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The Technology of Political Communication:

***R. v. Bryan* and the Knowledgeable Voter in the 21st Century**

Richard Haigh*

... the world of the third millennium is inevitably, is ineradicably modern, and ... it is our intellectual duty to submit to that modernity, and to dismiss as sentimental and inherently fraudulent all yearnings for what is dubiously termed the "original".

Julian Barnes — *London, London*

I. INTRODUCTION

The rapid development and prevalence of new information and communication technologies have radically reshaped the “interplay” between democracy and communication. It is no longer advisable to separate the study of democracy from a study of technological expansion. The growth and merger of the information and communication industries has changed the very meaning of democracy. Successive Canadian governments have articulated a vision of being known around the world as the government most connected to its citizens.¹

Arguably, the Internet enables citizens to become more informed and more engaged participants in the development and maintenance of a social and political identity. However, it may well be a victim of its own success. As with the question whether a tree falling in a forest makes a sound without a listener there to hear it, it is now not too far-fetched to ask whether information that is not retrievable via a keyword-search and

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¹ Canada, Speech from the Throne to open the second session, 36th Parliament of Canada, October 12 (Ottawa: Privy Council Office, 1999).

logarithmic equation from the index of a popular search-engine, actually exists. There is a growing movement, perhaps generational,² that believes all knowledge will soon be available on the Internet, that information is less valuable if it is not on the Internet, and that access to the Internet is a prerequisite to being a fully informed citizen.

Like older technologies such as radio and television, the Internet serves to facilitate and mediate technology. Unlike older forms of communication, however, the nature of computers and networks means that they can serve as both an information retrieval system and communication device. They allow for the simultaneous reception and production of information. Computers have the power to make individuals publishers, broadcasters, commentators, analysts, readers, viewers and listeners. At the same time, as with any powerful institution, the Internet is not value- or ideology-free. It delivers information with ready-made cultural assumptions, biases and slants. In other words, it can determine culture simply by the way the information is encoded and transmitted.

Moreover, the Internet can be socially isolating. Those who regularly access the Internet³ risk removing themselves from a physical agora into an e-gora. Instead of face-to-face transactions, they can become increasingly dependent on the Internet for community. Evidence exists that this is happening. Chat rooms, blogs, website memberships, online dating sites, Facebook and other social networking sites are now mediating many elements of social interaction. More and more political and social discussion occurs via online communities. All this raises potential questions: does debate and discussion occur differently in an online community? Is there less opportunity for dissenting views amongst homogeneous online communities? Or a stratification of viewpoints? In other words, does the Internet frustrate rather than promote informed political debate?

Coupled with this socio-cultural reformation is the Internet's technical complexity. The vast majority of the people who use it have no idea how it works. Control over carriage is largely left to technicians and

² There is a lot of popular literature on "Generation Y" (those born between 1975 and 1990) and how they think and work differently. For example, see Virginia Galt, "The Generational Divide" *The Globe and Mail*, March 31, 2004, at C1.

³ Of course, there are still a large number of Canadians who do not enjoy regular access to computers. But the numbers are obviously growing: recent statistics show 20.45 million users, which is equivalent to 63.5 per cent of the total population. 53.6 per cent of Canadians connect to the Internet using a type of high-speed connection, compared to 33.8 per cent in the U.S. — see Statistics Canada, Household Internet Use Survey, <<http://www.statcan.ca/Daily/English/040708/d040708a.htm>>.

industry experts, as opposed to government officials. In part, this has allowed it to flourish and grow to an unimaginable size in little more than a decade. But it also, so far, has made maintaining government control over content very difficult.

These issues provide a backdrop to the recent ruling of the Supreme Court of Canada in *R. v. Bryan*.⁴ This paper examines the case and explores it in the context of new technology, focusing on the following two matters: whether the Supreme Court's decision to uphold the constitutionality of the law prohibiting the premature transmission of election results ignores the practical realities of new media (and possible unknown media inventions in the future) and its own trend-setting decisions in *Thomson Newspapers Co. v. Canada (Attorney General)*⁵ and *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*,⁶ and given this modern information age, the nature of section 1 analysis, and possible reforms of the *Oakes* test, to address the influence of technology on legal rights. These will be discussed after a brief review of the case.

II. THE POLLS ARE CLOSED IN HALIFAX — DO YOU KNOW WHERE YOUR VOTER IS?

In 2000 Paul Bryan, a software designer from British Columbia, launched a website which he eponymously titled “Bryan’s Election Results Canada”.⁷ The website was used as a vehicle to discuss then-current Canadian politics and the upcoming November federal election. On the site, Bryan advertised that he intended to post the Atlantic Canada election results on his webpage immediately after the polls there closed, in direct contravention of section 329 of the *Canada Elections Act*.⁸

By that time the Act had been modified to follow, at least in part, the recommendations of the 1991 report of the Royal Commission on

⁴ [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527 (S.C.C.) [hereinafter “*Bryan*”].

⁵ [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.) [hereinafter “*Thomson Newspapers*”].

⁶ [2004] S.C.J. No. 44, [2004] 2 S.C.R. 427 (S.C.C.) [hereinafter “*SOCAN*”].

⁷ See <<http://www.electionresultscanada.com>>. See also Canadian Press, “Supreme Court to Rule on Election Result Blackout” *Toronto Star*, March 14, 2007, online: *Toronto Star* <<http://www.thestar.com/News/article/191832>>.

⁸ See *Canada Elections Act*, S.C. 2000, c. 9, s. 329 [hereinafter “*Act*”]: “No person shall transmit the result or purported result of the vote in an electoral district to the public in another electoral district before the close of all of the polling stations in that other electoral district.”

Electoral Reform and Party Financing (“Lortie Commission”).⁹ The report, a two-volume compendium, provides a comprehensive assessment of Canada’s electoral process. It makes a number of recommendations related to federal elections, on topics such as the right to be a candidate, the role and the financing of political parties, election expense controls, public funding, disclosure, enforcement and broadcasting. One of the specific recommendations that was adopted provides for staggered opening and closing hours of various polling stations across Canada in order to minimize the effects that our multiple time zones have on the availability of election results. Because a significant number of ridings are concentrated in central time zones, the Act was amended to change the opening times of polls in Ontario and Quebec so that they are open from 9:30 a.m. to 9:30 p.m., while the westernmost ridings (B.C. and some of Alberta) now open at 7 a.m. and close at 7 p.m. (Atlantic Canada polls remaining the same at 8 a.m. to 8 p.m.). The delay in closure of the polls in the central time zones ensures that it will be impossible for the ultimate result of a federal election to be determined before the polls close in British Columbia.¹⁰ The new hours do not, however, prevent the results of Atlantic Canada from being available before the polls close in the West. Section 329 (first enacted under a different statutory provision in 1938) was not amended, thus maintaining the ban on the transmission of election results from areas where the polls had closed to time zones where the polls had not yet closed. The Act establishes that anyone breaching section 329 is liable to a summary conviction offence punishable by a fine not exceeding \$25,000.

