
Libman v. Quebec (A.G.) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model

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This article contends that in *Libman v. Quebec (A.G.)*, the Supreme Court of Canada rejected the libertarian reasoning of the Alberta courts in *National Citizens' Coalition* and *Somerville* in favour of an egalitarian theory of electoral regulation. The egalitarian model adopted by the Court provides a justification for spending and expression limits that mitigate the disproportionate effects of wealth in the election process. The egalitarian model, it is argued, draws upon the Canadian tradition of "fairness" in electoral regulation and the liberal philosophy of John Rawls. The egalitarian model is suggested to be, in large part, a reaction to the deleterious effect of big money on the United States political process made possible by the United States Supreme Court's decision in *Buckley v. Valeo* that struck down controls on election spending. The possibility that *Libman* represents a reconception of electoral expression as a distinct genre of expression—termed "institutionally-bound" expression by C. Edwin Baker—akin to Parliamentary or other context-specific speech is raised. Such a conclusion is argued to be plausible, but premature. This article also considers the Supreme Court of Canada decision in *Thomson Newspapers*. *Thomson Newspapers*, it is suggested, shows that the egalitarian theory does not justify limits on forms of expression such as opinion polls that can distort the electoral process, but does not do so in a predictable way that contributes to political inequality.

Cet article soutient que dans *Libman c. Québec (P.G.)*, la Cour suprême du Canada a rejeté le raisonnement libertaire des tribunaux de l'Alberta dans *National Citizens Coalition* et *Somerville* et a privilégié une théorie égalitaire de la réglementation électorale. Le modèle égalitaire adopté par la Cour permet de justifier les limites qui sont imposées aux dépenses et à l'expression afin de mitiger les effets disproportionnés de la richesse sur le processus électoral. Le modèle égalitaire est inspiré de la tradition canadienne d'impartialité et d'équité (*fairness*) dans la réglementation électorale mais aussi de la philosophie libérale de John Rawls. Il est suggéré que le modèle égalitaire serait, en grande partie, une réaction à l'impact nuisible des fortunes sur le processus politique aux États-Unis. Cet impact a été facilité par la décision de la Cour suprême des États-Unis dans *Buckley c. Valeo* qui a aboli le contrôle des dépenses électorales. Il est proposé que l'affaire *Libman* redéfinit l'expression électorale comme étant un genre d'expression distinct que C. Edwin Baker appelle «institutionally-bound». Ce genre serait comparable à un discours parlementaire ou à tout autre discours donné dans un contexte particulier. Une telle conclusion est plausible mais prématurée. Cet article examine également la décision de la Cour suprême du Canada dans *Thompson Newspapers*. Ce jugement démontre que la théorie égalitaire ne saurait justifier des restrictions aux formes d'expression comme les scrutins populaires qui, bien qu'ils puissent nuire au processus électoral, ne nuiraient pas de façon prévisible et donc ne contribueraient pas à l'inégalité politique.

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The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens. If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate.

Libman v. Quebec per curiam

Introduction

Since the introduction of the *Canadian Charter of Rights and Freedoms*¹ in 1982, the regulation of expression in Canadian elections has been under seige. A series of decisions in Alberta, the jurisdiction of choice for libertarian opponents of the *Canada Elections Act*,² casts serious doubt on the sustainability of controls over non-participant activities³ and, by extension, the integrated system of spending controls during elections. The uncertainty created by these decisions was dispelled by *Libman v. Quebec (A.G.)*,⁴ the first case after the *Charter*'s entry into force where the Supreme Court of Canada had the opportunity to contemplate the constitutionality of the administration of democracy. Unlike the Alberta decisions which contested federal election regulations, *Libman* took place in the context of a provincial referendum law.⁵ *Libman* was a watershed decision because it emphatically demonstrated that the *Charter* guarantee of freedom of expression and the Canadian tradition of regulating democracy can live together. Moreover, *Libman* indicated that the Supreme Court is developing a coherent theory of election and referendum regulation based on *Charter* values and a common sense understanding of representative democracy as it has developed in Canada. Subsequent to *Libman* in *Thomson Newspapers v. Canada (A.G.)*,⁶ the Supreme Court revisited the subject of freedom of expression in elections in the context of opinion poll restrictions. *Thomson* clarified some elements of the egalitarian theory and revealed that there is a division between members of the Court as to the scope of the theory.

American political philosopher Frederick Schauer argues that, broadly defined, there are two conceptions of democracy: libertarian and egalitarian.⁷ The libertarian

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

² R.S.C. 1985, c. E-2.

³ For the sake of clarity, the term "non-participant" will be used instead of "third party" to describe individuals and groups not standing for election or fielding candidates.

⁴ [1997] 3 S.C.R. 569, 151 D.L.R. (4th) 385 [hereinafter *Libman* cited to D.L.R.].

⁵ The terms "referendum" and "election" will be used interchangeably to reflect the Supreme Court's obvious intention that the principles outlined in *Libman* apply equally to elections.

⁶ [1998] 1 S.C.R. 877, 159 D.L.R. (4th) 385 [hereinafter *Thomson Newspapers* cited to S.C.R.].

