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ANTICIPATION: EXPRESSIVE FREEDOM AND THE SUPREME COURT OF CANADA IN THE NEW MILLENNIUM

Jamie Cameron^{*}

I. INTRODUCTION

On the eve of the millennium, with fireworks setting off in stages around the world, the prospects for section 2(b) of the Charter¹ were not so bright. Too many times, in decisions which include *Libman v. Quebec (Attorney General)*² and *R. v. Lucas*,³ the Supreme Court of Canada accepted limits on expressive freedom when the activity in question was not considered valuable enough to warrant the Charter's protection. Nor did one of its final decisions under section 2(b) in the last century, *Thomson Newspapers Co. v. Canada (Attorney General)*, displace the assumptions of a values methodology, though a majority found there that Parliament's ban on opinion polls was not justifiable.⁴

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 (invalidating Quebec's referendum restrictions on associational and expressive freedom, and inviting the province to re-legislate and impose strict limits on third party participation in referendum elections).

³ [1998] 1 S.C.R. 439 (with the exception of s. 299(c), upholding ss. 298, 299 and 300 of the *Criminal Code* prohibiting defamatory libel).

⁴ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (invalidating Parliament's opinion poll blackout in the final days of a federal election campaign). The evolution of the

At present, then, the question is whether there is any reason to believe that the prospects for expressive freedom have improved. Since autumn of 2000, the Supreme Court of Canada has decided three significant cases under section 2(b) of the Charter.⁵ While two of the three decisions, *Little Sisters* and *Sharpe*, accorded free expression a modicum of protection, *Harper v. Canada (Attorney General)*, which was the first of the three, was not dispositive on the merits. Still, it is difficult to discount the latter decision on procedural grounds. There, in the context of an interlocutory proceeding, all members of the Court but Mr. Justice Major uncritically conceded restrictions on political expression when at its zenith during a federal election campaign. As for *Little Sisters*, the majority opinion admitted that egregious Charter violations had occurred at the Canada-United States border and then concluded that the unconstitutional implementation of customs legislation did not compromise the law itself. Finally, the decision in *Sharpe* embarked on an extraordinary exercise in statutory construction and judicial amendment to transform the *Criminal Code*'s child pornography provisions into a model of respect for expressive freedom. To summarize, the Court was given the opportunity to enforce the guarantee in each case, and declined to do so in all three.⁶

On the strength of early returns, the prognosis for expressive freedom is not especially positive, but nor is it wholly negative. Consistently with the past, the Court's initial decisions in the new millennium disclose an uneven conception of expressive freedom, one that is as uncertain and ambivalent as ever. After briefly suggesting the shortcomings of the pre-millennium jurisprudence, this paper takes a closer look at the trilogy of *Harper*, *Little Sisters*, and *Sharpe*. On the one hand, it laments the Court's lack of commitment to the expressive freedom, both as individual judges and as an institution. It may be a fresh century, but the opportunity for a fresh start under section 2(b) may already have been lost. On the other hand, though, the dissenting opinions in *Harper* and *Little Sisters* are encouraging. In addition, the Court should be given credit for granting expressive freedom some protection in *Little Sisters* and *Sharpe*. The qualification, however, is that in each case its support for the guarantee was seconded to strategic

"values methodology" is analyzed and critiqued in Cameron, "The Past, Present, and Future of Expressive Freedom under the Charter" (1997), 35 Osgoode Hall L.J. 1, at 7-27.

⁵ *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (granting the government's application to stay the injunction against enforcement of provisions of the *Canada Elections Act*); *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 (conceding that customs officers violated the Charter but declining to invalidate the statutory provision in question); and *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (upholding the *Criminal Code*'s child pornography provisions).

⁶ Note, though, that in *Little Sisters*, the Court found the reverse onus clause in section 152(3) of the *Customs Act* unconstitutional, and held that it should not be construed or applied to require an importer to establish that goods are *not* obscene. *Supra*, note 5, at para. 154.

considerations. Specifically, the Court sought to minimize the institutional consequences of protecting expressive freedom by declining to invalidate the impugned legislative provisions. To the extent section 2(b) gained ground in these decisions, the question is whether principle was sacrificed in the process.

II. THE PRE-MILLENNIUM JURISPRUDENCE

There is a divide in the Supreme Court of Canada's conception of expressive freedom, with access on one side and content on the other. Though some have failed, it is fair to say that the Supreme Court has been more sympathetic to claims which implicate access or accountability values, or which otherwise advance the interests of the listener.⁷ By contrast, the Court has been discernibly less enthusiastic when a speaker seeks Charter protection for expression that is considered unpleasant or distasteful.⁸ There, and with few exceptions, content-based claims have failed in almost every case the Court has considered.⁹ In Canada, it seems, expressive freedom is prized when it reinforces conventional

⁷ See, e.g., *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (invalidating a publication ban, largely on the strength of the public's right of access to information about court proceedings); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (modifying the common law's balancing of interests between fair trial and a free press, again to improve the public's access to information about criminal proceedings); and *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (vindicating the principle of openness in court proceedings); see also *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 (protecting commercial expression under the Charter, in part, because of the listener's or consumer's right to receive information); *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 (supporting the public's right of access to advertising and information about dental services); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 (invalidating restrictions on tobacco advertising that denied consumers information about the properties of different brands of cigarettes); *Thomson Newspapers, supra*, note 4 (characterizing voters as rational beings who are entitled to last minute polling information about the relative support for competing parties and candidates); and *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 (supporting secondary picketing activities in order that the public receive information about the issues at stake in a labour dispute).

