Political and media bias about the Supreme Court of Canada: Dispelling the big lie that the court is "soft on crime"

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In the United States, there is a long tradition of politicizing the judiciary. The tradition begins with the fact that most American judges, at the state and local levels, are directly elected by vote of the majority and must run for re-election at the end of their terms. It extends to the requirement that Supreme Court judges must have their appointments confirmed by a favourable vote from the political party that has control of the Senate. And it includes the routine phenomenon of politicians, and members of the media, attacking judicial decisions on blatantly political grounds.

In the United States, these attacks on the judiciary have generally come from right-wing politicians and right-wing newspapers—that is, from the Republican Party and its supporters—arguing that particular judges or particular courts are too "liberal." However, in one recent well-known case, President Clinton openly criticized a federally appointed judge for excluding evidence in a drug case. The judge eventually reversed his decision.

This highly politicized culture in which the American judiciary operates has generally been absent in Canada. None of our judges are elected, or must run for re-election. None of our judges have their appointments subjected to confirmation votes by a majority of elected politicians. And political attacks on judges and their courts, by politicians or by the media, are generally regarded as improper attempts to influence the process of impartial adjudication. Indeed, in this country, it is arguable that any attempt to bring political pressure to bear on the judiciary would be regarded as a violation of the constitutionally entrenched requirement of judicial independence.

This Americanization and politicization of our legal culture is profoundly disturbing and must be resisted. If these trends continue they will inevitably lead to judicial decision making in this country that is driven by a desire to please the majority or the powerful or those who control access to the media.

In the face of this apparently stark contrast between American legal culture and Canadian legal culture, there are some disturbing recent events in this country, in which the *Canada Watch* Supreme Court conference has played a role.

First, the Reform Party and its leader have adopted the American Republican Party tradition of launching blatantly political attacks on the judiciary for being too "liberal." Second, the right-wing media have given prominence to these political attacks and have aided and abetted with their own misleading coverage of the courts. Third, the Conservative Party in Alberta has now begun to openly muse about ways to bring greater political control over its Provincial Court judges (for example, by limited term appointments). And finally, events like *Canada Watch*'s annual Supreme Court conference have encouraged lawyers and academics to seek out "the latest trends" in the Supreme Court's Charter jurisprudence and to obtain "front page coverage" of any "controversial" theories they might have about the court's direction.

In my opinion, this Americanization and politicization of our legal culture is profoundly disturbing and must be resisted. If these trends continue they will inevitably lead to judicial decision making in this country that is driven by a desire to please the majority or the powerful or those who control access to the media. The ideal of judicial decision making that is based on rational principles, objective reasoning, and stubborn neutrality will be lost.

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In this regard, Chief Justice Lamer recently made a very disturbing confession to Kirk Makin in his February 2, 1999 interview in *The Globe and Mail*, while discussing the political storm whipped up by the Reform Party and the media after a B.C. Supreme Court Judge struck down the child pornography possessory offence in the *Criminal Code*:

> I am concerned that as a result of virulent or harsh comments by the press or the public, *the most popular thing to do might become the outcome*. Judges are human beings. I would be remiss if I were to say that we are super human *or that we are not influenced sometimes*. [Emphasis added.]

When the *Feeney* case was re-tried, without the benefit of the inadmissible evidence excluded by the Supreme Court pursuant to the Charter, his *conviction* at the re-trial was barely mentioned in the media. Feeney's conviction at his re-trial should have sent a clear message—namely, that it is possible to respect basic civil liberties and, at the same time, maintain law and order. This was obviously not a message that interested the politicians or the media.

I would like to use *Canada Watch*'s review of the Supreme Court's 1998 criminal and constitutional jurisprudence as an opportunity to illustrate my concerns about political and media bias toward the court, and its possible effect on the court. From the perspective of those who would like to politicize our legal culture, the majority of the Supreme Court has used the Charter much too liberally in furtherance of an individual rights or civil liberties bias that sacrifices collective public security and law enforcement values. The politicians and members of the media who espouse this view became particularly vociferous during 1997 when the Supreme Court decided the *Feeney* case on May 22 (reported at 115 C.C.C. (3d) 129). By a slim 5-4 majority, the court decided that it was a serious Charter violation for a police officer to enter a dwelling house without a warrant and without reasonable and probable grounds and where there were no exigent circumstances to justify such a warrantless entry.