Ignoring the warning of then-Chief Electoral Officer Jean-Pierre Kingsley (who had got wind of Bryan’s intention), on election night Bryan posted the results of Atlantic Canada before the polls in British Columbia and parts of Alberta had closed. He was charged under the Act. Although he conceded that he had breached section 329 by posting these early results, he challenged the law as breaching his section 2(b) *Canadian Charter of Rights and Freedoms* right to freedom of expression.¹¹ The case made its way through the British Columbia courts,

⁹ Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Proposed Legislation* (Ottawa: Ministry of Supply and Services Canada, 1991) [hereinafter “Lortie Report”].

¹⁰ Bryan, *supra*, note 4, at paras. 47, 87.

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

variably winning and losing, before reaching the Supreme Court.¹² Since the ban effectively only covers the results from Atlantic Canada,¹³ the specific issue for the Supreme Court was whether the publication of such results before the polls in Western Canada close can be restricted or whether that is an unjustifiable breach of freedom of expression under section 2(b).

The Supreme Court decision consists of three separate concurring judgments upholding the law (on behalf of a majority of five judges) and a single dissenting judgment of four judges. All nine judges agreed that section 2(b) of the Charter was breached. The differences play out in the section 1 analysis. Justice Bastarache (Deschamps, Charron and Rothstein JJ., concurring in a separate judgment), suggests that potential voters who know in advance the results of Atlantic Canada could sway voting patterns or be discouraged from voting.¹⁴ One of his key concerns is that the publication of these results would make the system appear unfair to voters because westerners would have the advantage of knowing the result of some votes from another part of the country, while eastern voters could never enjoy the same advantage. Even if this informational inequality had no actual effect on voting patterns, it could shake the confidence Canadians have in the electoral system generally; for him, legitimacy depends as much on perception as reality.¹⁵

Both Bastarache J. and Fish J. (in a separate opinion also concurred separately by Deschamps, Charron and Rothstein JJ.) discuss the difficulty and complexity of the section 1 analysis and the need to contextualize requirements of proof in cases such as this. Justice Bastarache proceeds through a detailed analysis of the four contextual factors (from *Harper v. Canada (Attorney General)*)¹⁶ and *Thomson Newspapers*) that situate the legislation's infringement of section 2(b) rights: (i) the nature of the harm and the inability to measure it; (ii) the vulnerability of the group protected; (iii) the subjective fears and apprehension of harm that result; and (iv) the nature of the infringed

¹² *R. v. Bryan*, [2003] B.C.J. No. 318, 2003 BCPC 39 (B.C. Prov. Ct.) (application to declare s. 329 of the *Canada Elections Act* unconstitutional dismissed); *R. v. Bryan*, [2003] B.C.J. No. 2479, 2003 BCSC 1499 (B.C.S.C.) (acquittal from criminal conviction because of unconstitutional breach of s. 2(b) of the Charter by s. 329 of *Canada Elections Act*); *R. v. Bryan*, [2005] B.C.J. No. 1130, 2005 BCCA 285 (B.C.C.A.) (appeal allowed).

¹³ *Bryan*, *supra*, note 4, at para. 95.

¹⁴ *Id.*, at para. 14; see also para. 19, where Bastarache J. says that logic and common sense must be relied upon since predicting voter actions is almost impossible.

¹⁵ *Id.*, at paras. 17, 30 (*per* Bastarache J.); paras. 62, 78 (*per* Fish J.).

¹⁶ [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.) [hereinafter "*Harper*"].

activity (political expression).¹⁷ For Bastarache J., the uncertainty of social science evidence allows the Court to rely, as it did in *Harper*, on logic and reason assisted by social science evidence to prove harm.¹⁸ He concludes his review of the contextual factors by observing:

... I note that vulnerability does not play a major part in the analysis, but in light of the fact that prevention of Canadians' subjective fears and apprehension of harm is a goal of s. 329, evidence of those subjective fears must be taken as important. While political expression is undoubtedly important, the right at issue is the putative right to receive election results before the polls close; restricting access to such information before polls close carries less weight than after they close. Furthermore, it has not been established that a right to such information, which is at the periphery of the s. 2(b) guarantee, has been breached.¹⁹

He then proceeds effortlessly through the section 1 justificatory factors from *Oakes*. A low evidentiary standard is adopted: the first step, although not an "evidentiary contest", requires only that an objective be "asserted" by government in order for it to be accepted by the Court as pressing and substantial;²⁰ the next step, rational connection, becomes "eminently clear" based on reason or logic; minimal impairment is assessed partly through logic and reason (which constitute "appropriate supplements to what evidence there is");²¹ and finally, since the ban is the only effective response available to Parliament and 70 per cent of Canadians believe in the importance of informational equality, logic and reason suggest that section 329 contributes in a salutary way to public confidence in the electoral system.²² In other words, none of the steps requires evidence more rigorous than logic or reason.

Probably as a result of the dissent's focus on proportionality, Fish J. added further reasons to the section 1 justifications provided by Bastarache J., specifically on the balance between deleterious and salutary effects of the legislative provisions. For him, the efficacy of the prohibition — *i.e.*, does it affect the election outcome? — was of little relevance: the short delay was either effective in addressing information imbalance if premature release of information would affect the result, or

¹⁷ *Bryan, supra*, note 4, at para. 10.

¹⁸ *Id.*, at para. 16.

¹⁹ *Id.*, at para. 30.

²⁰ *Id.*, at paras. 32, 34.

²¹ *Id.*, at para. 43.

²² *Id.*, at para. 49.

it was effective in addressing the perception of unfairness if there was no effect.²³ Harm arose regardless; there were simply two different types of harm. That also helped Fish J. lower the evidentiary standard (in the absence of definitive scientific evidence of harm) to rely on “logic, reason and some social science evidence”.²⁴ In the end, for him, the salutary effects of the legislation outweighed any deleterious effects. Although he recognized that salutary effects may be diminished somewhat by technology (citing the possibility of circumventing the prohibition through telephone and e-mail communications), these were dismissed as minimal, being primarily local and not having widespread effect. At the same time, the deleterious effects of the delay, due solely to the short duration of the publication ban, were slight.

