

# Horse race of another kind: Libman, Thomson Newspapers, and "rational choice"

## "GRAVELY INSULTING"

There is much in *Thomson Newspapers v. Canada* to applaud. There the Supreme Court of Canada invalidated s. 322.1 of the *Canada Elections Act*, which imposed a blackout on opinion polls in the final 72 hours of a federal election, as an unjustified violation of s. 2(b) of the Charter.

Perhaps most notable is the self-important role Bastarache J. assigned voters in his majority reasons. The government's suggestion that the blackout was reasonable because voters should be shielded from information that might influence their exercise of the franchise was, in his opinion, nothing short of "gravely insulting." Far from being "mesmerized" or "enthralled" by polling data, he maintained, voters must "be presumed to have a certain degree of maturity and intelligence." After all, the Canadian voter is "a rational actor who can learn from experience and make independent judgments." He found, as a result, that to uphold a blackout on electoral information because "a very few voters might be so confounded" would "reduce the entire Canadian public to the level of the most unobservant and naive among us."

Those who regarded s. 322.1 as an example of appalling paternalism were quick to congratulate Justice Bastarache for his forceful defence of the voter's right to know. On the other hand, if *Thomson Newspapers* seemed an easy case, s. 322.1's fatal flaw was far from self-evident to the Ontario Court of Appeal, which upheld the measure, or to the Supreme Court of Canada's three Quebec judges, who dissented *en bloc*. Moreover, as roughly contemporane-

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ous decisions in *Libman v. A-G Quebec* and *R. v. Lucas* show, a victory under s. 2(b) of the Charter can rarely be taken for granted. From that perspective it is a good question whether *Thomson Newspapers* should be regarded as a one time nod to expressive freedom, a case determined by its facts and context, or can instead be considered a step forward in the s. 2(b) jurisprudence.

## "FAITH IN THE ELECTORAL PROCESS"

The Bastarache majority may be right that Parliament's opinion poll blackout

was an insult to voters and an affront to s. 2(b); still, the dissent had the better argument from precedent, especially the court's decision in *Libman*. There, referendum legislation that effectively eliminated political participation outside the statute's mandatory campaign committees ultimately failed under minimal impairment. Even so, the court unanimously agreed that it is reasonable for Parliament and the legislatures to impose strict controls on participation in election campaigns.

Prior to *Libman*, the court had designated categories of "low-value" expression under s. 1, which included hate propaganda, obscenity, and defamatory statements. The purpose of that designation was to rationalize a downward adjustment, or attenuation, in s. 1's standard of justification for expressive activities deemed to be either valueless or marginally valuable. The significance of that approach in *Libman* was this. An assumption that some expression is low value and therefore entitled to minimal protection only under s. 1 implies, conversely, that other s. 2(b) activity must be "high value" and worthy of vigilant protection under the Charter. When that proposition was put to the test, however, the court's response was a grudging concession that Quebec's referendum provisions "do in a way restrict one of the most basic forms of expression, namely political expression."

*Libman* not only discounted the interference but repeatedly stressed that controls that would prevent "disproportionate influence" in the referendum debate and ensure an "informed choice," thereby preserving the electorate's confidence in the democratic process, should be regarded as positive.

Once expression at the core of s. 2(b) was cast in negative terms, as a distorting force, the court did not find it difficult to grant the legislature the same latitude under s. 1 as it was permitted in cases of low-value expression. Hence *Libman* proclaimed that "a certain deference" was appropriate, and, having declared that referendum campaigns fall within the realm of social science, "which does not lend itself to precise proof," held that the legislature is "in the best position" to choose the means to attain that objective.

In *Thomson Newspapers*, Justice Gonthier found it easy to uphold s. 322.1's blackout on polls: all he had to do was follow the court's decision in *Libman*. First, he maintained that, far from being restrictive of s. 2(b), the purpose of the limit was to "promote political expression." Then, after announcing that "freedom of expression should not be considered as an end *per se*," he held that s. 322.1 furthered the quest for better information, because a "multiplicity of polls" would "foster confusion." Thus he concluded that the 72-hour blackout was "positive rather than negative," and that s. 322.1 would assist "effective representation" by promoting "an informed vote over a misinformed vote," thereby enabling the voter to make "a rational choice."

Once again following *Libman's* lead, the suggestion in *Thomson Newspapers* that s. 322.1 is "consistent with and indeed enhances the objectives underlying expressive freedom" served to attenuate the standard of justification under s. 1. There, Gonthier J.'s statement that s. 1 does not require scientific proof was solidly rooted in the case law, and he went on to supply a list of decisions which upheld limits, despite inconclusive s. 1 evidence that the infringement of expressive activity was justifiable. At that point it remained only for him to invoke the familiar refrain that "this court should not second-guess the wisdom of Parliament in its endeavour to draw the line between competing credible evidence," and remind other members of the court that Parliament was not bound

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to find the least intrusive or even the best means of achieving its objective. On that, his concern was that to find otherwise would impose "too high a standard for our elected representatives to meet" and thereby deny Parliament its "choice of reasonable choices, holding it to a standard of perfection of uncertain reach."

It may well be unclear why Parliament, rather than the voter, should judge the question of "effective representation" and likewise, why Parliament, not the voter, should pronounce on how "faith in the electoral process" is either created or maintained. Still, Gonthier J.'s dissent can hardly be faulted for following the court's unanimous decision in *Libman*. Given that he brought his argument squarely within precedent, the more intriguing question is how Justice Bastarache's majority of five came to the opposite conclusion.

#### **RATIONALITY TO THE RESCUE**

The majority opinion's riposte in *Thomson Newspapers* relied on two points that effectively collapse into each other. In accordance with the court's dichotomy of valueless and valuable expression, Bastarache J. began with the usual declaration about the importance of a contextual approach under s. 1 and added, in the circumstances of s. 322.1, that "there can be no question that opinion surveys regarding political candidates or electoral issues are at the core

of expression guaranteed by the *Charter*." Fair enough, but the same was true in *Libman*, where significant restrictions on "one of the most important forms of expression" were endorsed just the same.

The challenge for Bastarache J., in invalidating the blackout, was to explain away the low-value jurisprudence and the presumption in favour of deference where "social science evidence is in some controversy." As to the former, he denied that limits were upheld in a slew of cases because the court had applied a lower standard under s. 1. Instead, he maintained that, when the expressive activity has low value, it is easier for the government objective to outweigh it. Consistent with the rest of the s. 2(b) jurisprudence, the result in *Thomson Newspapers* turned on the majority's perception that polling information is simply more valuable than other activities that had been reasonably limited.

According to Bastarache J., expression in the "low-value" category, including hate propaganda and obscenity, is intrinsically harmful or demeaning, and systematically and consistently undermines the position of some members of society. In contrast, polls are "sought after and widely valued." As for *Libman*, Bastarache J. claimed that participation in election campaigns was different from opinion polls because the former would "significantly

**Horse race, page 113**

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. ❀

## Horse race continued from page 107

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*. ❀