⁷ F. Schauer, "Judicial Review of the Devices of Democracy" (1994) 94 Colum. L. Rev. 1326 at 1340.

conception eschews State controls and permits those with greater resources or abilities to express themselves disproportionately in the so-called "marketplace of ideas". This conception of democracy has, for the most part, prevailed in the United States where the Supreme Court struck down a central pillar of election finance regulations in the landmark decision of *Buckley v. Valeo*.⁸ Many of the American campaign excesses and controversies in the last twenty years can be blamed, to one degree or another, on *Buckley*. In contrast, the egalitarian conception of democracy is an extension of the "one person-one vote" principle which stands for the proposition that each person's voice in the democratic process is of equal worth. John Rawls, a leading proponent of the egalitarian approach, argues that a just political procedure is only possible where political liberties are fairly valued. He concludes that a just electoral procedure requires that the wealthy be prevented from controlling the electoral process to the detriment of others with less economic power.⁹ This article argues that an egalitarian conception of democracy informed by the ideas of Rawls and other liberal theorists has been adopted by the Supreme Court of Canada in *Libman* under the guise of the elusive idea of "fairness".

The Supreme Court seems to have recognized, at least implicitly, that elections and referenda operate in a *sui generis* context and, despite acknowledging the importance of political expression, freedom of expression is Janus-faced and only one of several competing interests within this context. The majority judgment in *Thomson Newspapers*, written by Bastarache J., neither accepted nor rejected this interpretation, whereas the minority judgment, written by Gonthier J., explicitly adopted this view. Therefore, it can be argued that at least some members of the Supreme Court have accepted the premise that democracy is analogous to other institutional forms of political expression where, in order for there to be effective deliberation, it is necessary that there be regulation of expression to some degree. Implicit in such a view is that some speakers and some subjects are more important or relevant than others and should be given priority. In *Libman*, the Supreme Court effectively created a hierarchy, placing the interests of voters and participants above those of non-participants.¹⁰ This decision has important ramifications for many areas of election regulation.

Part I of this article discusses John Rawls' egalitarian theory of electoral regulation, Ronald Dworkin's criticisms of the theory, C. Edwin Baker's conception of "institutionally bound" expression, and the adoption of the egalitarian model in Canada. In Part II, the libertarian conception of electoral regulation as expressed by the United States Supreme Court and the courts of Alberta is reviewed. The practical implications of the libertarian conception in the United States and Canada are considered. The context of *Libman* and the decisions of the lower courts and the Supreme Court of Canada are outlined in Part III. Part IV critically examines the Supreme Court deci-

⁸ 424 U.S. 1, 96 S.Ct. 612 (1976) [hereinafter *Buckley* cited to U.S.].

⁹ J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 360.

¹⁰ Following *Thomson Newspapers*, it can be argued that the media falls outside this hierarchy, rather than being treated as non-participants.

sion and evaluates the principles outlined against the theoretical basis of the egalitarian model.

I. The Egalitarian Model

The egalitarian model is a synthesis of the arguments for campaign finance restrictions proposed by liberal American scholars. These arguments for limits on campaign expenditures have developed in response to the perception that American politics is dominated by monied interests and that an unhealthy amount of elected representatives' time is spent on fund-raising. While it is true that discussions of the problems of the United States First Amendment are not always applicable to the Canadian constitutional protection of freedom of expression, the arguments advanced in favour of an egalitarian approach to election regulation are clearly relevant to the consideration of any justification of government actions under section 1 of the *Charter*. Two features of the egalitarian model are of particular concern to any consideration of the merits of electoral restrictions. First is the notion of equality of political influence as elaborated by John Rawls. Second is the reconception of electoral expression as "institutionally bound" expression that is, by its very nature, both a product of and subject to restrictions. The former value constitutes a potentially pressing interest and the latter provides an intelligent guide to the exercise of judicial deference.

A. Rawls' Goal of Equality of Political Influence

The egalitarian model has been expressed in different forms,¹¹ but the most influential expression of the principles of this model can be found in the work of John Rawls.¹² Rawls' idea of "justice as fairness" is predicated on a hypothetical idea of original equality; in essence it is based on a social contract model. This principle of equality, according to Rawls, should specify "the kinds of social cooperation that can be entered into and the forms of government that can be established."¹³ From this basic idea he extrapolates that individuals should have an equal opportunity to exercise their liberty to participate in the political life of the State. This is exemplified in the idea of "one person-one vote" and the creation of relatively equal electoral districts in terms of population.¹⁴ Equal opportunity in this sense is not a mere absence of controls so

¹¹ See e.g. O. Fiss, *The Irony of Free Speech* (Cambridge, Mass.: Harvard University Press, 1996); and C. Sunstein, *Democracy and the Problem of Free Speech* (Toronto: Maxwell Macmillan, 1993). It has even been expressed by members of the United States Senate: see Senator R.D. Feingold, "Representative Democracy Versus Corporate Democracy: How Soft Money Erodes the Principle of 'One Person, One Vote'" (1998) 35 Harv. J. on Leg. 377.

¹² J. Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972); and *Political Liberalism*, *supra* note 9. Rawls' ideas are relied upon in Sunstein, *ibid.*, and in Canada, *Royal Commission on Electoral and Party Financing, Final Report: Reforming Electoral Democracy*, vol. 1 (Ottawa: Canada Communications Group, 1991) (Chair: Pierre Lortie) [hereinafter *Final Report*].

¹³ *A Theory of Justice*, *ibid.* at 13.