This seemingly plausible result unleashed a rabid response from the Reform Party, from the chain of newspapers owned by Southam Inc. and from *The Globe and Mail*. The latter paper published a lengthy and prominent article in August 1997, centred on the *Feeney* case and purporting to be an objective analysis of an overall trend in the court's jurisprudence. The thesis of the article was that the majority of the court, led by Chief Justice Lamer, had developed a "pro-accused/anti-police" bias. *The Globe*'s reporter, Sean Fine, marshalled *10 cases* decided by the court in the last *10 years* in support of his thesis. In other words, his highly politicized argument was based on an examination of about 1 percent of the court's relevant jurisprudence.

When some colleagues and I wrote a rebuttal, pointing to 10 contrary cases, *The Globe and Mail* refused to publish it. In particular, our letter had pointed out that the Supreme Court of Canada has systematically reformed the law of criminal evidence in the last 10 years so as to make *the prosecution* of crime easier. We pointed to a line of recent cases where the court has held for the first time that forms of hearsay evidence and "similar fact" evidence, long excluded from common law, are now admissible at the instance of the Crown (see, *R. v. Khan* (1990), 59 C.C.C. (3d) 92; *R. v. K.G.B.* (1993), 79 C.C.C. (3d) 257; and *R. v. C.R.B.* (1990), 55 C.C.C. (3d) 1). At the same time, the court has also abrogated the common law rule that relevant *defence* evidence is always admissible, no matter how minimally probative, because it may raise a reasonable doubt. Instead, the court has held, again for the first time, that some forms of relevant defence evidence can be excluded by the Crown because of prejudice to the Crown's interests (see, *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 and *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1). It is arguable that this trend in the court's modern case law, toward admitting some dubious forms of prosecution evidence while excluding relevant but minimally probative defence evidence, has contributed to wrongful convictions in this country (see, for example, *R. v. Parsons* (1996), 146 Nfdl. and P.E.I. R. 210 (Nfdl. C.A.) and F. Kaufman Q.C., *The Commission on Proceedings Involving Guy Paul Morin*, 1998, vol. 2, at 1138-59).

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L'EFFET JURIDIQUE DE L'AVIS EXPRIMÉ DANS LE RENVOI

La Cour suprême du Canada a prononcé son jugement dans le *Renvoi relatif à la sécession du Québec* dans l'exercice de son rôle consultatif, plutôt que de sa fonction judiciaire.

Dans les commentaires qu'il a formulés à la suite de la décision rendue par la Cour suprême dans le *Renvoi relatif à la sécession du Québec*, le ministre québécois des Affaires intergouvernementales, Monsieur Jacques Brassard, a déclaré que l'opinion de la Cour était un « simple avis », et non un jugement qui lie le gouvernement du Québec. Les journalistes lui ont alors demandé comment il pouvait insister sur la conclusion de la Cour portant que le devoir de négocier la sécession constituait une obligation impérative, selon les termes employés par la Cour même. De plus, pourquoi cette obligation, que la Cour a qualifiée de réciproque, lierait-elle le gouvernement du Canada, si elle ne lie pas le gouvernement du Québec parce que l'énoncé de la Cour constitue un « simple avis »?

Un point de vue plus éclairé a été exprimé plus tard par les procureurs qui ont représenté M. Bouchard et le procureur général du Québec, M. Serge Ménard, devant la Cour d'appel du Québec dans la deuxième affaire *Bertrand, Bertrand c. Bouchard et autres* (*Bertrand (no 2)*).

Cette conclusion de la Cour est extrêmement salutaire pour les traditions civiques et la culture politique du Canada.