Justice Fish concluded his reasons by turning the media intervenors’ arguments against themselves. (A number of major media conglomerates intervened, including CBC, CTV, Rogers Broadcasting, CHUM, Sun Media, *Globe and Mail*, and CanWest Media.) Although their position was similar to that relied upon in *Thomson Newspapers* — that voters had a right to as much information as possible regarding the election of their future government in order to make informed and strategic voting choices — they also assumed that the premature publication of Atlantic election results *would* have an effect on other voters’ choices.²⁵ Their point was that voters have the right to allow such information to affect their choices. Justice Fish held that this illustrates perfectly that western Canadians could be influenced how and even whether to vote.²⁶

Justice Abella wrote the dissent on behalf of McLachlin C.J.C., Binnie and LeBel JJ. The key issue for the minority was the sufficiency of the government’s evidence justifying the breach of section 2(b). In the final analysis, Abella J. found that the government had not provided reasoned demonstration that the benefits of the limitation outweighed its harmful effects. Her assessment was harsh: “[a]ny evidence of harm to

²³ *Id.*, at para. 66.

²⁴ *Id.*, at para. 69.

²⁵ See *Thomson Newspapers*, *supra*, note 5. *Bryan* is not an example of the Court overruling itself or being inconsistent with the doctrine of *stare decisis* — technically the ban on polling (which was at issue in *Thomson Newspapers*) is still in effect on the day of voting. *Bryan* makes much less sense if the Court’s concern is with strategic voting. The main problem, however, was not over people voting strategically — it was with voters not having equal access to information that allows them to vote strategically (information equality). Unlike Western Canadian voters, voters in the Atlantic provinces do not have the benefit of results from elsewhere in order to vote strategically.

²⁶ *Bryan*, *supra*, note 4, at para. 77.

the public's perception or conduct in knowing the election results from Atlantic Canada before they vote is *speculative, inconclusive and largely unsubstantiated*.”²⁷ She also argued that the majority overvalued the evidence. For her, prior publication of election results has only been shown to affect voter behaviour where it deals with the likely outcome of the *entire* election, *i.e.*, not just results from a small number of ridings which will be inconclusive to the result as a whole. Given Canada's unequally distributed population, results from Atlantic Canada are unlikely to have any predictive value. In other words, for the minority there was nothing in the evidence to suggest an inherently harmful effect attributable to the mere presence of an information imbalance.²⁸ They accepted that scientific proof of this premise is unavailable; however, there must still be a “reasoned or logical basis” for assessing the validity of a claim that the harm created by protecting expression outweighs the benefits of information equality. In fact, the minority concluded that there was no demonstrated benefit to the limitation at all.²⁹

In sum, *Bryan* continues the long history of a Supreme Court divided over expressive rights, particularly in the nature and operation of section 1 in the face of breaches of those rights.³⁰ The next section looks in more detail at that divide in the context of modern technology.

III. *BRYAN* IN CONTEXT

1. On Modernization, Technology and Community

The Supreme Court has acknowledged that legitimacy and popular opinion are connected. In *R. v. Burlingham*,³¹ L'Heureux-Dubé J., albeit

²⁷ *Id.*, at para. 107 (emphasis added).

²⁸ *Id.*, at paras. 117, 120.

²⁹ *Id.*, at para. 132.

³⁰ It is also another case dealing with the constitutionality of some aspect of elections, or democratic process problems as they are known. Colin Feasby has written a number of articles on this issue: see, for example, “Freedom of Expression and the Law of the Democratic Process” (2005) S.C.L.R. (2d) 237; “The Supreme Court of Canada's Political Theory and the Constitutionality of the Political Finance Regime” in K.D. Ewing & Samuel Issacharoff, eds., *Party Funding and Campaign Financing in International Perspective* (Oxford: Hart Publishing, 2006); and “Constitutional Questions About Canada's New Political Finance Regime” (2007) 45(3) Osgoode Hall L.J. 513. Feasby has made the point on a number of occasions that Parliament is often in a conflict of interest position when it comes to crafting laws dealing with the democratic process; and a court assessing contextual factors related to deference should be mindful of this. However, in the above-noted 2007 article he observes that *Bryan* is different in that there is no inherent conflict of interest in MPs wishing to restrict the access of westerners to eastern election results (at 543).

³¹ [1995] S.C.J. No. 39, [1995] 2 S.C.R. 206 (S.C.C.).

in the context of section 24(2) of the Charter with its requirement for maintaining the repute of the administration of justice, noted the importance of the link between legitimacy and public opinion:

... in the application and enforcement of our laws, our constitutional values [should] neither run too far ahead nor lag too far behind our basic values as a society. One of [s. 24's] purposes is therefore to ensure that the institution charged with upholding those fundamental values does not lose legitimacy in the eyes of those whose values it is entrusted to protect.³²

In *Vriend v. Alberta*³³ Iacobucci J. took this concept a little further, by recognizing that the courts are not isolated from society at large: “hardly a day goes by without some comment or criticism to the effect that under the *Charter* courts are wrongfully usurping the role of the legislatures.”³⁴ Later on, Bastarache J., speaking extra-judicially, remarked that it is essential that the Supreme Court not be out of step with the general public, identifying links between public scrutiny, public opinion and legitimacy.³⁵ Of course, as the Supreme Court has often noted (particularly in the criminal law context), it is sometimes necessary for the protection of fundamental values for a court to go against the tides of public opinion.³⁶ The balance is therefore a delicate one; but at a minimum we have moved beyond hearing complaints that high court pronouncements are obscure and of marginal relevance to the general public.³⁷

Another marker of legitimacy is currency. There are signs here too that the Court is striving to embrace modernism; in some aspects it is almost presenting itself as fashionable. For example, on its current website,³⁸ there are links to such pages as “Client Satisfaction Surveys”, a

³² *Id.*, at para. 72.

³³ [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.).

³⁴ *Id.*, at para. 130.

³⁵ C. Schmitz, quoting Bastarache J., “Justice: Top Court Goes ‘Too Far’” *Ottawa Citizen*, January 13, 2001, at A7.

³⁶ See, for example, *R. v. Hall*, [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309, at paras. 50, 128 (S.C.C.).

