful information is restricted without justification.

[104] Although the restriction on publication is but two and one-half hours, I consider that a law which permits some Canadians, but not all Canadians, to know facts pertaining to the election, is deleterious.

[105] The deleterious effect is more pronounced when one considers the observation of the Lortie Commission that it is becoming increasingly difficult to control the diffusion of information. Expansion in our communities of new technologies provides easier access to information for those with the technical and financial means to acquire it. Early knowledge of election results has moved beyond those with personal contact and a telephone, as in 1938, to those with new technology. In my view, the information differential between those with "a way around the provision" and those reliant on the common media, is a secondary deleterious effect of s. 329, in the context of the current voting scheme.

[106] It follows that I agree on this issue with the summary conviction appeal judge and would dismiss the appeal.

"The Honourable Madam Justice Saunders"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/05/02/2005bccca0285.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-bryan-2005>

Prepared on 29 October 2026 · Esheria