Le procureur général du Québec a cité le jugement de la Cour suprême selon lequel il n'est pas nécessaire d'examiner de façon plus approfondie les inquiétudes qui « *découlent du droit invoqué par le Québec de faire sécession unilatéralement* [, à] la lumière de notre conclusion *qu'aucun droit de ce genre ne s'applique à la population du Québec,* ni en vertu du droit international ni en vertu de la Constitution du Canada. »

En d'autres termes, le procureur général du Québec a invoqué—dans une instance devant les tribunaux québécois—l'avis exprimé par la Cour suprême du Canada dans le *Renvoi relatif à la sécession du Québec* et sa conclusion qu'il n'existe pas de droit de faire sécession unilatéralement. Je ne mentionne cet élément que pour illustrer le fait que le procureur général du Québec a manifestement accepté—comme il devait le faire—que l'avis exprimé par la Cour suprême du Canada sur le *Renvoi relatif à la sécession du Québec* constitue maintenant un élément important de la jurisprudence pertinente en matière constitutionnelle qui s'applique au système juridique canadien, et notamment aux tribunaux québécois.

CONCLUSION

La décision équilibrée de la Cour fournit à tous les participants à la fédération canadienne une occasion de marquer un arrêt, et peut-être de débattre de l'avenir du Canada et du Québec en utilisant un vocabulaire moins absolutiste, à la rhétorique et au ton moins stridents, plus respectueux des traditions, des institutions, des valeurs, des espoirs et des aspirations de l'autre partie, et qui tienne davantage compte du fait que bon nombre de ces valeurs et de ces aspirations sont partagées par toutes les parties et découlent de leur histoire commune.

Si le débat sur l'avenir se tient avec plus de clarté, dans un climat assez serein et dans une meilleure compréhension et perception du cadre juridique régissant les choix politiques fondamentaux dans notre pays, c'est dans une large mesure grâce aux efforts déployés, avec une profonde intelligence, par les juges de la Cour suprême dans le cadre du Renvoi.

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These significant recent developments in the law of evidence have facilitated the prosecution of crime and have made the defence of those accused of crime much more difficult. And yet this kind of major development in the law has gone completely unnoticed, except within the legal profession itself, because it runs counter to the dominant "law and order" bias of the media and of politicians.

It is also noteworthy that when the *Feeney* case was re-tried, without the benefit of the inadmissible evidence excluded by the Supreme Court pursuant to the Charter, his *conviction* at the re-trial was barely mentioned in the media. Feeney's conviction at his re-trial should have sent a clear message—namely, that it is possible to respect basic civil liberties and, at the same time, maintain law and order. This was obviously not a message that interested the politicians or the media.

This kind of selective reporting about the court's work makes it appear that the politicians and the media, who criticize the court from a right wing perspective, are not interested in an objective analysis of the court's work and are, instead, simply interested in creating a false appearance about the court that furthers their own agendas. The politicians always believe they can exploit a "law and order" agenda and the media always believe they can exploit controversy. It is in their mutual self-interest to portray the court as being "soft on crime," whether it is true or not.

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This impression of the court has now become a media and political artifact in this country. The "big lie" about the court has been repeated often enough that even reporters who did not participate in creating the false picture now refer to it. The lie itself has become newsworthy. Thus Kirk Makin, in his recent *Globe and Mail* interview with Chief Justice Lamer, put it to the Chief Justice that "critics ... say the Supreme Court is soft on crime." The Chief Justice replied, defensively, by pointing to his apparently impressive list of dismissed conviction appeals.

With this background in mind, let us analyze the criminal and constitutional cases decided in 1998 to determine whether the court has, in fact, used the *Charter of Rights and Freedoms* in furtherance of a "pro-accused/anti-police" bias.

There were 10 significant criminal and constitutional cases decided by the court in 1998. Of these, four cases could be said to have produced results and doctrinal developments that favour the liberty of the subject over the powers of the state. In this broad sense they are "pro-defence" as opposed to "pro-Crown," if we must use these terms. The four cases are *Cook, Williams, Maracle*, and *Caslake*.

