Governance and Anarchy in the S.2(B) Jurisprudence: A Comment on Vancouver Sun and Harper v. Canada

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Governance and anarchy in the s. 2(b) jurisprudence: A comment on Vancouver Sun and Harper v. Canada

Jamie Cameron

1. GOVERNANCE AND ANARCHY IN CONSTITUTIONAL DECISION MAKING

A bipolar conception of the guarantee has resulted in contradictions and double standards, which are the defining features of the Supreme Court’s section 2(b) jurisprudence. Rather than break it, the Court’s decisions in Vancouver Sun, Re¹ and Harper v. Canada (Attorney General)² confirm a pattern in which a model of governance co-exists with methodological anarchy of sorts. Governance, in this paper, refers to a system of rules or principles that direct and regulate decision making from one case to the next. Absent a system, the section 2(b) jurisprudence is capricious, and a captive of instincts which shift from judge to judge, case to case, and issue to issue. If anarchistic is harsh, it nonetheless describes a result-based jurisprudence which lacks the discipline of principled adjudication. While Vancouver Sun fits the governance

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¹ Professor, Osgoode Hall Law School.
model, *Harper v. Canada (Attorney General)* is an example of result-driven decision making.

Not long after it saved campaign spending limits in *Harper,* the Supreme Court concluded that a presumption of openness applies to investigative hearings that are initiated under Parliament’s anti-terror legislation. After upholding the provision in a companion case, a majority led a second time by departing Justices Iacobucci and Arbour applied the presumption to investigative hearings under section 83.28, and set a high threshold for derogations from the open court principle. In doing so the joint opinion was unsympathetic to the argument that the presumption should be displaced, either because these proceedings are investigative or because the hearings are a vital element in Parliament’s fight against terrorism. The judges found instead that the same standard applies to this provision as to derogations from open court in other settings. *Vancouver Sun* is a model of governance in constitutional adjudication because principle prevailed over the claim that the Court

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3 The *Canada Elections Act* ("C.E.A."), S.C. 2000, c. 9, s. 350 limits third party election advertising to $3,000.00 per electoral district and $150,000.00 nationally.


6 *Vancouver Sun*, supra, note 1.


(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
should defer to the state’s assessment of strategy in the war on terrorism, including the need for secret investigative hearings.

For these reasons, Vancouver Sun represents a high water mark for the open court principle. The decision is yet more remarkable when juxtaposed with Harper which, almost simultaneously, defined a new low point in the section 2(b) jurisprudence. There, the Court upheld Parliament’s limits on third party advertising. In doing so, the majority opinion could not save the restriction without departing from its own case law on participation in the democratic process. Bastarache J. upheld the legislation because he and other members in the majority agreed that third parties should not have a credible voice in election debate. The result was anarchistic, in this paper’s sense of the word, because Harper v. Canada (Attorney General) resisted section 2(b)’s values, as well as the evidentiary requirements of section 1, to uphold provisions that effectively exclude citizens from the democratic process.

A comparison of these cases confirms the presence of double standards in the section 2(b) jurisprudence. For instance, after applying a low standard of justification in Harper, the Court set a high threshold for limits on the open court principle in Vancouver Sun. Both times the expressive activity was at the core of the guarantee, but while the Court deferred to Parliament on the question of third party spending, it refused to grant the same latitude to the government’s claim that proceedings under section 83.28 must be conducted in secret. Moreover, access was at the heart in both cases. While the issue in Harper was one of access to the electoral process and the right to participate in the election debate, the secrecy orders challenged in Vancouver Sun denied the public access to information about the existence of an investigative hearing into terrorist activities. In fact, the argument for an exception to the open court principle was stronger in Vancouver Sun than the evidence of reasonable limits was in Harper. Whereas Vancouver Sun followed the model of governance the Court had developed in the open court context, Harper ignored the evidence and demands of principle to uphold limits which failed established standards of constitutional adjudication. And that, as this paper will show, is the difference between governance or principle-based decision making, and anarchy, or result-based adjudication.

This paper develops these themes by commenting on the two decisions. From the perspective of Vancouver Sun, the first section explains why the open court jurisprudence is a section 2(b) success story. Perhaps for that reason, this part of the paper is brief in comparison with its next
section, which focuses on *Harper v. Canada (Attorney General)*. The discussion of *Harper* begins by reviewing the Court’s decisions on participation in the democratic process. Doing so reveals that the majority opinion in *Harper* avoided the force of precedent to uphold the C.E.A.’s third party spending limits. Then, an analysis of the majority opinion shows how it also ignored established principle and abandoned the requirement that limits on the Charter’s guarantees be justified by evidence.

Though an unfavourable assessment of *Harper* is unavoidable, the paper’s purposes are positive, rather than negative. A final section returns to a comparison between these two approaches to adjudication under section 2(b). As *Harper* shows, the Court’s decisions on certain questions too often abandon principle in favour of unspoken assumptions about the relative value of the expressive activity in question; instincts about whether and to what extent the activity is “harmful”; a rough calculus of whether the limit on expressive freedom is too unforgiving to be saved under section 1; and a political calculus of whether deference is appropriate, either to divert institutional criticism or to forestall a confrontation with Parliament. This paper suggests that the Court can avoid the anarchy of result-based adjudication by adapting and applying the open court model to other section 2(b) issues. Not only would the adoption of a governance-based approach address the problem of double standards and promote consistency, it would ensure that limits on section 2(b) activity are based on the evidence and not on subjective perceptions about the expressive activity at stake and its relative value. Having explained that the open court jurisprudence provides a model, the last section also indicates how its key elements can be adapted and applied to other branches of the case law, to avoid the anarchy which is all too often indicative of a result-based approach to decision making.

2. **RE VANCOUVER SUN**

(a) The Open Court Principle: A section 2(b) Success Story

The open court jurisprudence is a section 2(b) success story because the Court developed a principled model or system of governance in this setting, which it faithfully applies to these issues. The jurisprudence is described here as a success story because the Court’s methodology protects the principle’s underlying values but permits exceptions when the circumstances at hand meet the model’s standard of justification. An approach that focuses attention on the relationship between principle
and the evidence in particular cases offers a model for adjudication which should be followed on other issues. *Vancouver Sun* is the most recent in a series of decisions that exemplify this approach to open court under the Charter.

*Edmonton Journal v. Alberta (Attorney General)* was one of the Court’s early initiatives in developing a model of governance to ensure that access to proceedings and publicity would not be inhibited by closure orders and publication bans. The three elements of the model can be found in most of the Court’s open justice decisions. First and foremost are the principle’s underlying values. Section 2(b)’s values are recited in most of the jurisprudence; in the context of open justice, though, the values play more than a rhetorical role. Not only are they actively discussed and affirmed, they support a presumption in favour of openness that is not easily displaced.

The second element of the methodology, then, is a doctrinal framework that is designed to protect those values by defining and limiting the scope of derogations from the open court principle. Chief Justice Lamer created the template in *Dagenais v. Canadian Broadcasting Corp.*; that template was then adapted and further entrenched in the jurisprudence in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, as well as in *R. v. Mentuck* and *R. v. O.N.E.* The *Dagenais/Mentuck* standard which emerged sets structured criteria which must be satisfied every time an exception is granted.