⁸ See, e.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697 (upholding the *Criminal Code*'s hate propaganda provisions); *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (upholding *Human Rights Act* provisions prohibiting the communication of discriminatory opinions); *R. v. Butler*, [1992] 1 S.C.R. 452 (upholding the *Criminal Code*'s obscenity provision); *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (refusing to modify the common law of defamation on the ground that defamatory statements have low value); *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (upholding a human rights legislation complaint against a schoolteacher who expressed anti-Semitic views outside the classroom); *Libman, supra*, note 2; and *R. v. Lucas, supra*, note 3.

⁹ Counter-examples include: *R. v. Zundel*, [1992] 2 S.C.R. 731 (invalidating the *Criminal Code*'s false news provision in a prosecution for Holocaust denial); and *RJR-MacDonald, supra*, note 7 (invalidating Parliament's absolute ban on tobacco advertising).

views and otherwise limited whenever unpopular views can be dismissed as valueless, and thereby silenced or punished.

The Supreme Court's reaction to anti-Semitism, sexually explicit materials, defamatory statements and certain kinds of advertisements, both commercial and political, undercuts *Irwin Toy*'s promise that the Charter would protect the *freedom* of expression, even and perhaps especially when it offends.¹⁰ The hypocrisy of section 2(b)'s pre-millennium jurisprudence crystallized in a section 1 analysis that unapologetically invoked subjective perception to dilute the requirements of justification. Referred to, neutrally, as the contextual approach, that methodology asked whether the expressive activity was valuable or not, and relied on a negative assessment of its content to diminish the Charter's protection of expression. That approach quite possibly reached its zenith in *R. v. Lucas*,¹¹ with the Court's conclusion there that protecting reputation is so imperative that defamation can be punished by a jail sentence.

Though orthodoxy and freedom might never co-exist in comfort, the Court attempted to forge a compromise between the two through the Charter's bifurcation of breach and justification. While *Irwin Toy*'s principle of neutrality governed the question of breach, the values methodology determined the justifiability of content-based limits under section 1; that, for the most part, was the pattern of the pre-millennium jurisprudence. As the new century turned into sight, the contradiction between the entitlement that section 2(b) recognized and section 1's focus on the redeeming value of expression remained intact.

As well, the divide between access and content in the jurisprudence exposed a conception of the right that is driven and controlled, not in particular by the speaker's entitlement but rather, by third party interests. Under that vision of the guarantee, claims based on access and accountability reinforce the right to receive information and, accordingly, enjoy a relatively high rate of success. Meantime, those that assert the freedom to espouse reproachful views are subject to the interests of third parties not to be confronted with or influenced by communications perceived as undesirable or uninvited. Whether the section 2(b) claim was based on access or content, third party interests were paramount to the speaker's entitlement in the Court's pre-millennium jurisprudence.

Returning to the guarantee's evolution, it is a point of no small interest, then, that *Thomson Newspapers* straddled the divide.¹² The case implicated access and accountability values because Parliament's opinion poll blackout denied voters information during the final stages of a democratic election. Even so, the section 2(b) claim was awkward given the Court's conclusion in *Libman* that strict limits

¹⁰ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 968.

¹¹ *Supra*, note 3.

¹² *Supra*, note 4.

on third party participation in democratic elections are constitutionally permissible. In the Quebec referendum case, the Supreme Court unanimously held that restrictions on the speaker's right to enter the forum of public debate are justifiable because third parties might dominate, manipulate or influence the democratic process. Put in simple terms, *Libman* viewed non-party groups and individuals as intruders, and a distorting influence in a forum that has traditionally been controlled by the political parties. Far from being beneficial, in *Libman* the prospect of more information and debate during an election was considered counterproductive.¹³

At least as to the government's interest in preventing distortion, manipulation and undue influence, much the same could be said about access to last minute opinion polls. That may explain why Gonthier J. relied on *Libman* in his dissenting opinion in *Thomson Newspapers*. For the majority, however, Bastarache J. found a way to avoid open conflict between the third party spending and opinion poll issues. In doing so, he managed to support voter access to opinion polls without undercutting the assumptions of a methodology that frowns on expressive activity whose content is unlikeable. By distinguishing precedents that based section 1's protection of expression on subjective assessments of what is good or bad and valuable or valueless, Bastarache J. was able to avoid *Libman*'s force as precedent.¹⁴ Unlike *Irwin Toy*, *Keegstra*, *Butler*, *Ross*, and *Libman*, the issue at stake in *Thomson Newspapers* did not concern the government "intervening against a powerful interest to prevent expression from being a means of manipulation and oppression."¹⁵

In relying on that distinction, Bastarache J. further entrenched the dichotomy between expressive activity that can be regulated because it is mean or manipulative and therefore irrational, and that which is "rational" or informational, like opinion polls, and cannot be so easily limited. For that reason the federal government could not justifiably withhold information and thereby frustrate the voters' right to know. Though *Thomson Newspapers* was correctly decided, it should be noted just the same that "scientific" polling information and the "rational" voter are not especially in need of section 2(b)'s protection. Rather, it is expressive activity whose content is disliked, dismissed or feared that is susceptible

¹³ The anomaly of *Libman* is that the Court struck Quebec's extreme restrictions on voter participation in the referendum debate but, in doing so, strongly supported the view that limits on participation serve, rather than compromise, democratic values. *Libman*, *supra*, note 2, at para. 41 (stating that restrictions are democratic and egalitarian because affluent members of society are prevented from exerting a disproportionate influence and dominating the referendum debate), and at para. 47 (suggesting that limits on participation are necessary to guarantee that voters are adequately informed).