In *R. v. Cook* (reported at 128 C.C.C. (3d) 1), the court held by a 7-2 majority that the protections of the Charter, in particular s. 10(b), extended to an accused who was interrogated in the United States by Canadian police about a Canadian murder. A narrow and technical reading of the Charter could have led to the view that it can never apply to state action outside of Canadian territory.

In *R. v. Williams* (reported at 124 C.C.C. (3d) 481), a unanimous court relaxed the threshold that an accused has to meet when seeking to challenge prospective jurors for cause on the basis of alleged bias against a racial minority. A narrower application of the pre-existing case law could have led to a more restricted right to challenge prospective jurors for cause.

The "big lie" about the court has been repeated often enough that even reporters who did not participate in creating the false picture now refer to it. The lie itself has become newsworthy.

In *R. v. Maracle* (reported at 122 C.C.C. (3d) 97), the court held by a narrow 3-2 majority that the accused's s. 11(b) right to trial within a reasonable time was violated by almost two years of post-committal delay, some of which was the accused's own responsibility. This was a relatively close case that required a generous balancing of the relevant interests in order to find a Charter violation.

R. v. Caslake (reported at 121 C.C.C. (3d) 97) is an important decision concerning the power of the state to conduct warrantless searches as an incident of arrest. By a narrow 4-3 majority, the court placed limits on this common law power, requiring that the police have proper arrest-related purposes for such searches and that an objective basis exist for the police purpose. It is arguable that these requirements place new restrictions on police powers that were not clearly articulated in the pre-existing case law. However, it must be noted that the court went on to hold unanimously that the .5 gram of cocaine found in the accused's car, as a result of the unconstitutional search, was still admissible in evidence. It could be argued that this is actually a "pro-Crown" decision because it continues the court's virtually unblemished record of never excluding evidence of drugs, pursuant to s. 24(2) of the Charter, in spite of Charter violations. I have included it as a "pro-defence" case because of the majority decision on s. 8 of the Charter.

Weighed against the above four "pro-defence" cases are four other cases decided in 1998 that go in the opposite direction—that is, favouring the powers of the state over the rights of the individual. These four "pro-Crown" decisions are *Arp, M.R.M., Rose*, and *Schreiber*.

R. v. Arp (reported at 129 C.C.C. (3d) 321) involved two very important *Charter of Rights and Freedoms* issues, both of which were resolved in favour of the Crown by a unanimous court. There can be no doubt that if either of these two issues had been resolved in favour of the accused, it would have made the prosecution of crime—particularly violent crime—more difficult in this country. The first issue involved the troubling question of whether "similar fact" evidence can be admitted, linking the accused to different crimes, without proof beyond a reasonable doubt that the accused in fact committed any one of those crimes. In other words, can the Crown call evidence of a number of merely suspicious crimes connected to the accused in order to prove that the accused committed any one of them. Some would say that this approach violates ss. 7 and 11(d) of the Charter and the historic requirement that the Crown must prove guilt beyond reasonable doubt. The appellate courts in this country were legitimately divided on the issue and the Supreme Court of Canada decisively sided with Ontario's "pro-Crown" approach and rejected Alberta's "pro-defence" approach.

The second issue in *Arp* was equally important—namely, whether the accused's

consent to provide the police with a bodily sample (such as hair, saliva, or blood), in relation to the investigation of one crime, extends to a subsequent investigation of an entirely separate crime. Again, there were good arguments on both sides of this issue, which have profound importance in relation to the ability of the state to maintain ongoing DNA data banks on its subjects. In other words, if you voluntarily give your DNA to the state for one limited purpose, do you forever lose any s. 8 Charter rights in relation to that sample for the rest of your life? Again, the court unanimously sided with state interests on this issue.