³⁷ See, for example, Gareth Evans, “The Most Dangerous Branch? The High Court and the Constitution in a Changing Society” in A.D. Hambly & J.D. Goldring, eds., *Australian Lawyers and Social Change* (Sydney: Law Book Company, 1976) 13, at 74.

³⁸ See <http://www.scc-csc.gc.ca/Welcome/index_e.asp>. Websites are no longer optional for virtually all businesses, government institutions and agencies. A brief, random, Internet search shows websites exist for the following national courts: Fiji, China, India, Venezuela and Pakistan (Lahore). On the other hand, decisions of Qatar courts are not published, so there is at least one court without a website — see <<http://www.qatarlaw.com/English/sys4.htm>>.

“Court Modernization Project” and “Proactive Disclosure”.³⁹ Chief Justice McLachlin appears strikingly in a white suit on the home page — and you can even click on the photograph to view “image details”. Some businesses and institutions could learn from the Court’s functional and logical website design (including Bryan’s own “ElectionResultsCanada.com”).

However, most corporate and institutional websites are never far from being marketing and propaganda vehicles. To assess fully whether an institution such as the Supreme Court is keeping up with the times, one must scratch beneath the surface. A website is mainly gloss. The real test of a court’s understanding of, and attitude towards, technology must be determined from its decisions.

What, then, of the *Bryan* decision? The majority shied away from dealing with technology and its effect on communication and expression. Were they frightened of, or ill-informed about, the world of modern technology? Is the Court inadvertently showing its age? If so, will this detract from its legitimacy as a public institution?

Let us first go back three years before *Bryan*. In *SOCAN*, the Court was forced to deal with technology head-on. At issue was who should compensate composers and artists for Canadian copyright in music downloaded in Canada from Internet websites located elsewhere. Justice Binnie, representing an eight-member majority of the Court (including Bastarache and Fish JJ.) held that Parliament did not intend the *Copyright Act*⁴⁰ to make Internet intermediaries (such as Internet service providers) “users” so as to be subject to royalties for copyright infringement. The majority engaged in a deep analysis of problems caused by the wired world, acknowledging that times have changed “when it is as easy to access a website hosted by a server in Bangalore as it is in Mississauga”.⁴¹ In a lengthy discussion on the finer points of Internet protocols and delivery mechanisms, the majority exhibited a detailed, technical knowledge of the engineering behind the Internet.⁴² After concluding on that point, Binnie J. went on, noting some of the Internet’s social and cultural effects:

... The capacity of the Internet to disseminate “works of the arts and intellect” is one of the great innovations of the information age ...

³⁹ It is comforting to know that McLachlin C.J.C. has only relied on the (at best) inelegant word “proactive” on two occasions: *RJR-Macdonald v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at para. 158 (S.C.C.) and *Bracklow v. Bracklow*, [1999] S.C.J. No. 14, [1999] 1 S.C.R. 420, at para. 58 (S.C.C.).

⁴⁰ R.S.C. 1985, c. C-42.

⁴¹ *SOCAN*, [2004] S.C.J. No. 44, [2004] 2 S.C.R. 427, at para. 1 (S.C.C.).

⁴² See *id.*, at paras. 17-26.

[The much larger conundrum is] trying to apply national laws to a fast-evolving technology that in essence respects no national boundaries. ... The issue of global forum shopping for actions for Internet torts has scarcely been addressed. The availability of child pornography on the Internet is a matter of serious concern. E-commerce is growing. Internet liability is thus a vast field where the legal harvest is only beginning to ripen.⁴³

And then:

... The velocity of new technical developments in the computer industry, and the rapidly declining cost to the consumer, is legendary. Professor Takach has unearthed the startling statistic that if the automobile industry was able to achieve the same performance-price improvements as has the computer chip industry, a car today would cost under five dollars and would get 250,000 miles to the gallon of gasoline ...⁴⁴

Here, therefore, is a situation where the Court evinces a very adept appreciation of technology in general and the Internet in particular.

Obviously the basis of the litigation in *SOCAN* made it impossible to duck the issue of technology. But even if on one level *Bryan* is a straightforward matter of a person disobeying a clear law, making waves for his own self-aggrandizement (which Bryan surely was), the Court's awkwardness in handling the technology issue belies its earlier deftness in *SOCAN*. It now seems slightly out of touch with reality; the Supreme Court "just doesn't get it".

To begin, there is evidence in the text itself. Justice Fish states:

I recognize, of course, that modern communications technology diminishes the delay's effectiveness and thereby its salutary effects. Section 329 cannot and does not entirely prevent voters in Central or Western Canada who are determined to learn before casting their ballots what has transpired in the Atlantic provinces from obtaining that information by *telephone or e-mail*, for example. But it does, at the very least, curb widespread dissemination of this information and it contributes materially in this way to its objective — information equality between voters in different parts of the country.⁴⁵

Justice Fish's "modern technology" examples, particularly the telephone (what about a fax machine?), do not help cement the image of a court embracing technology. Where is the "legal harvest" as Binnie J., in his inimitable way, puts it? Is Fish J. not aware of social networking

⁴³ *Id.*, at paras. 40, 41.

⁴⁴ *Id.*, at para. 114.

⁴⁵ *Bryan*, [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527, at para. 79 (S.C.C.) (emphasis added).

software, or texting or other more rapid and widespread forms of “guerilla” communication? One begins to wonder whether the majority is scared of technology or displaying a lack of understanding of it, neither of which help establish the Court’s legitimacy nor currency. Of course, parsing a small passage of Fish J.’s decision for evidence of a more general conservatism may be making too much of it — he did mention “e-mail” after all.

More important is the Court’s institutional epistemology. What happened in the three years after *SOCAN* to bring out such apprehension in *Bryan*? The Court seems to go from being hip to hidebound in two steps. In *Bryan* it throws up its hands in apparent surrender, refusing to acknowledge the enormous impact current technology has on the social and cultural ordering of society. Its main source of knowledge is a 16-year-old government study. In 1991 there was no e-mail, no Google, no YouTube, no iPod or MP3s. No one knew about fantasy and social networking games such as Avalon, EverQuest and Second Life. And it would have been impossible to fathom that someone in one of these games, portraying a virtual realtor, could become an actual millionaire through such virtual sales.⁴⁶ It is not too harsh to say, therefore, that in this case, the majority is deeply out of touch with reality.