¹⁴ *Thomson Newspapers*, *supra*, note 4, at para. 114.

¹⁵ *Id.*

to censorship by the state.¹⁶ In the end, *Thomson Newspapers* was an easy case that did not significantly advance or alter the Court's section 2(b) methodology.¹⁷

III. THE NEW MILLENNIUM

Fortuitously, events brought expressive freedom onto the Supreme Court's docket early in the new millennium and, given changes in the Court's composition, it was not impossible to hope for a fresh start under section 2(b).¹⁸ It should be noted, though, that two of the trilogy decisions, *Little Sisters* and *Sharpe*, fell on the content side of the divide where the Court had been less receptive, historically, to the claim. As for *Harper* and third party participation in election campaigns, *Libman* pointed the Court in one direction and *Thomson Newspapers*, at least potentially, in another.

1. *Harper v. Canada (Attorney General)*¹⁹

Largely overlooked in the fanfare of *Sharpe* and *Little Sisters* is the Supreme Court of Canada's brief decision in *Harper*. Though the issue was interlocutory, the decision is important: with Major J. dissenting alone, the Court concluded that the Alberta Court of Appeal erred in issuing an injunction to bar the *Canada Elections Act* being enforced during autumn 2000's federal election campaign. Specifically, the provisions that were challenged set new limits on third party participation.²⁰

In opposing the injunction, the federal government introduced no concrete evidence to demonstrate that the balance of convenience favoured enforcement of the legislation over its non-enforcement.²¹ That did not deter the Court from

¹⁶ This paragraph is taken, in the main, from Cameron, "Horse Race of Another Kind: *Libman*, *Thomson Newspapers*, and 'Rational Choice' " (1999), 7 *Canada Watch* 106, at 113.

¹⁷ In that regard it should be noted that *Thomson Newspapers* did reinforce a stronger application of the final proportionality test, and is doctrinally important for that reason. *Supra*, note 4, at paras. 123-130.

¹⁸ Since the decisions in *Lucas* and *Libman*, Mr. Justice Bastarache joined the Court; since *Thomson Newspapers*, Binnie, Arbour and LeBel JJ. likewise joined the Court; as well, Beverley McLachlin became Chief Justice of Canada in the interim between *Thomson Newspapers* and the millennium trilogy.

¹⁹ *Supra*, note 5.

²⁰ *Canada Elections Act*, S.C. 2000, c. 9, s. 350 (allowing increased expenditures by third party participants but imposing limits nonetheless).

²¹ Three issues are relevant to the granting of an injunction: there must be a serious issue to be tried; the applicant must be at risk of suffering irreparable harm without the injunction; and, the balance of convenience must favour the applicant. The judge at first instance found that the Attorney General of

concluding that the public interest would be served by “maintaining in place the duly enacted legislation...” To support that view the Court referred to “the partial limitation on freedom of expression imposed by the restrictions.”²² It also stated that there is a presumption on such motions that the law is “directed to the public good and serves a valid public purpose,” and further indicated that the prospect of a Charter violation was insufficient to displace that assumption.²³ As a result of that reasoning, eight of nine judges were unmoved by the argument that the legislation stifled democratic participation when at its apex, during a federal election campaign.

The point was not lost on Major J., whose dissenting opinion stressed four points. First, he emphasized that the activity in question was invaluable, given its significance in the political process, and that the Court therefore should tread lightly in limiting such expression.²⁴ Second, he noted that the Attorney General provided little or no evidence to show that not enforcing the legislation would have harmful consequences. For years, he observed, federal elections proceeded without restrictions and likewise without calamitous consequences.²⁵ In the absence of “anything beyond speculation” and “in the face of a serious denial of *Charter*-protected freedoms,” Mr. Justice Major had little doubt that the balance of convenience favoured an injunction.²⁶

Third, he commented that the sequence of events between enactment of the law and the election call enabled the government to immunize the third party provisions from “meaningful constitutional scrutiny.”²⁷ Hence his concern that, absent an injunction to halt enforcement of a law that might ultimately be declared unconstitutional, affected citizens would be left without a remedy. The majority opinion resisted the injunction on the further ground that an interlocutory remedy would grant the law’s challengers a substantial measure of success when the case was heard on its merits. Not only did that argument cut both ways, Major J. observed, but the timing of the legislation and the election call were both entirely within the government’s control. In such circumstances, the plaintiff could hardly be faulted for seeking an injunction to enforce his rights. To conclude, Mr. Justice Major adopted the following words as “apt,” from Sopinka and Cory JJ. in *RJR-MacDonald Inc. v. Canada (Attorney General)*: “[f]or the courts to insist rigidly

Canada had called “no evidence” on the harm that would result from suspending the operation of the law. *Harper, supra*, note 5, at para. 6.