Although the decision in *Arp* has greatly facilitated the ability of the Crown and police to prosecute suspected serial murderers and serial rapists, it is noteworthy that it did not lead to an outpouring of media coverage and political commentary to the effect that the Supreme Court of Canada has now been enlisted into the right wing's "war on crime" and should be regarded as "pro-police/anti-accused."

In *R. v. M.R.M.* (reported at 129 C.C.C. (3d) 361), the court held, by a decisive 8-1 majority, that school officials searching students for evidence of criminal offences (marijuana possession and trafficking in this case) need not comply with the usual ss. 8, 10(a), and 10(b) Charter requirements. In particular, a search of the person need not be based on reasonable and probable grounds, there is no need for an arrest or a warrant, and there is no right to counsel even when the student is detained in the school principal's office with a police officer present. In announcing these new relaxed Charter standards, applicable in the school setting, the court was clearly influenced by its view that serious lawlessness in our schools was on the increase. Cory J. stated for the majority, at 368 C.C.C.:

> Schools today are faced with extremely difficult problems which were unimaginable a generation ago. Dangerous weapons are appearing in schools with increasing frequency. There is as well the all too frequent presence at schools of illicit drugs. These weapons and drugs create problems that are grave and urgent.

It is much easier to unleash superficial sound bites that focus on one or two notorious cases that have been wrenched out of their larger context. However, the extra effort is required when the very survival of an important institution is at stake.

There does not appear to have been any empirical evidence before the court on this issue. The facts of the case involved "a small quantity of marijuana," something that has been commonplace in our schools for over 30 years. One wonders whether the court's somewhat politicized rhetoric on these issues was influenced by the negative press clippings it received, completely unjustifiably, after the *Feeney* decision in 1997.

It is noteworthy that, within a few weeks of the release of the judgment in *M.R.M.*, there was a public outcry in Ontario when a number of male high school students were strip searched by a teacher and vice-principal who were investigating a theft at the school. The very conservative premier of Ontario was interviewed and expressed shock at such conduct by school officials. And yet the media did not launch a counter-attack against the Supreme Court of Canada for being way out in front of even the most right-wing "law and order" politicians in the country.

In *R. v. Rose* (reported at 129 C.C.C. (3d) 449), the court dealt with a longstanding thorn in the side of defence counsel in this country—namely, the requirement that they must address the jury first, without any right to reply after the Crown's jury address, in all criminal cases where a defence is called. This ancient rule has been criticized by the Law Reform Commission of Canada and by appellate court judges and it no longer exists in England, New Zealand, parts of Australia, and most of the United States. It arguably constitutes a penalty for calling a defence and it is contrary to the normal rules in all other forms of litigation. Normally, the party who bears the burden (namely, the Crown in a criminal case) must make submissions first, the opposing party then responds, and the party with the main burden then has a final and brief right of reply. The court was badly divided but, by a 5-4 majority, upheld the Crown's right to go last with no right of reply in the defence. Most observers of the justice system would regard this result as one that is advantageous to the Crown and detrimental to the defence.

Finally, in *Schreiber v. A.G. Canada* (reported at 124 C.C.C. (3d) 129), the court held by a clear 5-2 majority that s. 8 of the Charter does not apply at all to searches of Canadians' bank accounts in foreign jurisdictions, even though the search is requested by Canadian police and prosecutors in furtherance of a Canadian criminal investigation. This was the famous, or infamous, "Airbus Case" that led to former Prime Minister Brian Mulroney's libel suit against the RCMP and the federal minister of justice. It involved a letter of Request for Mutual Legal Assistance, sent to the relevant Swiss authorities by the Canadian Department of Justice, seeking a search of certain bank accounts in Zurich.

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Schreiber was a Canadian who held one of the bank accounts and he sought a declaration that the Canadian letter, requesting the foreign search, violated his s. 8 Charter rights. The Federal Court, both at trial and on appeal, agreed with his position and held that a Canadian warrant, based on reasonable and probable grounds, was required to authorize the letter of request. The Supreme Court of Canada reversed, essentially holding that the Charter has no application to searches of foreign bank accounts by foreign officials.