Election polling and election results are part of a very different world in 2007. Given the divergent opinions in the *Bryan* and *SOCAN* cases, it is not clear why the Court would ignore many relevant technological factors. That is putting it at its mildest. More distressing is the possibility that the Court simply selects whether it wants to be up-to-date or out-of-touch. Given its apparent comfort with technology, nuanced understanding of modernity and finely tuned approach to legal decision-making in a globally wired world that it displayed in *SOCAN*, the more cynical view does not seem too far-fetched.

What might have been useful to review in *Bryan*? For one, social network websites such as Facebook,⁴⁷ MySpace,⁴⁸ Flickr,⁴⁹ Friendster,⁵⁰

⁴⁶ Anshe Chung is apparently the first person to make one million real-world dollars through her virtual real estate transactions and holdings. (I must confess that I cannot comprehend how this works.)

⁴⁷ Online: <<http://www.facebook.com>>. Facebook and MySpace are the most popular sites. According to “Inside Facebook” as of September 2007, there were 42 million Facebook members, a doubling from approximately 20 million in September 2006. (See <<http://www.insidefacebook.com/2007/09/25/new-numbers-on-facebook-platform-growth/>>.) MySpace boasts over 106 million members — see Alexa:the Web Information Company at <<http://www.alexa.com>>.

⁴⁸ Online: <<http://www.Myspace.com>>.

⁴⁹ Online: <<http://www.flickr.com>>.

⁵⁰ Online: <<http://www.friendster.com>>.

LinkedIn,⁵¹ Bebo⁵² and Twitter⁵³ are important communicative tools today. They are fast becoming powerful forces in their own right, gaining attention as phenomena worthy of study. According to the *New York Times*:

Each day about 1,700 juniors at East Coast college log on to Facebook.com to accumulate “friends”, compare movie preferences, share videos and exchange cybercocktails and kisses. Unwittingly, these students have become the subjects of academic research. To study how personal tastes, habits and values affect the formation of social relationships (and how social relationships affect tastes, habits and values), a team of researchers from Harvard and the University of California, Los Angeles, are monitoring the Facebook profiles of an entire class of students at one college ...⁵⁴

The researchers have found that social networks are a form of living, breathing entities that reproduce and have a collective memory, a sense of purpose, and can achieve things differently from what the individual members can on their own.⁵⁵

In the digital age, social networks are not only massive and ubiquitous, but they are also much easier to follow. People leave digital traces of where they are and who they are interacting with; huge amounts of data are retained that can be used to investigate fundamental questions about social organization, human behaviour and group dynamics. At the same time, these networks are much more complex than traditional social relationships. As Nicholas Christakis, the Harvard sociologist, notes:

[I]t is a very, very fundamental observation that things happening in a social space beyond your vision — events that occur or choices that are made by people you don’t know — can cascade in a conscious or subconscious way through a network and affect you. This is a very profound and fundamental observation about the operation of social life ... [W]e have found substantial evidence for the ... spread of norms ...

Now we are talking about the flow of tastes in privacy through the network. And tastes in all kinds of other things, like music, movies, or

⁵¹ Online: <<http://www.linkedin.com>>.

⁵² Online: <<http://www.bebo.com>>.

⁵³ Online: <<http://www.twitter.com>>.

⁵⁴ Stephanie Rosenbloom, “On Facebook, Scholars Link up With Data” *New York Times*, December 17, 2007.

⁵⁵ See The Edge, “Social Networks are Like the Eye: A Talk with Nicholas A. Christakis”, February 25, 2008, online: <<http://www.edge.org>>.

books, or a taste in food. Or a flow of altruism through the network. All of these kinds of things can flow through social networks and obey certain rules we are seeking to discover.⁵⁶

The implication that these sites and this research has for a lowly provision such as section 329 of the *Canada Elections Act* is clear. Social networks and networking sites function incredibly rapidly in ways that we are barely beginning to understand. They operate with little regulatory control. They can disseminate hard facts and basic information, but also behaviours, norms and tastes.

Moreover, they can be quite insidious. Unlike Bryan's clumsy attempt to alert the public to his website postings, social networks can move quickly through vastly disparate groups. For example, one Facebook group of politically interested members could send the Atlantic Canada poll results to their "friends", who could then forward to a new subgroup of "friends" and so on. Given that the average Facebook member has between 150 and 200 friends, it would not take long at all for potential recipients to number in the millions.⁵⁷

Although the minority in *Bryan* paid heed to the reality of technology and the need to assess the effectiveness of a publication ban in an era where circumventing it is made relatively easy by technology, it also shied away from acknowledging the revolutionary nature of social networking sites (though it did not need to in order to reach its determination).⁵⁸ The majority, however, appeared old-fashioned. It made little effort to understand technology in general and social networks in particular. By standing on a principle of informational equality, in the midst of today's culture of information sharing, it ends up standing on an island in a tsunami. If not yet precarious, this is a position that cannot long remain viable.⁵⁹

⁵⁶ *Id.*, at 9. See Nicholas Christakis & James Fowler, "The Spread of Obesity in a Large Social Network over 32 Years" (2007) 357 New Engl. J. Med. 370.

⁵⁷ For statistical information about Facebook, see N.B. Ellison, C. Steinfield, & C. Lampe, "The benefits of Facebook 'friends': Social capital and college students' use of online social network sites" (2007) 12(4) J. Computer-Mediated Communication, article 1, online at <<http://jcmc.indiana.edu/vol12/issue4/ellison.html>>.

⁵⁸ See *Bryan*, *supra*, note 45, at paras. 123-24. Justice Abella referred to the discussion of technology found in the Lortie Commission (which was published in 1991!), Professor Waddell's observation of how e-mails, instant messages and phone text messaging can circumvent the blackout, and Lamer C.J.C.'s conclusion in *Dagenais v. CBC*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) regarding the difficulties of bans in the global electronic age.

⁵⁹ A good example of the power and rapidity by which social networks can operate, and one that illustrates what could occur in elections to come, relates to CBC's recent decision to change Radio 2's program content. Within a few days of the announcement a Facebook "group" was

2. The Continuing Saga of Section 1 Jurisprudence

As discussed above, the Court's legitimacy can be harmed when it ignores technological reality. This is exacerbated when added to a decades old controversy at the Court regarding the proper approach to take in determining justification for limits on rights under section 1 of the Charter.