²² *Id.*, at para. 11.

²³ *Id.*, at para. 9 (adding that “only in clear cases will interlocutory injunctions against the enforcement of a law on ground of alleged unconstitutionality succeed”).

²⁴ *Id.*, at para. 20.

²⁵ *Id.*, at paras. 23-25.

²⁶ *Id.*, at para. 25.

²⁷ *Id.*, at para. 29.

that all legislation be enforced to the letter until the moment that it is struck down” could “condone the most blatant violation of *Charter* rights.”²⁸

It is disheartening that the Court’s decision on the interlocutory motion anticipated its view of the merits. Though Chief Justice Fraser indicated, in the Alberta Court of Appeal, that *Libman* was not dispositive of the *Canada Elections Act* provisions at issue in *Harper*, it strains credulity to believe that the referendum case was not on the Supreme Court’s mind.²⁹ There, in an act of judicial fiat, the Court effectively overruled the Alberta Court of Appeal’s decision in *Somerville v. Canada (Attorney General)*.³⁰ Significantly, though, *Somerville* was never appealed, the evidence and record were not before the Supreme Court in *Libman*, and referenda and parliamentary elections, while similar, may not be identical for purposes of section 2(b). For those reasons, *Libman*’s strong comments about *Somerville* demonstrated a remarkable inattention to due process on the Court’s part. Even so, in deciding *Harper* the Court was unlikely to retreat from *Libman*’s position that strict limits on third party participation are justifiable. Chief Justice Fraser was right in principle that *Libman* should not have been dispositive of *Harper*; it appears to the contrary, however, that it likely was.

2. Little Sisters Book and Art Emporium v. Canada³¹

Little Sisters presented overwhelming evidence that Canada Customs had engaged in the systematic targeting of goods headed for a Vancouver bookstore because of animus toward the gay community. Given the extreme and prolonged nature of the breach, the Supreme Court had little choice but to acknowledge the “serious dimension” of the issue. Early in his majority opinion, Binnie J. agreed that Little Sisters was entitled to relief that “goes beyond registering an act of faith in the continuance of the [customs] department’s expressed good intentions.”³² Incongruously, though, once having fully appreciated the infringement, he found it unnecessary to grant an effective remedy.

On the merits, Mr. Justice Binnie acknowledged that “freedom of expression does not stop at the border,” and opined that it is fundamentally unacceptable for

²⁸ *Id.*, at para. 35 (quoting *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at 333-34).

²⁹ *Harper v. Canada (Attorney General)* (2000), 266 A.R. 262, at 264 (C.A.) (stating that *Libman* is not dispositive, given a new statutory regime with a different scope and sweep than the legislation considered in *Somerville*) (Alberta Court of Appeal).

³⁰ *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 79 (stating, for the full Court, that “we cannot accept the Alberta Court of Appeal’s point of view [in *Somerville* (1996), 136 D.L.R. (4th) 205] because we disagree with its conclusion”).

³¹ [2000] 2 S.C.R. 1120 (Iacobucci, Arbour and LeBel JJ., concurring, and dissenting in part).

³² *Id.*, at para. 38.

expression which is free within the country to become stigmatized and harassed by government officials, “simply because it crosses an international boundary, and is thereby brought within the bailiwick of the Customs department.”³³ On the question of remedy, he agreed that “[t]he operation of the statutory scheme ... created a barrier to free expression that exceeded the government’s legitimate objectives,” but added that the violation “is a matter for regulatory or administrative action not necessarily legislative action.”³⁴ Thus he held that the statutory scheme, “properly implemented by the government within the powers granted by Parliament, was capable of being administered with minimal impairment” to the rights of importers.³⁵ In his view, a distinction should be drawn between legislation that is valid on its face and provisions that are administered in a way that violates the Charter. As a result, the faulty implementation of a statute may require correction, but it does not compromise the statute itself: “[a] failure at the implementation level ... can be addressed at the implementation level.”³⁶ Ultimately, then, Mr. Justice Binnie found it a sufficient remedy that “[t]he views of the Court on the merits of the appellants’ complaints ... are recorded in these reasons” and that the Court’s findings “should provide ... a solid platform from which to launch any further action” necessary to ensure the protection of the bookstore’s rights.³⁷ In other words, the majority’s reasons in *Little Sisters* were an adequate disincentive to the further commission of constitutional violations by customs officials.

The dissent on the question of remedy in *Little Sisters* marks the first time members of the Court have expressed strong disapproval of prior restraint.³⁸ Though Iacobucci J. was not previously known as an advocate of expressive freedom, he did not flinch in *Little Sisters* from insisting that Parliament be obligated under the Charter to institute procedural protections against the regime of prior restraint at the border.³⁹ His response to the question of remedy was informed

³³ *Little Sisters*, *supra*, note 31, at para. 124; parenthetically, it should be noted that the Court rejected the contention that same-sex materials should be treated differently, or even exempted, under the *Butler* test; see paras. 66-68 (*per* Binnie J.) and paras. 194-99 (*per* Iacobucci J.).

³⁴ *Id.*, at para. 150 (emphasis in original).