A third aspect of this model grants the evidence a central role in the decision making process. As a result, the Court has consistently stressed that exceptions will not be permitted unless an evidentiary record estab-

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lishes their justifiability. It is axiomatic that limits on Charter guarantees must be demonstrably justified under section 1. And though the purpose of the Oakes test was, in part, to ensure that limits which are not substantiated would not be upheld, the Court has been inconsistent in its approach to the evidence. The open court jurisprudence is different, because there the Court has consistently demanded evidence to support derogations from that principle.12

Long before the arrival of constitutional rights, open court was a featured principle of the common law and its conception of the justice system's responsibility to the public. MacIntyre v. Nova Scotia (Attorney General) was the decision that forged a link between a tradition of openness at common law and the constitutionalization of rights under the Charter.13

(b) MacIntyre v. Nova Scotia (Attorney General) and the Covertness Exception

MacIntyre is the key, both to the constitutionalization of open court under the Charter, and to the status of that principle in investigative proceedings. By granting openness significant protection at common law, while recognizing the need for exceptions to protect competing interests, MacIntyre showed the Court the way under the Charter. There, a journalist sought access to search warrants which had been issued on an ex parte basis in the course of a criminal investigation. Dickson J. held that though access to such materials should be denied while an investigation is underway, the interest in maintaining covertness ends


once the search warrant’s work is over. At that point, the value in openness prevails over the need for an exception during the active phase of investigation.

Dickson J.’s opinion in MacIntyre provided a template for the model of governance that evolved under the Charter. In doing so it incorporated the underlying values of open court into the Court’s reasons, and then developed criteria to determine access to investigative materials. The judge recognized that limits are necessary at the investigative stage of the criminal process, both to protect the innocent from premature publicity and public suspicion, and to ensure that law enforcement objectives are not put at risk. Yet he also rejected the argument that covertness is a necessary incident of the investigation at all stages of the process. Having explained that “covertness is the exception and openness the rule,” and added that the rationale of the open court principle is “maximum accountability and accessibility”, he held that the principle of openness applies in judicial proceedings, whatever their nature, and in the exercise of judicial powers. And so he rejected a distinction between trial and pretrial proceedings, because Parliament had seen fit “to involve the judiciary” in the issuance of search warrants. Dickson J. concluded that all judicial proceedings must be held in public, whether they are part of a trial or not. In the end, he proposed the following compromise between the open court principle and the need for secrecy: though members of the public should not have access to the application or to warrant materials while investigative steps are being actively taken, once the investigation has concluded the materials are subject to the open court principle and must be accessible to members of the public.

In dissent, Martland J. stated that the function of a justice may be considered to be a judicial function, but “might more properly be described as a function performed by a judicial officer”. Investigation does not lead to a requirement of openness, in his view, because it is not

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14 Ibid., at 185.
15 Ibid., at 184.
16 Ibid., at 185 (emphasis added).
17 Ibid., at 186.
18 Ibid. (emphasis added).
19 Ibid., at 189 (concluding that the administration of justice does justify an in camera proceedings when the warrant is issued, but finding that once the warrant has been executed, “exclusion thereafter of members of the public cannot normally be countenanced” and that a general rule of access must prevail except in respect of those who may be considered “innocent persons”).
20 Ibid., at 197.
mandatory that search warrants be authorized in open court, and the judge neither adjudicates nor makes any order. At the same time, disclosing search warrant information could damage a variety of interests, he thought, including the fair trial of an accused, the safety of informants, law enforcement goals, and the reputation of innocent persons unconnected with the commission of an offence. Martland J. concluded that the search warrant process is not analogous to trial proceedings, and that opening search warrant documents to public inspection “is not equivalent to the right of the public to attend and witness proceedings in court”.

On its face, section 83.28 is investigatory in nature. From that perspective, MacIntyre could support a conclusion that the open court principle should be displaced in favour of in camera hearings during that phase of the investigation. At the same time, section 83.28 hearings are held in court under judicial supervision. In that regard, MacIntyre could direct a contrary conclusion, that the proceedings must be open because the judiciary is involved. *Vancouver Sun* required the Supreme Court to choose between two interpretations of MacIntyre.

(c) **Section 83.28 and the Judicialization of the Investigative Process**

The joint majority opinion by Justices Iacobucci and Arbour began by noting the extraordinary and novel nature of the proceedings. As far as the Court was aware, the challenge to section 83.28 and its *Vancouver Sun* companion were the first cases to arise under the anti-terror legislation. This provision empowers the Crown to compel a witness to attend a hearing and provide sworn evidence in aid of an investigation into terrorist activities. There are two parts to the process: the Crown must apply, initially, for a judicial order authorizing a hearing; and once that order is granted, the hearing which follows takes place in court before a judge. The question in *Vancouver Sun* was whether the open court principle applied to either or both parts of the section 83.28 process.

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21 Ibid., at 201.
22 Supra, note 4.
23 Supra, note 5.
24 Supra, note 1.
25 See s. 83.28(4) & (5), dealing with the making and contents of an order to attend a hearing, and (8), making it mandatory for the investigatee to answer questions; supra, note 4.
While the majority opinion in *Vancouver Sun* consistently referred to it as a “judicial investigative hearing”, Bastarache J.’s minority opinion characterized section 83.28 proceedings as an “investigative hearing”. As far as he was concerned, hearings under that provision are investigative in nature and MacIntyre’s reasons for recognizing a “covertness exception” should apply. Although the investigative hearings under section 83.28 are a “new form of proceeding”, Bastarache J. claimed that they raise “essentially the same issues” the Court had considered “in the context of other investigative tools”.\(^{26}\) He observed that elsewhere, the Court had accepted the “necessity of clandestine proceedings” and that “[s]ecrecy therefore has been recognized as paramount in other settings which apply equally to terrorist groups or organizations”.\(^{27}\) Concerns arising from the disclosure of information, including the reputation of innocent individuals, witness safety, and the efficacy of investigative proceedings were in his view at least as strong, if not stronger, under section 83.28 than in other investigative contexts such as search warrants and wiretaps.\(^{28}\)

Bastarache J. was therefore unwilling to assign section 83.28’s investigative hearing a judicial character to which a presumption of openness would apply. He noted that the purpose of the hearing is to gather information and that the judge’s role is limited. In such circumstances, he found a requirement of openness counterproductive, because he claimed that it would be difficult, if not impossible, to rebut the presumption and meet the evidentiary burden of the *Dagenais/Mentuck* test. As he explained, “[t]he presumption of openness cannot operate in circumstances where it cannot in fact be rebutted”.\(^{29}\) Because holding section 83.28 hearings in public would threaten countervailing interests, he concluded that proceedings under this provision will “normally” be held *in camera*.\(^{30}\) Under his view, a requirement of openness would not be activated until the hearing is over, at which time public access could only be denied under the terms of the *Dagenais/Mentuck* test.\(^{31}\)

Meanwhile, Justices Arbour and Iacobucci did not agree that a hearing which is investigative in nature must be held in secret. In their view, section 83.28’s creation of a *judicial* investigative hearing triggered the

\(^{26}\) *Vancouver Sun*, supra, note 1, at para. 73.