This "pro-Crown" result in *Schreiber* involved a strict and narrow reading of the Charter. *The Globe and Mail* had engaged in prolonged and repeated lobbying on its editorial page for the opposite result, arguing that Canadians' foreign bank accounts should be protected by the s. 8 requirement of a Canadian warrant based on reasonable and probable grounds. It is curious that the same newspaper expressed such dismay at the *Feeney* decision when it merely extended similar protections to Canadians' dwelling houses located within this country. Presumably, the right-wing "law and order" agenda need not be extended to the foreign bank accounts of the rich and powerful, which are far more worthy subjects of Charter protection than the dwelling houses of ordinary Canadians.

Aside from the four "pro-defence" and four "pro-Crown" cases decided by the court in 1998, there are two further cases that cannot be easily categorized.

In *R. v. MacDougall and Gallant* (reported at 128 C.C.C. (3d) 483 and 509), the court held unanimously that the s. 11(b) right to trial within a reasonable time extends to the sentencing hearing. However, the court also held unanimously that the particular delay of 10 months in sentencing these two accused, due to judicial illness after the accused had pleaded guilty, was not unreasonable and there was therefore no violation of the Charter. The first of these two findings arguably gives a broad and generous reading to the Charter, although a fairly obvious and non-contentious one. The second finding, based on the view that judicial illness is largely an inherent or neutral form of delay that does not count in the s. 11(b) matrix, reflects a very cautious and conservative approach to this particular Charter right. Accordingly, this case cannot usefully be classified on the media's politicized Charter screen as either "pro-Crown" or "pro-defence."

The majority is constantly shifting back and forth, depending on the particular facts and the particular legal issues in each case. Each individual result can be criticized or supported, based on logic, precedent, and principle. But no clear trend or political bias can be detected.

The last case is *R. v. Dixon, Smith, Skinner, Robart and McQuaid* (reported at 122 C.C.C. (3d) 1, 27, 31, 36, and 40). It is the latest word from the court concerning the s. 7 obligation on the Crown to disclose all relevant information in its possession. The Crown had failed to disclose certain witness statements prior to trial. During the trial, police occurrence reports were obtained by the defence that included summaries of the statements but not the statements themselves. The court held unanimously that the failure to disclose the statements was a violation of the s. 7 right to disclosure. The court's analysis of this issue continues the large and liberal interpretation of this particular Charter right, found in a number of the court's earlier decisions. However, at the remedy stage, the court retrenched by announcing for the first time that defence counsel's "lack of due diligence" in failing to adequately pursue and seek out the withheld statements is a factor to be considered in deciding whether the remedy of ordering a new trial is justified. It is arguable that this latter proposition punishes the accused for his own counsel's negligent failure to uncover the Crown's Charter violation. This is hardly a generous approach to Charter rights. Accordingly, this decision reveals a somewhat mixed approach to the Charter that is not easily placed in either the "pro-Crown" or "pro-defence" categories.

What can one conclude from the above survey of the court's 10 significant criminal law *Charter of Rights and Freedoms* decisions released in 1998? It seems to me that the self-evident conclusion is that the court cannot be fairly classified as either "pro-Crown" or "pro-defence" in its application of the Charter to the criminal law. The majority is constantly shifting back and forth, depending on the particular facts and the particular legal issues in each case. Each individual result can be criticized or supported, based on logic, precedent, and principle. But no clear trend or political bias can be detected.

However, what is equally apparent is that if I were a member of a political party or a member of the media, and my party or my newspaper had a particular agenda concerning the court that it wished to advance, I could easily select the four "pro-defence" cases or the four "pro-Crown" cases and

marshall an argument that the court was biased in one way or the other. The argument appears persuasive and convincing to the public, provided no mention is made of the four cases going the other way.