³⁵ *Id.* (emphasis added).

³⁶ *Id.*, at para 82.

³⁷ *Id.*, at para. 158. Note that the Court found the statute’s reverse onus clause unconstitutional, because it required the importer to establish that the proffered goods are not obscene. The Court held, instead, that the burden of proving obscenity must rest on the Crown and its customs agents.

³⁸ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 constitutionalized the common law of publication bans, but did so without emphasizing that such bans are a form of prior restraint.

³⁹ But see *Haig v. Canada*; *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 (dissenting opinion defending voting rights in the Charlottetown referendum), and *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 (invalidating an absolute prohibition on postering).

by his conception of the entitlement and of the severity of the breach. Of expressive freedom he stated, “[i]f such a fundamental right is to be restricted, it must be done with care,” and added, “[t]his is particularly the case when the nature of the interference is one of prior restraint, not subsequent silencing through criminal sanction.”⁴⁰ Likewise, it is evident from his reasons that Iacobucci J.’s dissent was animated by a keen sense of the injustice suffered by the Little Sisters bookstore. That sense of injustice prompted him to stress that “[f]reedom of speech means not just the right to question the dominant political structure, but to question the dominant society and culture.”⁴¹ Declaratory relief being inadequate in the circumstances, Iacobucci J. concluded that it was appropriate to strike the Tariff Code provision⁴² and propose options for Parliament to consider in bringing its system of border inspection into compliance with the Charter.⁴³

In disagreeing on the remedial issue, Binnie J. noted that facial invalidity and the unconstitutional administration of a valid law represent two different kinds of infringements. As far as he was concerned, a law valid on its face could not become unconstitutional because of defects in its operation. More particularly, Mr. Justice Binnie concluded that a stronger remedy was inappropriate for three reasons. First, he attached significance to the border context, stating that the “concern with prior restraint ... operates in such circumstances, if at all, with much reduced importance.”⁴⁴ Second, he was hesitant to act in *Little Sisters*, given that Charter abuses lurk everywhere: “[w]hile there is evidence of actual abuse here, there is the *potential* for abuse in many areas, and a rule requiring Parliament to enact in each case special procedures for the protection of Charter rights would be unnecessarily rigid.”⁴⁵ Third, unwilling to grant a remedy under section 52(1), Binnie J. could not see how a section 24 remedy could practicably be granted in the circumstances. Yet, after such a long saga of harassment and litigation, it hardly seems fair to fault Little Sisters for not presenting a ready-made solution that could simply be adopted by the Court.⁴⁶

In the end the majority’s solution to the violation of the bookstore’s rights was formalistic and unresponsive to the breach. Denying an effective remedy unavoidably discounts the dangers, so graphically revealed by the facts of *Little Sisters*, that are inherent in any system of prior restraint. By contrast, the dissent

⁴⁰ *Little Sisters*, *supra*, note 31, at para. 231.

⁴¹ *Id.*, at para. 274.

⁴² *Customs Tariff*, S.C. 1987, c. 49, Sched. VII, Code 9956(a) (now Tariff Item 9989.00.00).

⁴³ *Little Sisters*, *supra*, note 31, at paras. 258-83.

⁴⁴ *Id.*, at para. 78.

⁴⁵ *Id.*, at para. 137 (emphasis in original).

⁴⁶ *Id.*, at para. 157 (announcing that “we have not been informed by the appellants of the specific measures (short of declaring the legislation invalid or inoperative) that ... would remedy any continuing problems”).

grasped the vital link between the substantive and procedural elements of the entitlement; in doing so, it recognized that the constitutional guarantee would count for little if section 2(b) materials could be turned back by administrative censorship at the border. Binnie J. need not have worried that granting a remedy would implicate other valid laws which are imperfectly implemented, because the dissent made it plain that *Little Sisters* was specific to section 2(b) and the particular dangers associated with prior restraint.

The systematic targeting of this or any gay bookstore could not have been justified under any view of the Charter. And that, ultimately, is why *Little Sisters* is disappointing. The majority opinion handled the easy issues well enough, and then faltered at the critical moment. When faced with a choice between exercising its authority to prevent the egregious violation of rights in the future, and leaving well enough alone — with only its own opinion as enforcement — the Court chose the path of least institutional resistance. Whether *Little Sisters* or other importers of expressive materials falling outside the mainstream are now safe from censorship is a matter of speculation. The point is that, in principle, they should not be required to bear that risk under a constitutional guarantee of expressive freedom.

3. *R. v. Sharpe*⁴⁷

Though the two lower courts found Parliament's child pornography law unjustifiable, and Charter advocates from a variety of constituencies spoke out against it, the Court would have found it enormously difficult, in political terms, to invalidate the legislation. It is perhaps no coincidence, then, that the Court's majority opinion declaring the law constitutional was authored by Chief Justice McLachlin, who has defended expressive freedom in the past.⁴⁸ In reaching the conclusion that the *Criminal Code*'s child pornography provisions are a justifiable limit on expressive freedom, she strained to render the law responsive to section 2(b)'s command of expressive freedom.