\(^{27}\) Ibid., at para. 75.

\(^{28}\) Ibid., at paras. 73-76.

\(^{29}\) Ibid., at para. 63.

\(^{30}\) Ibid., at para. 84.

\(^{31}\) Ibid., at para. 83.
presumption of openness. In addition, the majority opinion rejected the view that the extraordinary setting of the anti-terror legislation made a difference. Once Parliament chose to involve the judiciary, they said, hearings under section 83.28 must be as faithful to the open court principle “as is compatible with the task at hand”.

Iacobucci and Arbour JJ. stated that judges who are granted a discretion under section 83.28(5)(c) to determine the terms and conditions of hearings should reject secrecy and apply a presumption of openness instead.

Once having characterized the investigative hearing as judicial in nature, the open court principle became the majority’s default position. The judges concluded that covertness is an exception which can only be permitted at certain points in the process, and then only on evidence that demonstrates the need for that exception on an issue to issue and case to case basis. As the joint opinion explained, the presumption “should only be displaced upon proper consideration of the competing interests at every stage of the process”. As much as the subject matter of the existence of a section 83.28 order should be made public as possible, they maintained, “unless, under the balancing exercise of the Dagenais/Mentuck test, secrecy becomes necessary”. Once the existence of an order is made public, the judge should then determine, under the same test, whether “any information ought to be withheld from the public”.

In applying the Dagenais/Mentuck approach to any decision to hold a hearing in camera, the majority opinion indicated that judges “should expect to be presented with evidence credible on its face of the risks that an open inquiry would present, including evidence of the information expected to be revealed by a witness”.

(d) Secrecy and the Air India Trial

As the dissent pointed out, in vain, the Dagenais/Mentuck test requires an evidentiary basis for limits on openness which perhaps cannot be established in proceedings where the evidence is unknown at the time an exception is sought. Not only did Bastarache J. rely on an analogy to other investigative procedures to demonstrate why such a high standard of proof is inappropriate, his opinion considered the risks inherent in

32 Ibid., at para. 38.
33 Ibid., at para. 39 (emphasis in original).
34 Ibid., (emphasis added).
36 Ibid., at para. 43.
opening up investigative hearings.\(^{37}\) Although the majority opinion agreed that "[i]t may very well be that by necessity large parts of judicial investigative hearings will be held in secret", the Court's fealty to the open court principle and the evidentiary requirements which must be met to displace it did not waver.\(^{38}\)

The state's powers under section 83.28 are extraordinary, and those powers were put to unusual use in case. The Crown began section 83.28 proceedings to see whether it could bolster its evidence in the Air India trial, which was at the time underway in a different courtroom under the supervision of another judge.\(^{39}\) The ex parte order authorizing an investigative hearing required the Named Person, who was not charged with any offence, to attend in court and give sworn information relating to the Air India crash and the Crown's theory that it was caused by a terrorist bomb. The judge ordered that the hearing be in camera and prohibited the Named Person from disclosing any information pertaining to the hearing. The Named Person challenged the constitutionality of section 83.28, and that hearing was also held in camera. The judge who heard the application dismissed the investigatee's constitutional challenge.

Neither the press nor the public had notice of proceedings which were conducted entirely in secret. The two accused in the ongoing Air India trial knew nothing of the proceedings either, but "fortuitously" became aware of the order. By happenstance, an alert Vancouver Sun reporter also discovered that a hearing which was somehow linked to Air India was taking place behind closed doors. As a result of those developments, the judge who dismissed the constitutional challenge delivered a synopsis of her reasons in open court. She allowed counsel for the Air India co-accused to attend the investigative hearing, but prohibited the lawyers from disclosing any information learned in that hearing to their clients.

If it is accepted that the open court principle must sometimes yield, the secrecy of this process was troubling. The fact that proceedings were commenced was unknown, not only to the public but also to the accused standing trial, who had an interest in what that process disclosed. That a constitutional challenge to section 83.28 had been brought was also

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37 See paras. 68-71 (discussing the safety, interests and rights of witnesses and third parties), and paras. 72-82 (considering the risk to the proper administration of justice).

38 Ibid., at para. 41.

39 The facts are set out in paras. 5-20 in the joint majority opinion; ibid.
hidden from the public. But for the doggedness of one reporter, the hearing and its consequences for the Air India trial might have remained a dark secret in the criminal justice process.

It is apparent that at least some members of the Court were taken aback by this chain of events. In the constitutional challenge to section 83.28, two of seven members of the panel were prepared to declare the provision unconstitutional and a third, Binnie J., expressed his outrage over what he regarded as a serious abuse of process. In *Vancouver Sun*, Iacobucci and Arbour JJ. refrained from criticizing the lower court judges but made it plain that “the present facts clearly illustrate the mischief that flows from a presumption of secrecy”. The problem was that “[s]ecrecy then becomes the norm, is applied across the board, and sealing orders follow as a matter of course”. As they explained, the “unfolding of events” in *Vancouver Sun* and the section 83.28 case also illustrates “how antithetical to judicial process secret hearings are”.

If the investigative nature of the process counselled against the full rigour of the open court principle, the extenuating circumstances of this hearing and the public distrust the process could so easily breed may have been factors in the Court’s decision to place section 83.28 under its strictures. By requiring the government to satisfy the *Dagenais/Mentuck* test or else hold section 83.28 hearings in public, the Court placed a substantial burden on the provision’s use. Without striking it down, the Court made it more difficult for the government to conduct investigative hearings into terrorist activities. The question that divided the majority and minority opinions was whether the *MacIntyre* rationales permitted a presumption of covertness in the case of section 83.28’s investigative hearing, or whether the competing interests at stake could be adequately protected under a presumption of openness, with covertness as the fallback position, under the *Dagenais/Mentuck* test. To the extent the government cannot effectively conduct investigative hearings under a presumption of openness, *Vancouver Sun* may have effectively rendered it unavailable.

40 LeBel and Fish dissented and would have declared s.83.28 invalid; Binnie J. would have upheld the provision but found its use in these circumstances to be an abuse of process. As he stated, “the s.83.28 order in this case was sought by the Crown for an inappropriate purpose, it was granted on inappropriate terms, and its impropriety was not cured”; *supra*, note 5, at para. 111.

41 *Vancouver Sun*, *supra*, note 1, at para.50.

42 Ibid.

43 Ibid., at para. 52.
What emerges from *Vancouver Sun* is a commitment to open justice and to the standards of governance that are necessary to protect that principle. It may be that the circumstances surrounding the Air India section 83.28 application made it easy for the Court to impose a constitutional requirement of transparency. Yet the government claimed that covertness was required and the Court’s rejection of the claim revealed its commitment to open justice and to section 2(b). That is why *Vancouver Sun* stands as an example of principled decision making.