¹⁴ *Ibid.* at 223.

that all individuals have the opportunity to express themselves as much as they want; it takes account of each individual's ability to influence and participate in the political process. The main obstacle to equal opportunity to participate in the political process is private wealth:

The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation. In due time they are likely to acquire a preponderant weight in settling social questions, at least in regard to those matters upon which they normally agree, which is to say in regard to those things that support their favored circumstances.¹⁵

In his most recent book, *Political Liberalism*,¹⁶ Rawls outlines in greater detail guiding principles for election regulations restricting freedom of speech. Although Rawls writes with the American First Amendment in mind, his points are sufficiently general to make sense in the Canadian context. Rawls states that election laws should be essentially "rules of order for elections and are required to establish a just political procedure in which the fair value of the equal political liberties is maintained."¹⁷ Rawls' primary concern is the protection of the "fair value" of equal political liberties of citizens which includes a roughly equal ability to influence the outcome of elections. An ideal electoral procedure, in Rawls' eyes, would mitigate the influence of wealth and give each citizen a relatively equal opportunity to influence an election or ascend to elected office. Rawls' view is echoed and expanded upon by Cass Sunstein in *Democracy and the Problem of Free Speech*.¹⁸ Sunstein adds a wrinkle to the argument by suggesting that the decision not to regulate speech is in fact a regulatory choice in itself—one that favours the wealthy. He argues that "a system of unlimited expenditures [as presently exists in the United States] should be seen as a regulatory decision to allow disparities in resources to be turned into disparities in political influence."¹⁹ Furthermore, Sunstein suggests that attempts to change the regulatory structure to mitigate disparities "should not be seen as impermissible redistribution."²⁰ The positions of Rawls and Sunstein can be reduced to three basic premises:

- (1) equality of liberty is more important than absolute liberty;
- (2) equality of liberty may only be achieved by limiting freedoms of the wealthy; and
- (3) this may only be achieved through State action.

¹⁵ *Ibid.* at 225.

¹⁶ *Supra* note 9.

¹⁷ *Ibid.* at 357.

¹⁸ *Supra* note 11.

¹⁹ *Ibid.* at 98.

²⁰ *Ibid.*

These premises ineluctably lead to the conclusion stated by Owen Fiss in *The Irony of Free Speech*:

[In some situations] the state may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech. It may have to allocate public resources—hand out megaphones—to those whose voices would not otherwise be heard in the public square. It may even have to silence the voices of some in order to hear the voices of the others. Sometimes there is simply no other way.²¹

In his explication of the principles of the regulation of electoral speech, Rawls also contends that “the instituted arrangements must not impose any undue burdens on the various political groups in society and must affect them all in an equitable manner.”²² This raises the question of what an undue burden is. For Rawls, the issue of defining an undue burden comes back to the question of what it takes to be heard on a roughly equal basis to other citizens. According to Rawls, the prohibition of large expenditures by wealthy individuals and groups would not constitute an undue burden. Indeed, “[s]uch a prohibition may be necessary so that citizens similarly gifted and motivated have roughly an equal chance of influencing the government’s policy and attaining positions of authority irrespective of their economic and social class.”²³ An example of an undue burden, from Rawls’ point of view, would be a restriction on expression in certain public places as that would preclude the expression of poor groups.²⁴

Rawls is careful to underscore the fact that while egalitarian objectives are important, regulations must not be allowed to limit freedom of speech merely because they serve such an end:

Finally, the various regulations of political speech must be rationally designed to achieve the fair value of the political liberties. While it would be too strong to say that they must be the least restrictive regulations required to achieve this end—for who knows what the least restrictive among equally effective regulations might be—nevertheless, these regulations become unreasonable once considerably less restrictive and equally effective alternatives are both known and available.²⁵

This limiting principle is reminiscent of the proportionality test under section 1 of the *Charter*. Like the proportionality element of the *Oakes* test,²⁶ Rawls’ statement is an expression of common sense to the effect that individual freedoms should only be limited in so far as is necessary and by reasonable means.

²¹ *Supra* note 11 at 4. For an elaboration of Fiss’ ideas on campaign finance reform, see O. Fiss, “Money and Politics” (1997) 97 Colum. L. Rev. 2470.

²² *Political Liberalism*, *supra* note 9 at 357.

²³ *Ibid.* at 358.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 at 227 [hereinafter *Oakes*].

Related to this notion of proportionality is Rawls' proviso that regulations not dictate the content of electoral expression and not favour any group or idea over another. Content neutrality is an obvious point—clearly regulations should not directly dictate the content of electoral expression short of a prohibition on violence.²⁷ The question of whether or not this is accomplished indirectly through regulations favouring one group over another is more problematic. Most likely, this condition should be interpreted as a requirement to prevent laws that target a discrete group or idea. For example, laws prohibiting a specific group like the Progressive Conservative Party from using television or prohibiting opposition to a specific policy such as the Goods and Services Tax would fall afoul of this principle. In the United States, it has been argued that the practical effect of spending restrictions is to favour the Democratic Party over the Republican Party because historically, the Republicans have been more effective fund raisers.²⁸ While this argument is generally true, the purpose of Rawls' proviso is not to protect the quantity of speech, it is to protect the quality or integrity of the content of speech. If a ceiling is to be imposed on spending, it will obviously affect one party more than another unless they are equally funded. Parties, although clearly important players and deserving of fair treatment, are clearly subordinate to the overriding concern of fairly valuing the political liberties of citizens.

B. Dworkin and Problems with the Egalitarian Model

The libertarian critique of the Rawlsian approach to the regulation of electoral speech is essentially a devaluing or denial of the place of equality in the consideration of free speech. This view is expressed by the United States Supreme Court in *Buckley* and will be discussed in Part II, below. Libertarians, however, are not the only source of criticism of the egalitarian model. Ronald Dworkin, although he has recently announced that he considers *Buckley* to be wrongly decided,²⁹ has argued that equality of

²⁷ It should be noted, though, that there are Canadian jurisdictions that impose content restrictions on the basis of "fraud": see e.g. the British Columbia *Election Act*, R.S.B.C. 1996, c. 106, s. 256(2) that purports to prohibit the persuasion of voters by "fraudulent means" to cast their vote in favour of or against a particular candidate or political party. Indeed, an action based on the 1996 election has been initiated: *Friesen v. Hammel*, [1997] 4 W.W.R. 268, 28 B.C.L.R. (3d) 354 (S.C.).