Meantime, three members of the Court resisted any temptation to compromise, and made an appeal to principle instead. If their separate reasons are entitled to respect for that reason, the opinion nonetheless presents a disturbing conception of expressive freedom. There is no mistaking their hostility toward section 2(b), and

⁴⁷ [2001] 1 S.C.R. 45 (L'Heureux-Dubé, Gonthier and Bastarache JJ., concurring in the decision to uphold the *Criminal Code* provisions and dissenting from the majority opinion's judge-made privacy exceptions).

⁴⁸ See *R. v. Keegstra*, [1990] 3 S.C.R. 697, and *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (dissenting opinions); *R. v. Zundel*, [1992] 2 S.C.R. 731; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459; and *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421 (the "search warrant" cases, dissenting opinions); and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

that is why their views should be challenged. In the absence of a critical analysis, there is a risk their assumptions about expressive freedom might attain majority support at some point in the future.

Initially, the judges expressed disappointment that the Crown had conceded the issue of breach. Although their opinion recognized that there was no basis in precedent for any conclusion that child pornography can be excluded from section 2(b), that did not deter them from hinting that the scope of the right could be revisited.⁴⁹ The minority's invitation to reconceptualize and reduce the scope of section 2(b) is a daring and unwelcome development. Apart from questions of access to public property, the suggestion has not been broached by any member of the Court for several years.

From there, the judges applied a methodology that sought to undercut section 2(b)'s values at every stage of the analysis. For instance, they invoked *Dagenais* for the proposition that freedom of expression should be read against section 15's guarantee of equality and section 7's security of the person.⁵⁰ Yet, far from being consistent with the *Dagenais* rule that the Charter's guarantees be given a non-hierarchical interpretation, the assertion was made in *Sharpe*, as elsewhere, to rationalize a kind of paramount status under the Charter for equality.⁵¹ The difficulty is that there is no textual basis for rendering some constitutional entitlements contingent on or subordinate to others. If Charter rights are truly co-equal, as *Dagenais* maintained, then freedom of expression cannot be read down to accommodate equality.

Additionally, the minority's reasons undermined section 2(b) in at least three significant ways. First, the judges stated that expressive freedom can be limited even though the harm it causes cannot be measured. In other words, constitutionally protected activity can be restricted, though the harm may be speculative and even fanciful, as long as its content is *perceived* to be harmful.⁵² Thus the judges stated that the Court had "broadened the traditional individualistic notion of harm, and recognized that *all members of society suffer when harmful*

⁴⁹ *Sharpe, supra*, note 47, at para. 151 (stating that the Crown's concession had deprived the Court of "the opportunity to fully explore the content and scope of s. 2(b) as it applies in this case").

⁵⁰ *Id.*, at paras. 133, 140 and 158.

⁵¹ The *Dagenais* principle is that a hierarchical approach to rights under the Charter must be avoided, *supra*, note 38, at 877; but see *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paras. 129-131 (*per* L'Heureux-Dubé J., dissenting); *New Brunswick (Minister of Health and Community Services v. G. (J.))*, [1999] 3 S.C.R. 46, at para. 115 (*per* L'Heureux-Dubé J., concurring); and *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 94 (*per* McLachlin and Iacobucci JJ.) (suggesting, in various contexts, that equality interests should be considered in determining the scope and content of section 7).

⁵² *Sharpe, supra*, note 47, at para. 158 (stating that the expression at issue preys on pre-existing inequalities), and at para. 160 (declaring that it creates "attitudinal harm" which is not "empirically measurable, nor susceptible to proof in the traditional manner" but "can be inferred" nonetheless).

*attitudes are reinforced.*⁵³ A constitutional guarantee of expressive freedom cannot be strangled by subjective perceptions of which attitudes and beliefs are good or bad, and the problem is not solved by adding the qualifying language of “harm” or “harmful” to what, under this view, contemplates the criminalization of socially unacceptable attitudes.

Second, the minority opinion relied on the vulnerability of children and their subjective fears to justify the legislation.⁵⁴ There is no argument that children are vulnerable and can be the victims of sexual crimes, but that does not mean section 2(b)’s guarantee should be contingent on the “subjective fears” of others. Applying evidence that expressive activity causes harm is one matter, and granting the subjective fears or perceptions of third parties a power to censor unwelcome ideas, attitudes or views is another. A third party prerogative to veto the speaker and control her rights under the Charter is inconsistent with the fundamental assumptions of section 2(b) and *Irwin Toy*.

Third, the minority opinion placed heavy reliance on any number of statutes and instruments, domestic as well as international, which address and protect the interests of children.⁵⁵ The point in doing so was to tip the balance under section 1 yet more conclusively against expressive freedom. Not only are such materials of limited relevance in determining the justifiability of particular *Criminal Code* provisions which must pass the different branches of *Oakes* in their own right, the Court should exercise caution in relying on international instruments which have not been incorporated into domestic law.

To summarize, at every phase in the analysis, the dissenting opinion advanced and relied on principles of interpretation that were designed to minimize the Charter’s protection of expressive freedom. In the end, perhaps most dangerous of all is the minority’s emphasis on the negligible value of the expressive activity.⁵⁶ Child pornography may be without merit but that is beside the point; the relevant question under section 1 is whether it causes a demonstrable harm that can be justifiably limited. While highlighting the need to prevent children from harm, the minority opinion essentially took the view that all sexual expression involving children is harmful because it is worthless. Citing *Lucas* in particular, the judges maintained that the criminal provisions must be upheld because it would be a mistake to give preference to “abstract notions of the value of expression in a democracy when the activity at issue does not serve [our democratic] values.”⁵⁷ Under that view, however, expressive freedom has no value in principle, and is

⁵³ *Id.*, at para. 163 (emphasis added).