3. **HARPER V. CANADA (ATTORNEY GENERAL)**

(a) The Contextual Approach: Not a section 2(b) Success Story

Though the Supreme Court did not apply the contextual approach in terms, *Harper v. Canada (Attorney General)* is of that tradition in the section 2(b) jurisprudence.\(^4^4\) That approach, which dominated decision making in the 1990s, was based on the following contradiction. On one hand, according to *Irwin Toy Ltd. v. Québec* (*Procureur général*), freedom of expression is based on a principle of content neutrality.\(^4^5\) In other words, all expressive activity — whether offensive or not and whether valuable or not — is protected by section 2(b) of the *Charter*. On the other hand, the content of expression can and should be treated differently under section 1.\(^4^6\)

The suggestion that not all expressive activities are equal first found voice in the proposal to apply a contextual approach in balancing values under section 1.\(^4^7\) Before long that innovation added a step to the *Oakes* test which allowed the judges to assess the relative value of expression.\(^4^8\)

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44 Supra, note 2.
“Core values” analysis was a device that enabled the Court to attenuate the standard of justification when it deemed the content of a message to be of low value. In function and result, the contextual approach’s values analysis legitimized the kinds of content distinctions s. 2(b)’s neutrality principle was designed to avoid.

In turn this methodology produced a generation of decisions which upheld a variety of restrictions on “low value” expression.\(^{49}\) In effect, the core-values analysis saved limits on expressive activity whenever

the Court found that the content of the message had little or no value. One difficulty was that this approach conflated the concepts of value and harm: it assumed that expression which has little or no value is also harmful, whether or not a harm independent of its perceived value could be shown. At the same time, an approach that limited expressive activity which was valueless but not harmful rendered the principle of content neutrality all but meaningless. As long as that methodology prevailed, the prospects for section 2(b) and the principle of content neutrality remained dim. Moreover, the contextual approach could not be considered a model of governance, because it invoked an abstract and ideal conception of expression to undermine the freedom in particular cases, it added “context” to the Oakes test as a way of diluting the standard of justification under section 1, and it allowed the Court to uphold limits on expression that was perceived as valueless but not proven, by evidence, to be harmful.

More recently, the Court has downplayed the role of the contextual approach in section 2(b). If it is unfortunate that the Court has not invalidated a legislative restriction on expressive freedom since Thomson Newspapers Co. v. Canada (Attorney General), the decline of the contextual approach has been encouraging. Its drop in doctrinal status suggested that the Court had begun to separate the concepts of value and harm in determining the permissibility of content-based distinctions. This was a welcome development, because expression is not constitutionally protected because a given message is necessarily valuable, but rather because freedom prevails unless there is evidence that its content is harmful. Placing the focus under section 1 on the evidence of harm is more consistent with the principle of content neutrality and the underlying values of section 2(b).

In hindsight, the contextual approach had two redeeming qualities. First, though misdirected, the Court was forthright enough during the 1990s to explain that the constitutional status of expression depended on the value of the message. This the majority opinion in Harper did not or could not do. Second, the contextual approach did not deter the
Court from protecting unpopular or controversial expressive activity when section 1’s requirements were not met. For instance, despite a rising tide against smoking, tobacco companies and advertising, a majority held in *RJR-Macdonald Inc.* that Parliament’s ban on tobacco advertising unjustifiably violated freedom of expression. Another example is *Libman c. Québec (Procureur général)*, which invalidated limits on third party spending under the minimal impairment analysis, despite the Court’s conclusion that such limits are justifiable in principle. A third is *Thomson Newspapers*, which applied a principled section 1 analysis and is an example of governance for that reason. The contextual approach may be in remission at present, but that does not mean that the Court’s decisions are grounded in principle.

Only days before Prime Minister Martin called a federal election in May 2004, the Supreme Court of Canada issued one of its most important judgments on expressive freedom in *Harper v. Canada (Attorney General)*. There, the Court upheld the Canada Election Act’s limits on third party advertising during federal election campaigns. Parliament’s restrictions targeted the status of the speaker, as a third party or citizen participant, rather than the content of the expression. Nor did the Court rely on the contextual approach to uphold the restrictions; participation in a democratic election is at the core of section 2(b) and it would have been awkward to dilute section 1 on a “core-values” analysis. Instead, when it found them inconvenient, the majority opinion simply deflected section 1’s evidentiary requirements. As *Harper* shows, the result of an *ad hoc* approach to section 1 and its evidentiary requirements is methodological anarchy. The point is reinforced by the Court’s pre-*Harper* decisions on participation in the democratic process.

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53 *Supra*, note 49.
55 *Supra*, note 52.
57 *Supra*, note 3.
(b) Elections and the Contest Between Equality and Participation


Though the constitutionality of limits under \textit{federal} legislation was a matter of first impression for the Court in Harper II, the status of third party advertising was not. In 1997 Libman \textit{v.} Québec (Procureur général) held that \textit{provincial} legislation which effectively banned third
party participation in a referendum setting was unconstitutional. Despite that result, the Court’s unanimous opinion relied heavily on the Lortie Commission Report, expressly disagreed with the Alberta Court of Appeal’s decision in Canada (Attorney General) v. Somerville, and recognized that “spending limits are essential to ensure the primacy of the principle of fairness in democratic elections.” Not only did Libman find such limits permissible, it indicated that they are positively desirable as well.

The Lortie Commission on Electoral Reform and Party Financing was charged to look at a number of issues relating to the electoral system and campaign finances, including the role of third party advertising, was one such issue. On that question the Commission was strongly of the view that limits on participation are vital to the integrity and fairness of the electoral process. In part, that view rested on the conclusion that it would be impossible to control party spending if third party advertising was not regulated. Significantly, though, the Commission also treated third parties as outsiders who should be held to a nominal role in election campaigns. The Commission thought that their participation would tilt the playing field, skew the process and pose a disruptive presence in election debate. Inevitably, some voices would become too powerful and others would be drowned out.

Libman c. Québec (Procureur général) agreed with those conclusions. Specifically, the Court found that Quebec’s restrictions on referendum advertising were “highly laudable”: the limits would prevent “the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources”; the limits would ensure that some positions are not “buried by others” and permit an “informed choice” by voters; moreover, by preventing the process from being “dominated by the power of money”,

64 Supra, note 59.
65 Libman, supra, note 56, at 598 (citing the Lortie Commission).
66 It would be disruptive in two ways: first it would undercut the political equality of citizens because those with wealth could monopolize the discourse and attain greater influence than those less affluent; and second, third party participation would create advantages and disadvantages for the candidates and their parties that would affect the fairness of elections.
limits would “preserve the confidence of the electorate in the electoral process”.

At the same time, ’s support for spending limits conflicted with the Alberta Court of Appeal’s decision in Canada (Attorney General) v. Somerville, which had invalidated Parliament’s earlier restrictions on third party advertising. The federal government did not seek leave to appeal and Somerville never came before the Court. Though it had no access to the record and evidence, or to submissions from counsel, the Court’s unanimous opinion simply declared in Libman that “we cannot accept the Alberta Court of Appeal’s point of view because we disagree with its conclusion”.