²⁸ This situation is glibly characterized in B. Neuborne, "One Dollar-One Vote: A Preface to Debating Campaign Finance Reform" (1997) 37 Washburn L.J. 1 at 1 where "The ABCs of Campaign Finance Reform" are said to consist of three principles and two corollaries:

PRINCIPLE A: Money Helps Win Elections.

PRINCIPLE B: Rich People Have More Money.

PRINCIPLE C: Republicans Have More Rich People.

COROLLARY I: Republicans oppose campaign finance reform, unless the reform is guaranteed to hurt Democrats more.

COROLLARY II: Democrats favor campaign finance reform, but are more likely to bend the rules because they are always playing financial catch-up.

²⁹ See *infra* note 36 and accompanying text.

political influence—the goal of Rawls' scheme—is both unattainable and undesirable.³⁰

In a 1987 article discussing the nature of political equality, Dworkin criticizes the use of restrictions on expression in the name of equality of influence in a truly egalitarian society as inappropriate and unjustifiable.³¹ Dworkin divides political influence into vertical and horizontal influence. Vertical influence is the ability to affect the decision-making of elected officials. Horizontal influence, the influence citizens have over each other, is different from vertical influence and more closely analogous to the type of influence that concerned John Rawls. Although Dworkin admits that equality of horizontal influence is superficially attractive, he argues that it is unattainable and, when examined closely, is undesirable—even “perverse”. Dworkin bases his argument on the premise that wealth is not the only source of political influence in modern society. The educated, eloquent, and experienced as well as the charismatic and motivated are all likely to have a disproportionate political influence in society.³² To Dworkin, the source of inequality of influence is irrelevant: why should someone who has acquired wealth all one's life have less influence than someone who has spent as much time nurturing political skills? A recent libertarian critique of efforts for American campaign finance reform cynically encapsulates this point: “Although reformers suggest that the elimination of monetary contributions will help make all citizens politically equal, it remains an Orwellian sort of equality where ‘[a]ll ... are equal but some ... are more equal than others.’”³³ Similarly, it can be argued that campaign finance restrictions are inherently flawed as the influence of wealth is manifested in other ways than simply through campaign donations or expenditures. For example, the owner or editor of a newspaper may express his or her opinion on an entirely disproportionate scale to that of the ordinary citizen. Finally, Dworkin suggests that spending limits may not be desirable because in a truly egalitarian society, a communal goal is political activity and limits on expression forestall the maximal exercise of such an ambition.³⁴

Dworkin's view of the place of restrictions on expression in his hypothetical egalitarian society seems to be in conflict with his recent public advocacy of campaign finance reforms.³⁵ Dworkin has joined over forty leading scholars, including John Rawls, in calling on the United States Senate to implement campaign finance reform:

We believe that the Buckley decision is wrong and should be overturned. The decision did not declare a valuable principle that we should hesitate to chal-

³⁰ R. Dworkin, “What is Equality? Part 4: Political Equality” (1987) 22 U. San Francisco L. Rev. 1.

³¹ *Ibid.*

³² *Ibid.* at 14.

³³ B. Smith, “Money Talks: Speech, Corruption, Equality, and Campaign Finance” (1997) 86 Geo. L.J. 45 at 93.

³⁴ *Supra* note 30 at 17.

³⁵ L. Wayne, “After the Election: Campaign Finance: Scholars ask Court to Backtrack, Shutting Floodgates on Political Spending” *The New York Times* (10 November 1996) 1/30.

lenge. On the contrary, it misunderstood not only what free speech really is but what it really means for free people to govern themselves.³⁶

From this statement it is possible to conclude that he has rethought his earlier position and now concurs with Rawls' view. However, it is more likely that he considers the United States as requiring restrictions on electoral expression to stop the wealthy from dominating the political process and preventing progress toward a more egalitarian society. This latter view is consistent with a recent article by Dworkin in *The New York Review of Books* in which he offers an alternative theoretical basis for reforming the approach to electoral expression.³⁷

Instead of accepting Rawls' idea of equality of influence as the theoretical basis for the regulation of electoral expression, Dworkin proposes an alternative candidate-based theory. He implicitly rejects the extension of the "one person-one vote" principle to equality of influence as a basis for electoral regulation, maintaining, instead, that citizens as voters have an interest in an absence of restrictions on expression so that they may become maximally informed. In contrast, citizens as candidates have a powerful interest in having a fair opportunity to be heard that balances the voters' right to the maximum amount of information. Since candidates of meagre means have little prospect of being heard under the existing electoral regime in the United States (and arguably in Canada too), he concludes that some campaign subsidies and restrictions on expression are required for the improvement of democracy. Dworkin recommends the banning of television advertising during regular programming and the provision of free television time for extended political broadcasts at the expense of the State.³⁸

Dworkin's rationale for electoral regulation is less ambitious than Rawls' sweeping theory. His more modest basis for justifying regulation—the candidate's right to be heard—circumscribes the rhetorical power of his argument. Perhaps more important than his theory of electoral regulation is his earlier point about the influence of individuals such as the owners of newspapers (which are excepted from most controls on electoral expression) who are excepted from restrictions. The inevitable and seemingly unjustifiable exclusion of some individuals and groups from the purview of electoral regulation is one of the most potent criticisms that can be made against limiting electoral speech. This apparent inconsistency goes to the heart of the equality and fairness argument.

³⁶ Testimony of Gene Karpinski, Executive Director, United States Public Interest Research Group (U.S. PRIG), House Judiciary Constitution Free Speech and Campaign Finance Reform Committee (27 February 1997) at 7 (NEXIS Federal Document Clearing House Congressional Testimony).