In a 2006 article,⁶⁰ Professor Sujit Choudhry proposed two versions of a "narrative" of the *Oakes* test: the first, dominant, narrative holds that the uniform approach that *Oakes* established for assessing justifiable limits was transformed into a categorization exercise, in which a search for varying criteria of deference depending on context eventually consumed the Court in doctrinal disagreements and difficulties. The second, counter-narrative, lies in the disjunction between the need for hard proof at each stage in the *Oakes* test, the reality of policy making under conditions of factual uncertainty, and how the Court allocates risk given such uncertainty. *Bryan* is an illustrative example of how these two narratives can combine in surprising ways.

As Choudhry argues, the dominant narrative provides a legacy of inscrutable and irreconcilable decisions. To begin, the Court in *Oakes* rejects arguments about the efficaciousness of reverse onus provisions. Less than 10 months later in *R. v. Edwards Books and Art Ltd.*⁶¹ the Court accepts that simplicity and administrative convenience are legitimate concerns in the proportionality analysis. The Court also moves the analytical bar around. Under the minimal impairment stage of the analysis, cases were distinguished based on the nature of "competing interests".⁶² Different outcomes arose depending on whether the state acted on behalf of the whole community as a "singular antagonist" or on behalf of third parties where it would mediate between competing

created to save Radio 2 ("Save Classical Music at CBC"). Within a matter of weeks, it had close to 12,000 members. Any news regarding CBC and Radio 2 can now be disseminated in an instant to all these members (see John Doyle, "Note to classical music fans: Get Over Yourselves", *The Globe and Mail*, April 7, 2008, at R3). The repercussions for election results are obvious: election dates are known in advance — a group of members could be set up well before the election date (call them "Early Election Result Aficionados"). On the night of the election Atlantic Canada results could be posted to all members within seconds after they are broadcast.

⁶⁰ Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1" (2006) 34 S.C.L.R. (2d) 501 [hereinafter "Choudhry"]. See also *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

⁶¹ [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.).

⁶² Choudhry, *supra*, note 60, at 512.

groups.⁶³ Further refinements occurred by “elevat[ing] the interests of third parties to the *constitutional* level, so that the state can be seen as protecting their Charter rights by limiting the Charter rights of others”,⁶⁴ or by downgrading the importance of the constitutional right at stake in some situations. Both methods are exemplified in *R. v. Keegstra*⁶⁵ where the right to freedom of expression of racial and religious minorities was upgraded to protect victims from the harm of silencing at the same time as hate speech was held to be peripheral to the core interests contained in the fundamental freedom of expression. But even these refinements were short-lived. In cases such as *RJR-MacDonald v. Canada (Attorney General)*⁶⁶ and *R. v. Guignard*⁶⁷ the Court withdrew from its position of distinguishing between core and peripheral speech.

Even more useful is Choudhry’s identification of the basic problem of deference that bedevils the Court to this day: how the “contextualization” of a problem can send deference in opposite directions. As he notes:

On the one hand, certain kinds of speech have been criminalized with the possibility of imprisonment, and therefore on *Irwin Toy* attract the highest standard of review under section 1. But on the other hand, the speech in many cases has been peripheral, which argues for deference.⁶⁸

As examples, he cites cases such as *R. v. Butler*,⁶⁹ the *Prostitution Reference*⁷⁰ and *R. v. Sharpe*⁷¹ in which the criminal nature of the underlying offence was ignored while the low value of expression was highlighted. He goes on:

This [failure to acknowledge the criminal side of the issue] is all the more bizarre given that *Irwin Toy* itself raised this problem, because it involved the regulation of commercial speech (warranting deference) through a regime that created criminal sanctions, including imprisonment (warranting no deference), albeit through provincial law.⁷²

⁶³ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.). See Choudhry, *id.*, at 512.

⁶⁴ Choudhry, *id.*, at 514 (emphasis in original).

⁶⁵ [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.).

⁶⁶ [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.).

⁶⁷ [2002] S.C.J. No. 16, [2002] 1 S.C.R. 472 (S.C.C.).

⁶⁸ Choudhry, *supra*, note 60, at 518.

⁶⁹ [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.).

⁷⁰ *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.).

⁷¹ [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 (S.C.C.).

⁷² Choudhry, *supra*, note 60, at 519.

At present, the dominant narrative has the Court shying away from an attempt to categorize the cases into discrete levels of deference, instead relying on the same form of analysis but recasting them as factors directing the appropriate judicial approach. Context becomes the new category.

All of these same issues arise in *Bryan*. The publication ban provision in the Act, breach of which gives rise to a summary conviction offence punishable by a fine, places the state in the role of looking after the entire community in the context of a federal election. At the same time, the provision attempts to mediate between competing groups such as individual voters located in different regions of the country, communications and media institutions and political parties, to name but a few. Moreover, the majority of the Court believed that the importance of elevating electoral fairness outweighed the small, temporary harm to freedom of expression. In this case, the majority creates a further refinement to Choudhry's dominant narrative. Here, the expression is not downgraded by virtue of it being in the category of less valuable expression (being political expression, that would be difficult to do) — it is downgraded because (i) the quality of the expression changes depending on who holds it;⁷³ and (ii) the restriction is limited in duration. In other words, a right can be situationally less important. The dissent, on the other hand, stressed that political expression is at the “conceptual core”⁷⁴ and receiving election results is a “core democratic right”,⁷⁵ and an “essential part of the democratic process”⁷⁶ for which it is “difficult to imagine a more important aspect”⁷⁷ of the values protected by section 2(b).

Choudhry's counter-narrative is equally germane. In this version, it is the cogency of evidence that becomes critical to the approach to section 1. Again, a history of conflicts within the Court is highlighted. For example, the majority in *RJR-MacDonald* stressed the need for “reasoned demonstration”⁷⁸ of the “actual” connections, objectives, benefits and seriousness⁷⁹ under *Oakes*; in *Sauvé v. Canada (Chief*

⁷³ See Bastarache J. in *Bryan*, *supra*, note 45, at para. 27 where he notes: “to suggest that election results are an important political form of expression *in the hands of those still to vote* is to prejudge the entire s. 1 inquiry” (emphasis in original).

⁷⁴ *Id.*, at para. 99.

⁷⁵ *Id.*, at para. 110.

⁷⁶ *Id.*

⁷⁷ *Id.*, at para. 128.

⁷⁸ *RJR-MacDonald*, *supra*, note 66, at para. 129.

⁷⁹ *Id.*, at para. 133.