The Court invalidated Quebec’s referendum spending limits in any case because the restrictions effectively placed a total ban on third party participation. In striking the legislation, it suggested that a limit similar to that recommended by the Lortie Commission would be “far less intrusive” of expressive freedom. Without endorsing the Commission’s recommendation, which proposed a $1,000 maximum, the Court indicated that the amount allowed would “have to be fair while being small enough to be consistent with the objectives of the Act”.

The federal government responded with new provisions that reset the third party limit on spending in parliamentary elections at $3000 per constituency and $150,000 nationally. In light of Libman the question in Harper II was whether that limit was generous enough to survive review under section 1. The Alberta Court of Appeal once again answered that question in the negative. Meanwhile, the Supreme Court’s jurisprudence had evolved.

After supporting its position on third party limits in Libman, a majority of the Court in Thomson Newspapers Co. v. Canada (Attorney General) disagreed with the Lortie Commission and struck Parliament’s ban on opinion polls in the final 72 hours of an election campaign.

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67 Ibid. (emphasis added).
68 Supra, note 59.
69 Libman, supra, note 56, at 619.
70 Under the Special Version of the Election Act applicable to the referendum process, third party spending was limited, under section 404, to a maximum of $600, which could be applied to the organization or holding of a meeting.
71 Supra, note 56, at 619-20.
72 Ibid.
73 Supra, note 61.
74 Though the Lortie Commission recommended a 48 hour blackout, the legislative provision considered by the Court in Thomson Newspapers established
with third party spending limits, the argument for a blackout was that such polls might unduly influence voters and distort election results. Against a strong dissent by Gonthier J., Bastarache J. relied on sound methodology to explain his reasons for striking the limit.  

After carefully considering the evidence, he held that “[t]he very serious invasion of the freedom of expression of all Canadians is not outweighed by the speculative and marginal benefits postulated by the government”. In doing so he refused to accept that voters required Parliament’s intervention to protect them from information which might corrupt their ballot decision. To the contrary, he asserted that voters have “the right to consider the results of polls as part of a strategic exercise of their vote”. Bastarache J. also scoffed at the suggestion that in doing so citizens would be “so naive as to forget the issues and interests which motivate them to vote for a particular candidate”. He claimed that it was impossible, “without gravely insulting the Canadian voter”, to accept that “there is any likelihood that an individual would be so enthralled by a particular poll result as to allow his or her electoral judgment to be ruled by it”.  

His majority opinion also considered the relative value and harm of opinion polls in some detail. On that point Bastarache J. stated that “[t]he possibility of harm arising from the unfortunate publication of an inaccurate poll does not replace the general nature of this expression at the core of s.2(b)”. Despite the possibility that some voters might be misled by these polls, he rejected the suggestion that the harm warranted a “significant level of deference to the government in fashioning means which trespass on the freedom of expression”. As he explained, “little

75 In dissent, Gonthier J. maintained that “[b]eing themselves the very objects of elections, members of Parliament were in the best position to assess the effects of polls in electoral campaigns and their impact on individual voters”; ibid., at 908. Following a review of the evidence he concluded that opinion polls have a significant influence and are subject to “error, misrepresentation and [are] open to manipulation” ibid., at 925. In such circumstances it was justifiable for Parliament to draw a distinction between voter access to any and all information, including poor information, and voter access to good information, including timely information. Ibid., at 908 and 923.  
76 Ibid., at 973.  
77 Ibid., at 949 (emphasis added).  
78 Ibid.  
79 Ibid.  
80 Ibid., at 945 (emphasis added).  
81 Ibid., at 962.
deference should be shown in this case where the contextual factors indicate that the government has not established that the harm which it is seeking to prevent is widespread or significant.”

Bastarache J. found no evidence that voters suffered from any misapprehension regarding the accuracy of a single poll. To that he added that the government’s claims of widespread or significant harm were not compelling. In fact he responded harshly to the government’s attempt to justify the ban “on the basis that some indeterminate number of voters might be unable to spot an inaccurate poll result and might rely to a significant degree on the error . . .” In striking down the opinion poll blackout, Bastarache J. gave section 2(b)’s underlying values and section 1’s evidentiary requirements rigorous and disciplined attention. Notably, Thomson Newspapers was the first Supreme Court decision under section 2(b) to break ranks with the dilution of section 1 analysis under the contextual approach during this period. It provided a model of governance of section 2(b) adjudication outside the open justice context.

In addition to Thomson Newspapers and its evidence-based section 2(b) methodology, the Supreme Court established a right to participate in the democratic process in Figueroa v. Canada (Attorney General). In doing so, Figueroa created potential conflict between the principle of meaningful participation and Libman’s support for third party spending limits. There, the challenge was aimed at provisions in the Canada Elections Act which made the statutory benefits and entitlements that are available to political parties subject to a 50 candidate minimum. Though it did not interfere with any citizen’s right to vote, the minimum disadvantaged smaller parties that could not field that many candidates. Parties unable to cross that threshold could not be registered, were not eligible to issue tax receipts, to transfer unused election funds to the party, or to have their party affiliation listed on the ballot.

Section 3 of the Charter protects the rights of citizens, not of candidates for office and their political parties. In the circumstances, the Court could only find a breach of the guarantee by concluding that Parliament’s requirements for party status infringed the individual rights

82 Ibid., at 963 (emphasis added).
83 Ibid., at 956.
84 Ibid., at 971 (emphasis added).
85 Supra, note 58.
86 Canada Elections Act, R.S.C. 1985, c.E-2, ss.24(2), 24(3), and 28(2).
87 This guarantee provides: “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein”.

88 Ibid., at 963 (emphasis added).
of Canadian voters. In the course of invalidating provisions that excluded the Communist Party from statutory benefits, Iacobucci J. created an individual right to play a meaningful role in the democratic process.

His majority opinion began from the proposition that section 3 guarantees the right “to a certain level of participation in the electoral process”. Iacobucci J. expanded on the concept of participation by describing it as the right “to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process”. He added that if the sovereign power in a democracy resides in “the people as a whole”, each citizen “must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives”. Absent such a right, he concluded, “ours would not be a true democracy”.

For those reasons, participation under his conception of democracy has an intrinsic value independent of its impact upon the actual outcome of elections.

Figueroa found that the 50 candidate minimum disadvantaged the Communist Party in ways that would deny citizens access to that Party’s ideas. As such, the legislation infringed the right of voters to “play a meaningful role in the electoral process”. Specifically, Parliament’s exclusionary threshold compromised voter participation because provisions that disadvantaged smaller parties augmented existing disparities and enabled the “most affluent parties” to dominate the public discourse, thereby depriving their opponents of a reasonable opportunity to speak and to be heard. In other words, the 50 candidate minimum exacerbated a pre-existing disparity in the capacity of disadvantaged political parties to introduce their ideas to the open dialogue of the electoral process. The problem with Parliament’s scheme was that it enabled the established parties to retain their advantages of size and opportunity. The voices of smaller parties would be drowned out under such a scheme.