³⁷ R. Dworkin, "The Curse of American Politics" *The New York Review of Books* 43:16 (17 October 1996) 19.

³⁸ *Ibid.* at 24.

C. Accounting for Criticisms: Modifying the Egalitarian Model

Dworkin's critique of the rationale behind the regulation of electoral expression poses three challenges. First, it accepts the notion that electoral expression is the epitome of political expression and is consequently precious to voters. This establishes a significant obstacle to any limitation on the flow of information during an election. Commensurately, Dworkin's recommendations for regulation are relatively benign. Second, Dworkin's argument points out the apparent inconsistency between regulating the expression of the wealthy, but not those wealthy individuals who happen to control the media. Third, Dworkin's argument that candidates have the right to be heard equally justifies the right of non-participants to be heard.³⁹ Each of these challenges may be met by attaching the egalitarian rationale for regulating elections to a practical understanding of elections and a reconception of electoral expression.

Electoral expression is inherently different from other forms of political expression. It is different in the same sense that political expression in Parliament is different from political expression outside of Parliament. Expression in Parliament is both more limited and more privileged than political expression in the public realm; it is subject to different rules that correspond to the nature of the forum. Parliamentary expression is restricted to a particular location, refereed by the Speaker, and it is often limited in time. At the same time, however, in the interests of vigorous debate and the full discussion of public issues, expression in Parliament is protected from the common law of defamation.⁴⁰ C. Edwin Baker contends that parliamentary expression is an example of "institutionally bound" expression. He further argues that "'institutionally bound' speech normally and properly only receives protection consistent with the institution of which it is a part."⁴¹ Moreover, Baker suggests that, like parliamentary debate,

elections are part of a formal, legally structured realm of the governmental apparatus. Campaign speech is a central part of this electoral realm. For this reason, campaign speech must be distinguished from the much broader category of political speech or speech about public issues.⁴²

The success of the egalitarian model requires that it not be viewed as an assault on liberty; rather, that it be viewed as augmenting liberty. Rawls correctly highlights the importance of equality, but he only refers to the flaws of the argument for *laissez-faire* elections in passing, noting that "the democratic political process is at best a regulated rivalry; it does not even in theory have the desirable properties that price theory as-

³⁹ *Ibid.* at 23.

⁴⁰ P. Milmo & W.V.H. Rodgers, eds., *Galley on Libel and Slander* (London: Sweet & Maxwell, 1998) at 13.27.

⁴¹ C.E. Baker, "Campaign Expenditures and Free Speech" (1998) 33 Harv. C.R.-C.L. L. Rev. 1 at 2.

⁴² *Ibid.* at 3. See C. Feasby, "Public Opinion Poll Restrictions, Elections, and the Charter" (1997) 55 U.T. Fac. L. Rev. 241 at 260. I have argued that expression in the electoral context is qualitatively different from expression generally. In my view, a distinction should be made on the basis that elections are an artificial context created for a specific purpose and dependent on State action.

cribes to truly competitive markets.”⁴³ In addition to the rejection of market-place analogies, it is important to understand that elections are an artificial end-driven process designed to select representatives of the people. Baker suggests that a preferable analogy is that of a hiring process where the electorate is the employer and the candidate is the applicant. In a hiring process:

Applicants are often required to speak—to take tests, write essays, or give illustrative performances of their abilities. Their speech is also limited. Each candidate is often given the same fixed time for the test. Applicants that get to the interview stage are often each given roughly the same amount of time, as determined by their potential employer, in which to charm the employer and to present their case for being chosen. Each is typically prohibited from getting outside help during these tests or interviews.⁴⁴

When electoral expression is separated—conceptually, if not formally—from political expression generally, it becomes easier to comprehend restrictions. Restrictions on electoral expression, when viewed through alternative analogies such as the hiring process, no longer seem to be an affront to a pivotal democratic value but a necessary incident of the political process. Under such a conception of electoral expression, restrictions that enhance the democratic process, including those that promote the egalitarian quality of elections, are justifiable.

Baker suggests that expression that might legitimately be subject to regulation can be determined by pragmatically applying this approach. The expression of candidates and parties obviously falls under the heading of electoral expression. The question of non-participant involvement is more problematic as it only falls into the category of electoral expression in some circumstances. Baker suggests that “independent expenditures that involve interventions unique to the campaign or at least directed specifically at the election ... can be subject to regulation or prohibition.”⁴⁵ Although campaign-related advertisements by non-participant groups would clearly be characterized as “unique to the campaign,” a large portion of political expression during a campaign could not be so characterized. Baker argues that any expression in the public sphere during a campaign that is not directed at influencing the outcome of an election cannot be a legitimate subject of regulation. Similarly, non-commercial person to person communication on the subject of an election cannot be legitimately restricted. He goes even further to suggest that the press (*not* including media specifically created to influence election) should be permitted to cover elections without restrictions on content, comment, or endorsements. Moreover, Baker argues that the day-to-day operations of political groups including regular newsletters should not be subject to restriction nor should such groups be prohibited from identifying whom they support through their regular means of communication.⁴⁶ Only expression that can be identified as manifestly “electoral” is a legitimate subject of restriction; expres-

⁴³ *A Theory of Justice*, *supra* note 12 at 226.

⁴⁴ Baker, *supra* note 41 at 26.

⁴⁵ *Ibid.* at 50.

⁴⁶ *Ibid.* at 49.

sion that can be considered customarily part of the public sphere should be afforded the respect usually accorded to political expression.