Electoral Officer)⁸⁰ the majority insisted on avoiding “vague and symbolic objectives”.⁸¹ The dissenting judges in each of these cases expressed a serious concern that governments could be “paralyz[ed]”⁸² by such evidentiary requirements where there are “different social or political philosophies upon which justifications for or against the limitations of rights may be based”.⁸³ As Choudhry notes, the fissures in the Court in this version of the narrative centre on the kinds of *inferences* governments can draw from inconclusive evidence⁸⁴ and the circumstances in which “logic” or “common sense” can be used to replace evidentiary gaps.⁸⁵

So it is no surprise that Professor Choudhry’s counter-narrative appears in *Bryan*. Whereas the majority’s view is captured by Bastarache J. stating “I am ... forced to resort to logic and common sense applied to the Attorney General’s evidence as proof of the harm of loss of public confidence in the electoral system as a result of premature release of results,”⁸⁶ the dissent replies with “the evidence submitted by the government in this case does not provide the requisite ‘reasoned demonstration’ to justify infringing the right at stake to the extent that it has”.⁸⁷ The cogency of evidence is again at the heart of the disagreement.

What is a surprise is that Choudhry’s counter-narrative has become part of the decision-making process itself, in a post-modernist, self-reflexive way. Now the Court is aware; Bastarache J. quotes directly from Choudhry’s counter-narrative section, to bolster his own argument for deference:

As Professor Choudhry aptly notes ... :

Public policy is often based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available. Justice La Forest offered an observation in [*McKinney* ...] which rings true: “[d]ecisions on such matters must inevitably be the product of a mix of conjecture,

⁸⁰ [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.) [hereinafter “*Sauvé*”].

⁸¹ *Id.*, at para. 22.

⁸² *RJR-MacDonald*, *supra*, note 66, at para. 67.

⁸³ *Sauvé*, *supra*, note 78, at para. 67.

⁸⁴ Choudhry, *supra*, note 60, at 527.

⁸⁵ *Id.*, at 528.

⁸⁶ *Bryan*, [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527, at para. 19 (S.C.C.).

⁸⁷ *Id.*, at para. 107.

fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society’.⁸⁸

At the same time, the dissent continues to play its role in this narrative by claiming

[W]hile scientific proof may not always be necessary or available, and social science evidence supported by reason and logic can be relied upon, the evidence must nonetheless establish the consequences of imposing or failing to impose the limit.⁸⁹

Unfortunately, neither side offers much in the way of a solution to this impasse. In fairness to the judges, Choudhry left it open as well.⁹⁰

I have two prescriptions to offer. First is to suggest that the Court develop a form of best evidence rule for section 1 justifications. The “best evidence rule” is a basic evidentiary common law rule that has been around for a long time. As stated in *Halsbury’s*:

That evidence should be the best that the nature of the case will allow is, besides being a matter of obvious prudence, a principle with a considerable pedigree. However, any strict interpretation of this principle has long been obsolete, and the rule is now only of importance in regard to the primary evidence of private documents. The logic of requiring the production of an original document where it is available rather than relying on possibly unsatisfactory copies, or the

⁸⁸ *Id.*, at para. 29. See also Choudhry, *supra*, note 60, at 524.

⁸⁹ *Bryan, id.*, at para. 103 (Abella J.).

⁹⁰ For a different interpretation of the “problems” of s. 1 jurisprudence in the context of expressive rights, see R. Moon, “Justified Limits on Free Expression: The Collapse of the General Approach to Limits on *Charter* Rights” (2002) 40 *Osgoode Hall L.J.* 337. Moon argues that the two-step adjudicative model built into *Charter* adjudication (determination of a rights violation, then justification under s. 1) may be part of the problem itself. As he notes at 365:

[I]n freedom of expression cases, the Court is not simply balancing separate interests and giving priority to one value or right over another. Rather, it is making a complex judgment about the realization of individual agency and identity in community life. It is seeking to draw a line between expression that appeals to conscious reflection or autonomous judgment and expression that seeks to manipulate. But there is no bright line to be drawn. Where the Court draws the line will depend on contextual factors and their impact on individual judgment. The strain on the *Oakes* test, as the Court attempts to fit freedom of expression into the adjudicative structure ... manifests itself in the broad definition of the freedom’s scope and the deferential approach to limits under section 1.

Moon’s argument is a strong one. The arguments I make below are perhaps based on a pragmatic view that for the foreseeable future we seem to be stuck with the two-step process and the *Oakes* test, so we better make the best of it.

recollections of witnesses, is clear, although modern techniques make objections to the first alternative less strong.⁹¹

It is normally a rule that applies to primary evidence in the context of a trial. Moreover, as noted, it has undergone significant reforms and watering-down from its earlier strict application. However, it could be a useful principle to resurrect and modify so that it applies to secondary sources used to assess a government's section 1 justification. In this context, *Halsbury's* principle is still sound — the best evidence is the path of prudence. In *Bryan*, the government's evidence arguably was feeble, and as noted earlier, out of touch with the modern electronic age. The Court relied almost entirely on two sources: the Lortie Commission report (which was the main source for both the majority and minority of the Court) and a Decima Research/Carleton University study by Chris Waddle entitled "Most Canadians Prefer Election Night Results Blackout."⁹² What about more comparative analyses? There are other countries where time zones affect elections. For example, several U.S. studies have attempted to estimate the impact that the early reporting of projected outcomes has had on voter turnout. Many of these have found the impact to be slight or negligible despite the fact that California, as the most populous state, votes later.⁹³ Or what about the independence of the evidence? The *Bryan* court accepts the government's own Lortie Commission report as sufficient evidence to justify a breach of a right. One need only compare the extreme care that the medical profession has recently been forced to take in ensuring full disclosure of research funding, editorial impartiality and publication integrity to understand the need for similar controls in terms of section 1 justification. As Danielle Pinard has previously noted, "the law can only ignore the empirical realities of the outside world at the expense of its own credibility".⁹⁴ The incredible expanse of the Internet and electronic era should, one would

⁹¹ *Halsbury's Laws of England*, 4th ed., Vol. 17, at 8. See also *R. v. Papalia*, [1979] S.C.J. No. 47, [1979] 2 S.C.R. 256 (S.C.C.) (discussing the best evidence rule in the context of recorded conversations where originals had been erased but copies were available).

⁹² The only other secondary sources relied upon in the decision were (what else!) Peter Hogg's *Constitutional Law of Canada*, vol. 2, loose-leaf ed. (Scarborough, ON: Carswell, 1997), updated 2000, rel. 1 and Choudhry, *supra*, note 60.