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88 Figueroa, supra, note 58, at 934.
89 Ibid.
90 Ibid., at 936 (emphasis added).
91 Ibid.
92 Ibid., at 935 (emphasis added).
93 Ibid., at 933.
94 Ibid., at 945.
95 As Iacobucci J. explained: “the already marginalized voices of political parties with a limited geographical base will be drowned out by the mainstream parties. . . .”; ibid.
Figueroa held significance for Harper II because spending limits have a greater, and more immediate impact on participation in the democratic process. The reason is that restrictions on third party participation effectively grant the political parties and their candidates a monopoly on debate during an election campaign. Provisions which limit third parties to nominal spending unavoidably exacerbate the existing disparities between party and non-party participants. Moreover, the acknowledged purpose of such limits is that to limit the role of third parties in the electoral process.

Seemingly, Harper v. Canada (Attorney General) required the Court to choose between Libman’s egalitarian model and Figueroa’s principle of meaningful participation. Under the Libman-Lortie view, elections are a process in which candidates and their parties are the active participants. That conception allows voters and third parties to exercise nominal rights of participation but otherwise relegates them to status as passive observers. The only forms of participation open to them are the right to vote, which is guaranteed by section 3 of the Charter, and the right to exercise their section 2(b) rights by making donations to the candidates or their political parties. Beyond the small allowance permitted in recent years by statute, individuals and groups are not allowed to participate in their own voice.

The dilemma for the Court was that Figueroa’s principle of meaningful participation could not be easily reconciled with Libman’s egalitarian rationale. Under the Libman-Lortie concept of electoral fairness, all third parties are formally equal: the process treats them the same way by effectively excluding them individually and as a collective of citizens-participants from playing a role in election debate. That conception of fairness focuses almost exclusive attention on the interests of political parties and their candidates. Libman made it clear in the statement that third party participation should be limited because “[i]ndependent spending could very well have the effect of directly or indirectly promoting one candidate or political party to the detriment of the others”.96 Despite acknowledging that third parties contribute to the debate in valuable ways, the Court concluded that their participation can be limited because “it is the candidates and political parties that are running for election”.97 Third parties may be equal to each other in the system but equal, under that conception of participation, means disentitled.

96 Supra, note 56 at 600.
97 Ibid., at 601 (emphasis added).
(c) The Egalitarian Model and the Equal Right Not to Participate

Though Bastarache J. acknowledged that Harper II provided the first opportunity for the Court to consider third party spending limits, his interpretation of Libman c. Québec (Procureur général) made it impossible for the challenge to succeed.\(^98\) He deflected Thomson Newspapers and Figueroa by circular reasoning which rested on the following logic. First he noted that Libman’s concept of electoral fairness was consistent with the egalitarian model adopted by Parliament.\(^99\) Then he observed that the C.E.A.’s third party limits constituted a response to Libman. The result was institutional accord: Libman’s endorsement of limits was consistent with the government’s conception of electoral fairness, and the government’s response to Libman was consistent with the Court’s conception of electoral fairness. Once Bastarache J. found that Parliament and the Court agreed on the merits of the egalitarian model, the C.E.A.’s spending limits became unassailable.

The Court’s majority opinion also asked the wrong question to enhance Libman’s status at the expense of Thomson Newspapers and Figueroa. The issue in Harper II was not whether the Court and Parliament agree that the right to participate should be limited to promote an egalitarian model. The Charter does not ask the Court to place its institutional weight on one side of that question or the other. The issue instead was whether the government could demonstrate that the risks associated with third party spending were sufficient to justify an egalitarian model that devalued rights of participation that are protected by section 2(b).

In the circumstances, Figueroa’s principle of meaningful participation posed an obstacle which had to be explained away. To avoid the force of Iacobucci J.’s uninhibited language, Bastarache J. declared that Figueroa did not apply in Harper because section 3’s rights of participation cannot be claimed under section 2(b). Yet if the statutory provisions that disadvantaged smaller parties compromised the rights of voters in Figueroa, it would be impossible for limits which directly prohibit individuals from playing a role in election debate not to constitute a more serious interference with rights protected by section 2(b)’s guarantee of expressive freedom.


\(^99\) Ibid., at para. 62.
In refusing to extend *Figueroa*’s logic to section 2(b), Bastarache J. suggested that third party advertising is inconsistent with section 3’s concept of meaningful participation because “the unequal dissemination of points of view undermines the voter’s ability to be adequately informed of all views”. Though it was not substantiated, his position was that information does not assist, but interferes with, the freedom of an informed voter. The loosely connected logic of that argument is that voters can only be informed when voices are equal, and that third party involvement undercuts the informed and therefore meaningful participation of voters. In making that argument Bastarache J. assumed that the voter’s perception would be clouded by too much information from diverse and unequal sources. Yet *Harper*’s protectionist gestures in this context recall Gonthier J.’s willingness in *Thomson Newspapers* to protect voters from poor polling information which might distract and confuse them in similar ways. There, however, Bastarache J. had retorted that “the Canadian voter is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information”.

Bastarache J. conceded that spending limits which are overly restrictive can undermine the informational component of section 3, but added that meaningful participation does not include the freedom to conduct a campaign that might determine the outcome. This also contradicts *Figueroa*, which held that participation has an intrinsic value independent of its impact on the election outcome. The issue in *Harper* was not whether third parties have a constitutional right to determine the outcome of an election; the question was whether they have a right to participate, whether their impact is small or large. Yet the majority opinion drove a wedge between the voter’s section 3 rights and section 2(b)’s guarantee of expressive freedom. Under that view, third party participation erodes rather than promotes meaningful participation under section 3. Put differently, democratic participation under section 2(b) is inimical to the interests of voters. Whatever the merits of that view, Bastarache J. still failed to explain why section 3’s guarantee is paramount over section 2(b), either in principle or in this context.

His majority opinion also rendered the evidence meaningless by insisting that the Court was required to choose between the egalitarian

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101 *Thomson Newspapers*, *supra*, note 52, at 956.
103 *Supra*, note 92.
model and unlimited rights of participation. Thus he maintained that those who have access to the most resources will monopolize the election discourse and undermine the voter’s ability to be adequately informed of all views. This observation supported the conclusion that section 3 does not guarantee a right to unlimited information or unlimited participation. But Harper did not force the Court to choose between a $3,000 limit and no limit whatsoever. By referring throughout the opinion to the problem of “unlimited third party advertising”, Bastarache J. framed the analysis as though there were only two choices. The question before the Court was not whether restrictions on third party advertising are per se unconstitutional but whether the particular limit chosen by Parliament – $3,000 per electoral district and $150,000 nationally – was justifiable under section 1.

In answer to that question and in contrast to the methodology he applied in Thomson Newspapers, Bastarache J. brushed quickly over discussion of the expressive activity at stake, noting only that third party advertising enriches the political discourse and lies at the core of section 2(b). Though he had little choice but to concede the point, his reasons make it clear that he attached little or no value to the right of third parties to participate in election debate. Once having accepted that it would normally be entitled to a high degree of constitutional protection, Bastarache J. stated that “third party advertising will be less deserving of constitutional protection” in some circumstances.