D. The Development of the Egalitarian Model in Canada

"Fairness" is a concept that has long been said to be the guiding purpose of Canadian election legislation.⁴⁷ In the early days of Canadian electoral history, "fairness" was construed as meaning merely the absence of the most transparent forms of corruption such as intimidation and trading alcoholic beverages for votes. Perhaps as early as the 1930s, however, the idea of fairness began to take on a more expansive and egalitarian meaning. McKenzie King's comments as leader of the opposition in 1934 seem to indicate an egalitarian view of the regulation of election broadcasting:

I think there ought to be some definite understanding that radio, where it is to be used for political purposes, will be used in a manner which will not give to one party which may happen to have more in the way of financial backing than other parties, a larger use of that national instrument.⁴⁸

In the 1966 Barbeau Committee Report,⁴⁹ this nascent view of fairness gained acceptance and was manifested in many of the recommendations to reform the *Canada Elections Act*. Among the recommendations of the Barbeau Committee were:

- the government should reimburse a portion of the expenses of candidates receiving at least 15% of the votes cast;
- broadcasters should be required to provide free advertising time to political parties;
- the aggregate amount of broadcast time allowed to political parties should be limited;
- any free time provided by broadcasters must be divided equally among candidates;
- campaign expenditures on purchases of media time should be limited; and
- non-participant groups should be prohibited from purchasing print or broadcast media advertising.⁵⁰

⁴⁷ See e.g. J. LaCalamita, "The Equitable Campaign: Party Political Broadcasting Regulation in Canada" (1984) 22 Osgoode Hall L.J. 543 which argues that from the days of McKenzie King onward, there has been a concern for fairness in election broadcasting. See also Royal Commission on Electoral Reform and Party Financing, *Money in Politics: Financing Federal Parties and Candidates in Canada* by W.T. Stanbury, vol. 1 (Toronto: Dundurn Press, 1991) at c. 2, "Evolution of the Regulatory Regime" which describes the history of efforts to create a fair electoral system.

⁴⁸ *House of Commons Debates* (30 June 1934) at 4511.

⁴⁹ Canada, *Report of the Committee on Election Expenses* (Ottawa: Queen's Printer, 1966) (Chair: Alphonse Barbeau).

⁵⁰ Stanbury, *supra* note 47 at 31-33.

These recommendations lay dormant until the early 1970s when the expense of provincial elections in Ontario and Quebec, as well as the United States Presidential election of 1972 and the ensuing Watergate crisis, generated public concern about the effect of high-priced campaigns on democracy.⁵¹ The 1974 *Election Expenses Act*,⁵² approved by all but three members of a minority Parliament, incorporated many of the recommendations of the Barbeau Committee Report.⁵³ The 1974 Act can be said to have three basic elements:

- (1) limits on the election expenses of candidates and registered political parties;
- (2) restrictions on the independent election spending of all other individuals and groups; and
- (3) broadcasting regulations on when, how and to what extent political parties and candidates can advertise on television and radio.⁵⁴

Prime Minister Trudeau later remarked that the legislation was "written for a specific purpose, which was to destroy the inequality which arose from the power of money. We think it was a very progressive piece of legislation, putting every citizen and every candidate on an equal footing in so far as election expenses are concerned."⁵⁵ The enactment of the 1974 *Election Expenses Act* signalled general acceptance of the evolution of the Canadian concept of electoral fairness from an absence of corruption to a rough political equality.

The view of fairness as a derivative of equality was strongly endorsed by the Royal Commission on Electoral Reform and Party Financing created by the Conservative government after the 1988 election and chaired by Pierre Lortie. The "promotion of fairness" was identified as one of the six objectives of electoral reform.⁵⁶ The *Final Report* describes "fairness" as "the central value that must inform electoral laws."⁵⁷ Furthermore, the *Final Report* states that for "fundamental equality of opportunity to be realized in the electoral process, our electoral laws must also be fair. In other words, the *Charter* establishes the equality of citizens; only if electoral processes themselves have the property of fairness, however, can this outcome be achieved

⁵¹ *Ibid.* at 635, n. 12.

⁵² S.C. 1974, c. 51.

⁵³ Notable recommendations not followed include: (i) broadcasters were not mandated to provide half of the political advertising allotment for free; (ii) the government was not required to pay for broadcasting; (iii) the publication of opinion polls was not prohibited; and (iv) total expenditures, rather than broadcasting expenditures, were limited. In addition, some structural recommendations were not followed and the precise amounts permitted to be spent by parties were adjusted.

⁵⁴ *Final Report*, *supra* note 12 at 326.

⁵⁵ Stanbury, *supra* note 47 at 44.

⁵⁶ The six objectives were: (i) securing the democratic rights of voters; (ii) enhancing access to elected office; (iii) promoting the equality and efficacy of the vote; (iv) strengthening political parties as primary political organizations; (v) promoting fairness in the electoral process; and (vi) enhancing public confidence in the integrity of the electoral process.

⁵⁷ *Final Report*, *supra* note 12 at 322.

in practice.”⁵⁸ The Commission’s understanding of “fairness” was the result of a careful reading of Canadian history and public opinion, but interestingly, the Commission also acknowledged its debt to the thought of John Rawls by quoting from *A Theory of Justice*.⁵⁹ The *Final Report*, in turn, formed the basis of the May 1993 amendments to the *Canada Elections Act*,⁶⁰ some of which were challenged in *Somerville v. Canada (A.G.)*⁶¹ and commented upon by the Supreme Court in *Libman*.