⁹³ See "Note — Exit Polls and the First Amendment" (1985) 98 Harv. L. Rev. 1927; Anthony M. Barlow, "Restricting Election Day Exit Polling: Freedom of Expression vs. The Right to Vote" (1990) 58 U. Cin. L. Rev. 1003, at 1005; L.K. Epstein & G. Strom, "Election Night Projections and West Coast Turnout" (1981) 9 Am. Pol. Q. 479.

⁹⁴ Danielle Pinard, "Charter and Context: The Facts for Which We Need Evidence, and the Mysterious Other Ones" (2001) 14 S.C.L.R. (2d) 163, at 172.

think, give the Court access to both better and more likely impartial, evidence. In this instance, common sense should become the last refuge of the scoundrel (even a judicial one at that).

The second prescription is more modest. Perhaps what the Court is really saying when it struggles over whether common sense, reason, logic or cold, hard empirical evidence is necessary for a particular section 1 analysis, is that, in most cases, the inferences that need to be made are what Charles Pierce coined as abductive.⁹⁵ I am not suggesting a radical revisioning of section 1. Rather, the Court may find it useful to examine the body of literature on abductive reasoning, as I believe it would assist with an *Oakes* analysis, particularly in the need to consider the thoroughness of the evidentiary record.

An abductive inference is simply a plausible inference arrived at from a particular provision, not an iron-clad solution. It is an “inference to the best explanation” which is, for Pierce, part of common sense logic (note the connection to much of what the judges rely on for section 1 analysis). Much of the concern surrounding the difficulty of assessing section 1, in my view, stems from the fact that it is necessarily an abductive process. Given the nature of much public policy formulation as Choudhry noted, it is much more plausible to recognize that in many instances there are only strong or plausible solutions, not necessary or infallible ones. John Josephson proposes three considerations that engage an abductive analysis and provide an assessment of the strength of an inference:

- (1) how decisively the leading hypothesis surpasses the alternatives;
- (2) how well the hypothesis stands by itself, independently of the alternatives;
- (3) how thorough the search was for alternatives;

and two pragmatic considerations, including:

- (4) how strong the need is to come to a conclusion at all, especially considering the possibility of gathering further evidence before deciding;

⁹⁵ I am indebted to Eric Neilsen, a student in my “Federalism and Institutions of Government” course, for providing me with information on Pierce’s work in this area. See *Pierce on Signs*, James Hoopes, ed. (London: University of North Carolina Press, 1991); John Josephson, “Symposium: Abductive Inference: On the Proof Dynamics of Inference to the Best Explanation” (2001) 22 Cardozo L. Rev. 1621.

(5) the costs of being wrong and the rewards of being right.⁹⁶

His typology is intended to apply to any form of argument or justification. The first three, however, are directly relevant to a section 1 analysis: a measure of reasonableness and appropriateness is only determinable in an environment where rigorousness is crucial (particularly in the form of assessing the extent of alternatives).

The *Oakes* test, particularly in the proportionality aspect, already covers some of these considerations. Rational connection, minimal impairment and benefits/burdens provide a method of assessment that weighs one option against others. However, Josephson's third component, that of thoroughness, is not always present. One might argue that the purpose of the minimal impairment test is to provide for an assessment of alternative approaches to a particular policy. This is true. It does not necessarily, however, give guidance as to how thorough the search was. The adversarial system may provide some checks and balances, but is it sufficient? Examples of questions that could be employed to assess a government's justification under section 1 include: What is the evidence that all plausible justifications have been considered? How deep is the lawyer's/court's experience in this area? How often have abductions in this area turned out to be mistaken because of novel phenomena? Has the possibility been considered that some givens are incorrect? Or that data merely appeared to be true? Has the possibility been considered that justifications based on materials/information from past experience may not be adequate to the current situation?⁹⁷

As with the best evidence rule described earlier, requiring this to be an overt step in the *Oakes* analysis could help reduce the difficulties Choudhry highlights in the Court's divergence of opinion over section 1 evidence. In *Bryan*, for example, the Court's reluctance to examine the staggering influence of technology and new forms of communication showed a lack of thoroughness that, as I have attempted to argue above, was significant and damaging to its ultimate conclusion. It is certainly not clear from the decision that the Court regarded the possibility that the Lortie Commission report is of less relevance in the electronic age. Moreover, by going through such an exercise, legitimacy will be enhanced because a court, in explicitly adverting to the thoroughness of evidence collected for the *Oakes* test, will better appreciate the

⁹⁶ See Josephson, *id.*, at 1626.

⁹⁷ I have modified these questions from a set proposed by Josephson, *id.*, at 1630.

importance of finding the best available evidence, and will, one would hope, be more aware of the need for law to be cognizant of current trends.⁹⁸

IV. CONCLUSION

In a country with multiple time zones such as Canada, virtually any attempt to control the publication of election results will result in conflicts over freedom of expression. The 1991 Lortie Commission canvassed a number of approaches to dealing with this problem. It did not, however, recommend any changes to the ban on publication of election results across time zones. In *R. v. Bryan* the Supreme Court of Canada upheld that law. It did so, as I have argued, without much appreciation of the difficulties such a law poses in the electronic age we are now living through.

There is no easy answer to this issue. The need to best preserve freedom of expression obviously needs to be considered, however. Staggered opening hours for polls across the country goes some way towards alleviating the problem. It still leaves the western provinces exposed to receiving early results from Atlantic Canada. One way out of this dilemma, which would also be safe from technological circumvention, is to have an embargo period after polls close so that results would not be made available until, for example, 11p.m. in Atlantic Canada. This would allow each region to be treated as equally as possible. It would not favour those who have access to resources and political connections who are able to obtain results before the masses. It would prevent websites or social networking sites from posting. At the same time, there would not be a breach of anyone's section 2(b) right, as without information, there can be no expression (which may be small consolation for those in the east who feel they have a right to know their election results as soon as possible, or those who worry that delayed election results are signs not of democracy but autocracy). Besides, it may even

⁹⁸ It should be noted that Josephson's final two considerations are less important in the judicial realm since courts (particularly those at the apex of the court system such as the Supreme Court of Canada) must come to a conclusion and do not typically engage in self-analysis of their decisions.

teach all of us the benefits of a virtue that is in short supply these days: patience.⁹⁹

⁹⁹ I like the McLachlin Court's acknowledgment of the law as an educative, pedagogical tool: the best example for me is *Sauvé*, *supra*, note 80, where the majority explores in great detail the message that prisoner voting laws sends to both prisoners and the general public alike.