Again in contrast to Thomson Newspapers, where he explained why deference was inappropriate, Bastarache J. held in Harper that the Court should defer to Parliament. Third party spending invited that approach, he said, because Parliament has the right to choose Canada’s electoral model and to address any nuances in its implementation. Without specifically relying on the contextual approach as it evolved in the section 2(b) jurisprudence of the 1990s, he relied on undisclosed “contextual factors” to support a deferential version of the section 1 analy-

104 Harper, supra, note 2, at para. 72.
105 Ibid.
106 Ibid., at paras. 97, 107, and 121.
107 Ibid., at para 84.
108 Ibid., at para 85.
109 Ibid., at para. 87.
110 Ibid., at para. 88. For instance, in undertaking the minimal impairment analysis, Bastarache J. stated that “the contextual factors indicate that the Court should afford deference to the balance Parliament has struck between political expression and meaningful participation in the electoral process”. Ibid., at para. 111.
sis.\textsuperscript{110} Apart from undisguised support for the egalitarian model, it is unclear which contextual factors invited this need for deference.

Once deference was in place, Bastarache J. sought to explain how Parliament's spending limits could be regarded as reasonable when there was no evidence that third party participation would harm the electoral process. There, too, he could not avoid admitting that "[t]here is no evidence ... that third party advertising seeks to be manipulative".\textsuperscript{111} Nor was there evidence that "third parties wish to use their advertising dollars to smear candidates or engage in other forms of non-political discourse".\textsuperscript{112} In the absence of recent, documented evidence, Bastarache J. reprimanded the lower courts for discounting the Lortie Report, which he touted as the "central piece in the evidentiary record establishing the possible harm engendered by uncontrolled third party advertising".\textsuperscript{113} At best, he was able to say that without limits, electoral fairness is "a real possibility".\textsuperscript{114}

The moment of truth in the majority opinion is found in the statement that "[s]urely, Parliament does not have to wait for the feared harm to occur before it can enact measures to prevent the possibility of harm occurring or to remedy the harm, should it occur."\textsuperscript{115} In blunt terms, this means that the evidence does not matter, and that limits on constitutional rights are reasonable and justifiable whether or not the government can show that exercising of the right poses an articulated or articulable harm. It is a remarkable statement at large, and one that is as worrying as it is surprising in this context. Harper II is yet more extraordinary against the background of the Thomson Newspapers methodology and Figueroa's principle of meaningful participation. It is as transparent as it is inescapable that the majority opinion is an example of result-based decision making. Bastarache J. could not uphold the limit on third party spending without ignoring the Court's decisions on participation, and abandoning the methodology of Thomson Newspapers and other section 2(b) cases.
(d) Participation and the Equal Voice of Each Citizen

The majority opinion’s unmasked support for the egalitarian model, in combination with its lack of respect for an evidence-based methodology under section 1, invited dissent. The Chief Justice and Major J. obliged by writing a joint minority opinion, in which Binnie J. concurred. They maintained that it was not necessary to choose between and Figueroa, because Parliament’s spending limits were unconstitutional for the same reasons Quebec’s scheme had been invalidated. As they explained, “the incursion essentially denies free expression and far surpasses what is required to meet the perceived threat that citizen speech will drown out other political discourse”. In Libman, the Court held that the restrictions were so severe that they came close to being a total ban. The Chief Justice and Major J. stated that Harper was indistinguishable on that point: the situation was “precisely the same” as in Libman, because “[i]t is not an exaggeration to say that the [CEA’s] limits on citizens amount to a virtual ban on their participation in political debate during the election period”.116

Unlike Bastarache J., who barely mentioned it, the joint dissent focused on the severity of the violation. To them the meagerness of Parliament’s $3,000 allowance represented a serious incursion on free expression in the political realm, because it effectively denied the right of an ordinary citizen to give meaningful and effective expression to her political views during a federal election campaign.118 Parliament’s provisions set advertising limits for citizens at such low levels that they “cannot effectively communicate with their fellow citizens on election issues during an election campaign”.119 As a result, “effective local, regional and national expression of ideas becomes the exclusive right of registered political parties and their candidates”.120 For them it was problematic that under Parliament’s regime, “the only sustained messages voters see and hear during the course of an election campaign are from political parties”.121

It is clear that the dissenting judges found that result offensive to democratic values and to the Charter principle that political expression

116 Ibid., at para 2 (citing Libman).
117 Ibid., at para 35.
118 Ibid., at para 1.
119 Ibid., at para 2.
120 Ibid., at para 7 (emphasis added).
121 Ibid., at para. 19.
is “the single most important and protected type of expression”.\textsuperscript{122} In their view, it was impermissible for Parliament to advance or protect the interests of registered political parties at the expense of section 2(b), which guarantees “an equal voice to each citizen”.\textsuperscript{123} The guarantee embraces the right of the speaker to communicate with members of the electorate, as well as the right of voters to listen and to have access to the commentary, perspective, and opinions of fellow citizens.

Not only did the dissent challenge the proposition that third parties do not have the same rights of participation as political parties, it rejected the majority opinion’s conclusion that non-party participation is inimical to the rights of voters under section 3. To the contrary, the Chief Justice and Major J. explained that voters have a constitutionally protected right, not only under Figueroa but under the section 2(b) jurisprudence as well, to hear the speaker’s message. They regarded the interests of the section 3 voter and the section 2(b) participants as compatible, not incompatible, as the majority opinion contended. Moreover, they said it was no answer to spending limits that citizens remain free to speak through a registered political party. Citizens are entitled to communicate with fellow voters directly, and the right to do so is “essential to the effective debate upon which our democracy rests, and lies at the core of the free expression guarantee”.\textsuperscript{124} For those reasons, the dissenting judges rejected deference and stated that limits on such a fundamental right must be supported by “a clear and convincing demonstration that they are necessary, do not go too far, and enhance more than harm the democratic process”.\textsuperscript{125}

Under section 1, the Chief Justice and Major J. admonished the federal government for failing to adduce evidence that third party spending is harmful; as they explained, the Attorney General had not shown “any real problem requiring rectification”.\textsuperscript{126} Instead, and in the absence of evidence that wealthier Canadians would dominate debate, “[t]he dangers posited [were] wholly hypothetical”.\textsuperscript{127} With a hint of sarcasm, the dissent suggested that if wealthy Canadians were “poised to hijack this country’s election process, an expectation of some evidence to that effect is reasonable”.\textsuperscript{128} Despite the Attorney General’s assertions of

\begin{itemize}
  \item \textsuperscript{122} \textit{Ibid.}, at para. 11.
  \item \textsuperscript{123} \textit{Ibid.}, at para. 13.
  \item \textsuperscript{124} \textit{Ibid.}, at para. 21.
  \item \textsuperscript{125} \textit{Ibid.}, (emphasis added).
  \item \textsuperscript{126} \textit{Ibid.}, at para. 34.
  \item \textsuperscript{127} \textit{Ibid.}
  \item \textsuperscript{128} \textit{Ibid.}, (emphasis added).
\end{itemize}
necessity, the legislation could only be regarded as a serious "overreaction to a non-existent problem".\textsuperscript{129}