II. Libertarian Democracy: Election Law and the *Charter* Before *Libman*

The libertarian view, which is called the “individual-choice” argument by Dworkin,⁶² holds that the citizen as voter has a right to uncontrolled access to information. Only the voter can decide what is or is not relevant to that voter’s decision. Any manipulation of the flow of information affects the ability of the electorate to be sovereign. This is encapsulated by the United States Supreme Court in *Buckley*: “In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.”⁶³ Central to this conception of electoral regulation is distrust of the government to set rules for the election of future governments.

In Canada, the libertarian individual-choice argument has been aggressively made by Canada’s “national” newspaper and interest groups like the National Citizens’ Coalition (NCC).⁶⁴ Indeed, it is very evident in a study done on Canadian electoral regulations published by the Fraser Institute. The author of the study argues:

I suggest that constituents may be better served by free races in which candidates can spend as much as they wish. At the heart of this argument is the idea that money enables valuable information to flow between candidates and constituents. ... Advertising lowers the cost to voters of making an intelligent choice. Political competition flourishes when challengers can advertise mistakes or misdeeds that incumbents have made in office. A competitive political system is one in which the threat of being unseated is great enough to keep the

⁵⁸ *Ibid.* at 322.

⁵⁹ The Commission quotes the following passage:

Those similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social classes. ... The liberties protected by the principle of participation lose much of their value whenever those who have greater means are permitted to use their advantage to control the course of public debate (*ibid.* at 326).

⁶⁰ *An Act to Amend the Canada Elections Act*, S.C. 1993, c. 19.

⁶¹ (1996), 184 A.R. 241, 136 D.L.R. (4th) 205 (C.A.) [hereinafter *Somerville* cited to A.R.].

⁶² “The Curse of American Politics”, *supra* note 37 at 22.

⁶³ *Buckley*, *supra* note 8 at 57.

⁶⁴ See e.g. “Ottawa’s gag law struck down” *The Globe and Mail* (7 June 1996) A16.

ruler honest and attentive to the needs of constituents. Campaign spending maintains this threat.⁶⁵

The libertarian individual-choice argument was accepted in two Alberta cases⁶⁶ and, prior to *Libman*, seemingly formed the foundation of *Charter* election jurisprudence.

Before the effect of the libertarian individual-choice argument on the interpretation of the *Charter* guarantee of freedom of expression in election cases is discussed, it is important to canvass the American experience. The story of American electoral regulation is one of the almost complete triumph of the libertarian conception of democracy. The seminal United States Supreme Court decision in *Buckley* endorses the libertarian view that free speech is the pre-eminent concern in a democratic society and allows only the limitation of speech where corruption is a demonstrable risk. This has had the unfortunate result of precluding meaningful containment of the cost of the American democratic process and has contributed to the recent controversies over campaign fundraising.

A. *Buckley v. Valeo and the American Problem*

The traditionally *laissez-faire* approach to electoral regulation in the United States was challenged by the 1972 United States Presidential election. The 1972 Republican campaign was one of the most sordid in the modern era, giving rise to the Watergate scandal and the eventual resignation of President Richard Nixon. In response to the public outcry against corruption in the electoral process and the increasing cost of campaigns,⁶⁷ Congress enacted amendments to the *Federal Election Campaign Act* of 1971, restricting contributions to candidates and parties by individuals and Political Action Committees (PACs), and limiting campaign expenditures by candidates and parties.⁶⁸ Contributions by individuals were limited to \$1,000 and contributions by PACs were limited to \$5,000. The Act further limited expenditures by individuals and PACs to \$1,000 and \$5,000 respectively "relative to a clearly identified candidate."⁶⁹ Expenditures by presidential candidates were limited to \$10 million for the primaries and \$20 million for the election and lesser limits were imposed on Congressional candidates.⁷⁰

⁶⁵ F. Palda, *Election Finance Regulation in Canada: A Critical Review* (Vancouver: Fraser Institute, 1991) at 25-26. See also F. Palda & K. Palda, *Campaign Spending and Finance Issues* (Working Paper 91-06) (Kingston: Queen's University School of Business, 1991).

⁶⁶ See Part II.B., below. A libertarian understanding also formed the heart of a strongly worded dissent per Conrad J.A. in a third Alberta case: *Reform Party of Canada v. Canada (A.G.)* (1995), 165 A.R. 161, 123 D.L.R. (4th) 366 at 397 (C.A.).

⁶⁷ Spending on Presidential elections increased from \$27.2 million in 1960 to \$94.4 million in 1972 (*Buckley v. Valeo*, 519 F.2d 821 at 837, 171 U.S.App.D.C. 172 (D.C. Cir. 1975)).

⁶⁸ *Federal Election Campaign Act Amendments of 1974*, Pub. L. No. 93-443, 88 Stat. 1263.

⁶⁹ *Ibid.* at §101(e)(1).

⁷⁰ *Ibid.* at §101(c)(1).

These restrictions were considered by the United States Supreme Court in *Buckley* in 1976. The Court upheld the contribution restrictions because the measures did not prevent an individual or group from expressing support for a candidate—despite limiting the quantity of that support—and the limits did not promise to prevent the raising of sufficient funds for campaigning. Moreover, the Court found the prevention of corruption a compelling justification for the abridgement of free speech citing “the deeply disturbing examples [of corruption] surfacing after the 1972 election.”⁷¹ In contrast, the expenditure limits on individuals, groups, candidates, and parties were found to be unconstitutional. The Court stated the problem as follows:

The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The \$1,000 ceiling on spending “relative to a clearly identified candidate,” would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.⁷²

Unlike the contribution limit, however, the expenditure limit did not address the acknowledged evil of corruption. It was argued that the expenditure limits were designed to further the government “interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.”⁷³ To this the Court curtly replied, “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”⁷⁴ and concluded that the expenditure limits were “restrictions that the First Amendment cannot tolerate.”⁷⁵

Although it upheld the contribution limits, *Buckley* was an emphatic statement of the United States Supreme Court’s estimation of the importance of free speech. More significantly, *Buckley* stands for the proposition that equality is an irrelevant consideration in the limitation of political speech. *Buckley* made it clear that in the United States, the only justifiable restrictions of political speech are those that go to the heart of the electoral process—namely, corruption.