⁵⁴ *Id.*, at para. 169 (discussing “The Vulnerability of Children and Their Subjective Fears” (emphasis added)).

⁵⁵ *Id.*, at paras. 170-80.

⁵⁶ *Id.*, at paras. 181-86.

⁵⁷ *Id.*, at para. 212.

only worthy of protection when its content is deemed valuable. With respect, section 2(b)'s guarantee is not based on an assumption that all expression is or must be valuable; rather, it is based on the assumption that, unless and until it causes harm, the freedom to engage in expressive activity is itself valuable.

Though the minority's reasons did not prevail, their opinion should be read with foreboding. By comparison, if the majority opinion is disappointing for other reasons, at least it avoided the values methodology of the past. To her credit, the Chief Justice countered the dissent by reinforcing the principle of content neutrality and substituting a harm-based analysis for an approach that depended on subjective perceptions of the expressive activity's value.⁵⁸

Otherwise, the Chief Justice's opinion was pragmatic in the sense of balancing the demands of the Charter against the institutional price that would have been paid for striking the legislation down. Thus she demonstrated concern for expressive freedom, but did so unconvincingly in light of her conclusion that the law was valid under section 1. There were two central issues in *Sharpe*: the first was whether the legislation had to fail due to concerns related to vagueness, overbreadth and minimal impairment; and the second was whether Parliament could criminalize the simple possession of materials that fell within the statute's definition of child pornography.⁵⁹ On the question of breadth and vagueness, Parliament had been put on notice of flaws in the legislation before it was enacted, but forged ahead anyway.⁶⁰ Subsequently, both lower courts in *Sharpe* invalidated the provisions.⁶¹ By the time of the Supreme Court hearing, interventions by interested parties, both formal and informal, had placed the scope and breadth of the provisions directly in issue.

Against that backdrop, Chief Justice McLachlin quickly deflated critics of the law by explaining that Parliament's legislation revealed a high degree of respect for expressive freedom.⁶² Given the legislation's expeditious enactment, the suggestion that Parliament acted in *bona fide* concern for expressive freedom is open to question. Just the same, the assertion that Parliament had been "[m]indful of the importance of freedom of expression ... and the dangers of vague, overbroad legislation in the criminal sphere" enabled McLachlin C.J.C. to save the legislation through an elaborate exercise in statutory interpretation.⁶³ In particular, by placing the focus on the law's construction, the majority opinion deflected attention from

⁵⁸ *Id.*, at para. 23.

⁵⁹ See *Criminal Code*, R.S.C. 1985, c. C-46, s. 163.1-7.

⁶⁰ See generally, Blugerman & May, "The New Child Pornography Law: Difficulties of Bill C-128" (1995), 4 M.C.L.R. 17.

⁶¹ *R. v. Sharpe* (1999), 136 C.C.C. (3d) 97 (B.C.C.A.), affg (1999), 169 D.L.R. (4th) 536 (B.C.S.C.).

⁶² *Sharpe*, *supra*, note 47, at paras. 34, 73 and 74.

⁶³ *Id.*, at para. 34.

more fundamental questions as to its constitutionality. Seen that way, the approach taken in *Sharpe* is slightly reminiscent of Sopinka J.'s analysis in *R. v. Butler*. There, too, an extended discussion of the judiciary's interpretation of the definition of obscenity in section 163(8) of the *Criminal Code* rendered the subsequent resolution of constitutional issues under the Charter a foregone conclusion.⁶⁴ Likewise, in *Sharpe* much of the analysis was completed by the time McLachlin C.J.C. reached the critical question of whether the simple possession of materials caught by a zealous definition of child pornography could be punished by a jail sentence. In this way, a substantial part of the majority opinion in *Sharpe* displaced constitutional analysis in favour of statutory construction.

Second, having concluded that Parliament had achieved its purpose in addressing the "dual concerns" of protecting children *and protecting free expression*, the Court turned to the question of possession.⁶⁵ One of the crucial issues there was the way harm is defined under section 1, and the evidence that is needed to support a rational connection between the possession of proscribed materials and the exploitation of children. Throughout the majority opinion, McLachlin C.J.C. appropriately focused on the expressive activity's harm, and not its relative lack of value. Still, her definition of harm was broad and to some extent lacking in rigour.⁶⁶ It may be unarguable that some forms of child pornography cause harm that can justifiably be prevented; it is a different question whether all the materials included in Parliament's definition are harmful enough to attract the criminal sanction. In the absence of a principled approach to the definition of harm and rational connection, substituting a harm-based approach for a values methodology achieves little.⁶⁷

Third, in the result the Chief Justice's majority concluded that two exemptions should be read in to address the constitutionality of the possession provision, at the margins of its application, where the legislation was "peripherally problematic."⁶⁸

⁶⁴ *R. v. Butler*, [1992] 1 S.C.R. 452. For a comment on that specific aspect of *Butler*, see Cameron, "Abstract Principle and Contextual Conceptions of Harm: A Comment on *R. v. Butler*" (1992), 37 McGill L.J. 1135, at 1141-44.