As long as politicians and members of the media are self-interested and selective, and do not fairly and objectively analyze the *entire body* of the court's work, it is very easy to mislead the public on this point. I concede that it is much more difficult for a reporter or a politician to engage in a thorough analysis of a large body of case law, before announcing a theory about an alleged trend. It is much easier to unleash superficial sound bites that focus on one or two notorious cases that have been wrenched out of their larger context. However, the extra effort is required when the very survival of an important institution is at stake.

I sincerely hope that politicians in this country, and members of the media, will cease their unfair attacks on the court. We all know that when really difficult decisions come along, which require independent and impartial adjudication, we turn to the courts to resolve these disputes instead of turning to highly politicized institutions that will only yield predictably biased results. If recent attempts by the right wing succeed in politicizing our courts, there will be no courts to turn to for fair and impartial adjudication. This is simply because a politicized court is no court at all.

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manipulate the political discourse" and "make the expression itself inimical to the exercise of a free and informed choice." Deference was not appropriate in the case of s. 322.1, because it regulated expression that was at "the core of the political process" and would inform voters seeking to make rational use of the polling data. Once deference was rejected, there was little doubt Parliament's blackout would fail s. 1's proportionality test.

The court's majority opinion is at once heartening and disappointing. It is heartening because Bastarache J. resisted the temptation to defer to Parliament's claim that polls might misinform or mislead voters. Significantly, he placed information that was banned at the core of s. 2(b), which in itself marks a rare occasion in the jurisprudence. In doing so, he rejected the suggestion that limits on political expression are *positive* because unregulated freedom is *negative*. As well, he grafted elements onto the s. 1 analysis that re-calibrated the balancing of values. Not only did he engage in a serious discussion of the salutary benefits versus deleterious consequences under final proportionality, he focused a certain amount of attention on harm as a *sine qua non* of justifiable limits on expression under s. 1. Each of those innovations is a welcome addition to the s. 2(b) doctrine and especially the latter, as harm and value are not synonymous. Expressive activity that is merely "valueless" should not be prohibited unless, independently of perceptions of its value, it is found to be harmful.

That said, the decision is somewhat disappointing from the perspective of broader principle. Justice Bastarache may be too clever a doctrinal technician by half. In *Thomson Newspapers* he managed to distinguish a slew of precedents that base the s. 2(b) jurisprudence on subjective judgments about what is good or bad and valuable or valueless. In doing so, he further entrenched the dichotomy between expressive activity that is deemed valueless because it is mean or manipulative and therefore irrational, and that which is valuable because the expressive activity, like polls, is "rational" or informational, and cannot be withheld from voters who have a right to know.

The distinction between what is good and bad, or rational and irrational is unsound for a variety of reasons. First and foremost, it promotes a conception of expressive freedom that is elitist and subjective. As well, it surely must be wrong in principle that s. 2(b)'s guarantee is contingent on the freedom being exercised wisely or rationally. As stated above, expressive activity should not be prohibited simply because its content is deemed stupid or valueless but instead, should be based on proof that limits are justifiable because the activity is harmful. Finally, though distinctions between third-party participation and a blackout on polls can no doubt be suggested, it is open to question whether the differences between *Libman* and *Thomson Newspapers* are persuasive. Justice Bastarache was not a member of the court when *Libman* was decided and whether he would have agreed with it is unknown; he was stuck with it in *Thomson Newspapers* just the same.

FORGOTTEN PROMISE

Many years ago, *Irwin Toy* admonished that freedom of expression was guaranteed "to ensure that everyone can manifest their thought, opinions, beliefs, indeed all expressions of the heart and mind, *however unpopular, distasteful or contrary to the mainstream*." In the end *Thomson Newspapers* was an easy case because Parliament's attempt to impose a blackout during an election campaign was offensive. Still, it is not "scientific" information or the "rational" voter that is most in need of s. 2(b)'s protection but instead, the expressive activity that is limited, purely and simply because we dislike and disapprove of it, perhaps even fear it. And, as virtually all the s. 2(b) jurisprudence, including *Thomson Newspapers*, demonstrates, the court has a long way to go to keep that promise once made in *Irwin Toy*.