The dissent went on to dismiss the suggestion that such draconian limits are required to meet the "perceived dangers of inequality, an uninformed electorate, and a public perception that the system is unfair".\textsuperscript{130} To the contrary, the judges speculated that the limits could exacerbate those dangers, produce an electorate that is less well informed and -- by silencing those citizens who would otherwise participate -- contribute to a perception that the election process is unfair. Not only did the dissent regard the possible benefits of the limit as illusory, it claimed that the measures "may actually cause more inequality, less civic engagement and greater disrepute than they avoid".\textsuperscript{131} In concluding, the Chief Justice and Major J. spoke in pique of the chilling effect the limits would have on political expression, forcing citizens into a Hobson's choice between not speaking at all during an election or having their voices reduced to a mere whisper.\textsuperscript{132}

(e) Conclusion

The egalitarian model prevailed in \textit{Harper v. Canada (Attorney General)}, though not without stiff resistance from members of the Court who saw Parliament's nominal spending allowance as a serious interference with a sacred Charter entitlement: the right to participate in the democratic election of a national government. As shown above, the majority opinion openly supported the egalitarian model, but could not uphold Parliament's limits under the existing law and record without abandoning its commitment to principled decision making. Bastarache J. reduced section 1's evidentiary requirements to the point of disappearance to uphold limits on expressive activity that was patently valuable in nature and not proven harmful.

As such, \textit{Harper} is in contradiction with the Court's key precedents on the Charter and the electoral process. As the dissent maintained, \textit{Harper} did not force the Court to choose between \textit{Libman} and \textit{Figueroa}. In the context of a national election, Parliament's limit effectively silenced third parties and in functional terms amounted to a virtual ban

\textsuperscript{129} \textit{Ibid.}, at paras. 34, 35.
\textsuperscript{130} \textit{Ibid.}, at para. 38.
\textsuperscript{131} \textit{Ibid.}, at para. 42.
\textsuperscript{132} \textit{Ibid.}
on participation. From that perspective, it was unconstitutional for the same reasons Quebec’s scheme was unconstitutional in Libman.

But the majority’s approach also abandoned the methodology of *Thomson Newspapers*, and contrived a conflict between the rights of voters and the rights of would-be participants to avoid *Figueroa*’s principle of meaningful participation. As already mentioned, *Thomson Newspapers* is one of the Court’s most principled section 2(b) decisions. There, the majority opinion considered the nature of the infringement and the value of the activity before concluding that deference to Parliament was unwarranted in the circumstances; in addition, it looked at the evidence of harm in some detail before deciding that the 72 hour opinion poll blackout was unconstitutional. For its inattention to the requisite elements of analysis, *Harper II* stands regretfully but unapologetically in contrast. Likewise, the majority opinion in *Harper* had to find a way of dismissing *Figueroa*’s concept of meaningful participation because that principle posed an obstacle to the egalitarian model. There, *Harper* drove a wedge between participation under section 3 and participation under section 2(b) by declaring that the two are incompatible. This facilitated the conclusion that limits could be imposed on expressive activity to prevent the voter’s meaningful participation from being compromised by the meaningless participation of section 2(b) claimants.

It is worrying that in *Harper* the Court sanctioned the silencing of third party participants. The more serious problem, however, is that the end justified the means: it was the end point or result that mattered to the majority and not the means or discipline of constitutional analysis. Though it should be the other way around, whenever methodology is in conflict with an outcome the Court wants to endorse, methodology is too often abandoned to avoid a result that is required by principled analysis and respect for the evidence.

### 4. A Model of Governance for Section 2(b)

In *Vancouver Sun* the Court held that the presumption of openness applies to various stages of proceedings under section 83.28, and that derogations are unacceptable unless justified under the standard. As a matter of methodology, the majority opinion reviewed the underlying values of the open court principle, contextualized those values to section 83.28 hearings, and then applied an evidence-based standard to the question of exceptions. This approach is exemplary because it reinforced the underlying values of the principle in the setting of investigative hearings, and then made derogations conditional on the evidence. In
doing so, the majority opinion did not flinch from a commitment to principle that unquestionably makes it more difficult for the state to conduct investigative hearings under section 83.28.

By contrast, the majority opinion in *Harper v. Canada (Attorney General)* was designed to diminish and negate section 2(b)'s guarantee of expressive freedom, as well as to avoid testing the permissibility of third party spending limits fairly, on the basis of the evidence. In *Vancouver Sun* the Court endorsed open court's constitutional status as a core value. The same point about democratic participation was conceded in *Harper* but not given significance in the analysis. Whereas *Vancouver Sun* refused to retreat from a presumption of openness, *Harper v. Canada (Attorney General)* did not accept that a similar presumption should apply to expression at the core of democratic government. Third party spending limits did not warrant serious scrutiny under section 1 because the majority opinion declared, instead, that the Court should defer to Parliament. Finally, *Vancouver Sun* applied an evidence-based standard to the question whether exceptions can be justified at various points in a section 83.28 proceeding. To compare, the majority opinion in *Harper* was evasive on that question and chose to uphold third party spending limits which were not demonstrably justified under section 1.

*Harper v. Canada (Attorney General)* is a good example of the worst the section 2(b) jurisprudence has to offer: it is a decision that does not rest on principle but is based on instinctive, reflexive, *ad hoc* considerations. A system of governance is unimportant in such circumstances, because what matters is the result. Rules and principles of governance which stand in the way of that result are a nuisance that must be disregarded. As the Introduction suggested, this style of decision making is anarchistic because it is rule and principle-averse; for that reason it is unacceptable and can only damage the Court's credibility. As well, it is unnecessary: as decisions like *Thomson Newspapers Co. v. Canada (Attorney General)* demonstrate, the Court has developed a system of governance for other section 2(b) issues that is akin to the open court model. It simply has to follow that system from issue to issue and case to case, as a matter of principle.

That model has the same three elements: it affirms section 2(b)'s underlying values, regardless of the context; it incorporates those values into a standard that does not allow them to be easily displaced; and it makes any limits on expressive activity conditional on section 1's evidentiary requirements. Three points or further suggestions can be added to the basic framework. The first is that – as with the open court model – the section 1 analysis in other section 2(b) cases should be informed
at the outset by a presumption specifically in favour of content neutrality, or of the entitlement generally when content neutrality is not in issue. Second, section 2(b)’s underlying values and the elements of the analysis should be constant, and should not shift with subjective perceptions of the expressive activity at stake. For example, the exacting scrutiny of Thomson Newspapers cannot stand alongside the undue deference of Harper, when participation in the democratic process is the issue in both cases. And third, the requirement that limits on constitutionally protected activity be supported by evidence of harm must be taken seriously. Not to do so makes a mockery of the s.1 analysis.

Subject to those qualifications, a model of governance is in place, and needs only to be followed. Not to do so in all s.2(b) decision making will perpetuate the contradictions and double standards that a comparison of Vancouver Sun and Harper reveals; not to do so will also perpetuate the methodological anarchy that identifies Harper, unfortunately, as the new low point in the s.2(b) jurisprudence.