⁶⁵ *Sharpe*, *supra*, note 47, at para. 74.

⁶⁶ Thus she stated that "[c]omplex human behaviour may not lend itself to precise scientific demonstration" and that "the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of"; those observations led the Chief Justice to conclude that social science evidence, "buttressed by experience and common sense" meets the requirements of a rational connection. *Sharpe*, *supra*, note 47, at paras. 89, 94.

⁶⁷ See Cameron, "The Past, Present, and Future of Expressive Freedom under the Charter" (1997), 35 Osgoode Hall L.J. 1 (criticizing Mr. Justice Sopinka's opinion in *Butler* for claiming that the decision was based on a harm-based approach when it was clear, from his reasons, that the Court upheld limits on obscenity because it is considered of low value and detrimental to gender equality).

⁶⁸ *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 111. Accordingly, she read in remedies for "Self-created expressive material" and "Private recordings of lawful sexual activity", at para. 115.

While less controversial than a declaration of invalidity would have been, that approach cheats the constitutional entitlement. Not only that, in drafting exemptions to protect privacy interests, the Court approached the margins of its own institutional role. It is anything but clear that the Court should be reassuring Parliament that attention to draftsmanship is unimportant because the judges can be counted on to fix errors caused by expedience or a callous disregard of Charter rights.

The majority opinion in *Sharpe* can be seen as a valiant compromise between concern for expressive freedom and a strong instinct to quell the sexual exploitation of children. On the positive side, the Court's pragmatic reconstruction of the legislation minimizes the risk that the child pornography provisions will be applied to expression that is protected by the Charter. As well, without explicitly abandoning it, the majority opinion broke ranks with the minority and declined to apply the values methodology of the pre-millennium period. Even so, and despite the judge-made privacy exemptions, possession remains an offence, and that has implications for section 2(b). Moreover, it seems doubtful that the Chief Justice's commitment to principle is as vital as in the past.⁶⁹ That is unfortunate, for section 2(b) is greatly in need of, and still lacking, a champion on the Court. It is also unfortunate that pragmatic considerations led the Court to uphold legislation twice struck down in the courts below. Whether Parliament can criminalize child pornography is not the question, as it surely can; the point is that expressive freedom can only be protected when Parliament is held to an adequate standard of justification under section 1.

IV. CONCLUSION

Positive signals can be found in the millennium trilogy. For example, the majorities in *Little Sisters* and *Sharpe* unquestionably made an effort to accommodate expressive freedom. As well, it is possible, though not a certainty at this point in time, that the values methodology, which evolved and then dominated in the 1990s, is now falling out of favour. Finally, dissenting opinions indicating a stronger resolve on section 2(b) issues were registered in *Harper* and *Little Sisters*.

On the merits, optimists can hope that the majority opinion in *Little Sisters* provided a sufficient warning from the Court that the constitutional violations that

⁶⁹ See, e.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. Zundel*, [1992] 2 S.C.R. 731; the "search warrant" cases: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, and *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421; and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

occurred at the border will not be tolerated in the future. By the same token, the Chief Justice's insistence in *Sharpe* that the child pornography provisions were carefully drafted to exclude constitutionally protected expression may adequately deter any overreaching in the application of the law. Should those predictions be confirmed, that would leave *Harper* as the least supportive decision, among the three, of expressive freedom.

Whereas *Sharpe* and *Little Sisters* each acknowledged the value of expressive freedom, language along similar lines in *Harper* can only be found in Major J.'s dissent. Granted, the Court should be vigilant when Parliament criminalizes expressive activity, or acquiesces in the extreme and discriminatory interference with constitutional rights that occurred at the Canada-United States border in *Little Sisters*. Still, political expression and the right to participate in a federal election campaign were at stake in *Harper*. Though the issue came before the Court by way of interlocutory proceedings, it is difficult to conclude that the majority was not influenced by *Libman* in lifting the injunction against enforcement of the *Canada Elections Act*. In light of the link between expressive freedom and self-government, the Supreme Court's approach to the question of third party participation requires a more rights-based conception of democratic governance than that adopted in *Libman*.

Despite the positive indications, these decisions are unsatisfying at the end of the day. There can be no quibble that the Court must be mindful of institutional relations in interpreting the Charter. At the same time, there can likewise be little doubt that pragmatic decision-making is appropriate and desirable. The issue, though, is whether principle has been pushed aside to make room for compromises that create the appearance of balanced decision-making but reveal undue deference to Parliament. The Court's willingness to sacrifice principle to consensual views about the relative worth of expressive activity, unfortunately, was one of the hallmarks of the pre-millennium jurisprudence. On the basis of this first trilogy of decisions, and notwithstanding that some steps forward have been taken, it appears that the Supreme Court of Canada remains hesitant to grant section 2(b)'s guarantee of expressive freedom a principled interpretation.

Freedom of expression requires leadership for its protection. It is not realistic to expect the leadership and moral courage to tolerate unconventional or offensive views to come from the democratic branches of government, as they are under constant pressure to sanitize public discourse and criminalize the ideas we fear. That is why the impetus to protect expressive freedom must come from the Supreme Court of Canada, and that is also why the millennium trilogy can only be seen as a disappointment.