The *Buckley* decision spawned a generation of law review articles and has been widely discussed in the popular press.⁷⁶ More importantly, *Buckley* is the spiritual fa-

⁷¹ *Buckley*, *supra* note 8 at 27.

⁷² *Ibid.* at 19-20 [footnotes omitted].

⁷³ *Ibid.* at 48.

⁷⁴ *Ibid.* at 48-49.

⁷⁵ *Ibid.* at 59.

⁷⁶ See e.g. J. Skelly Wright, “Politics and the Constitution: Is Money Speech?” (1976) 85 Yale L. J. 1001; J. Skelly Wright, “Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?” (1982) 82 Colum. L. Rev. 609; D. Cole, “First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance” (1991) 9 Yale L. & Pol’y Rev. 236; K.J. Levit, “Campaign Finance Reform and the Return of *Buckley v. Valeo*” (1993) 103 Yale L.J. 469; and F.J. Sorauf, “Politics, Experience, and the First Amendment: The Case of American Campaign Finance” (1994) 94 Colum. L. Rev. 1348.

ther of the American electoral morass that we witness from a comfortable distance. By striking down a central provision of the regulatory framework, *Buckley* has created a situation where candidates must raise money in small amounts, but are allowed to spend an infinite sum.⁷⁷ This paradox dictates that candidates commit ever more time raising money so that they will have more to spend. One commentator has suggested that the amount of time that members of Congress are required to spend raising money, as opposed to doing their jobs, may be a justification for the argument for spending limits of analogous importance to the need to limit corruption.⁷⁸

Since *Buckley*, the cost of American elections has spiralled out of control. The combined expenses of the major candidates and parties for the 1996 presidential election were approximately \$800 million.⁷⁹ Individual candidates for United States Senate seats routinely raise \$3 to \$6 million per campaign. The problem, however, is not merely the cost of elections, but where the money is coming from and to whom it is going. Contributions from PACs are now a substantial portion of total donations and are disproportionately directed toward incumbents. In the 1996 election, House of Representatives incumbents received six times as much money from PACs as did challengers while incumbent Senators only received five times as much money as their challengers.⁸⁰ Indeed, of the twenty Senate candidates that received the most money from PACs, fifteen were incumbent Senators, four were members of Congress seeking empty seats, and one did not occupy a federal elected office.⁸¹ The lack of spending limits has clearly favoured established politicians over challengers.

Buckley has also given rise to an "eccentric billionaire" problem. The restrictions on the supply of money combined with the absence of any ceiling on the expenditure of money has created a situation where extraordinarily wealthy individuals may outspend their competitors with funds from their own pocket. Candidates of modest means simply cannot raise enough money through piecemeal donations of \$1,000 or less to off-set the personal wealth of the super-rich. The United States has the dubious distinction of having had two of the richest men in the world—Steve Forbes and Ross Perot (twice)—attempt to "buy their way" into the Presidency by outspending their opponents using their personal fortunes. Candidates have also attempted to use their personal riches as a vehicle to a Senate seat. In the 1994 California race for the United

⁷⁷ This is roughly the same situation that prevails in Alberta provincial elections. See "Alberta Tories make most of lax electoral spending laws" *Canadian Press Wire Service* (23 February 1997), online: QL (CPN) where Alberta's Chief Electoral Officer is quoted as saying: "We have only limits on contributions, so you're free to spend what you can raise. ... It's basically a free market politically." The Alberta Conservative Party spent more than all other participants in the 1997 provincial election put together.

⁷⁸ V. Blasi, "Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All" (1994) 94 Colum. L. Rev. 1281.

⁷⁹ "Financing of Campaign '96: One More Cause for Reform: Once Again the Current System's Injustice is Made Obvious" *The Los Angeles Times* (13 November 1996) B8.

⁸⁰ *Ibid.*

⁸¹ "Big Money for Big Senate Races" *The Washington Post* (15 August 1996) A17.

States Senate, Michael Huffington spent \$27 million of his own money in an attempt to defeat incumbent Diane Feinstein.⁸²

Meaningful campaign finance reform in the United States can only be achieved if *Buckley* is overturned or circumvented. Despite the assertion of constitutional scholars that *Buckley* was wrongly decided,⁸³ the prospect of the United States Supreme Court overturning *Buckley* is remote. The Supreme Court reaffirmed the principles in *Buckley* when considering limits on PAC expenditures under the *Presidential Election Campaign Fund Act*⁸⁴ in its decision in *Federal Election Commission v. National Conservative Political Action Committee*⁸⁵ and again when considering party and PAC expenditures in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*.⁸⁶ The Court's faithful adherence to *Buckley* suggests that campaign finance reform initiatives, such as the proposed McCain-Feingold Bill,⁸⁷ might fall afoul of the First Amendment. The Court's interpretation of the First Amendment in *Buckley* is so formidable an obstacle that some legislators have concluded that a constitutional amendment is required before effective regulation of campaign finance is possible.⁸⁸

B. The Canadian Experience

1. *National Citizens' Coalition v. Canada (A.G.)*

Only two years after the introduction of the *Charter*, the National Citizens' Coalition (NCC) successfully challenged the constitutionality of the restrictions on non-participant expenditures and advertising in the Alberta Court of Queen's Bench.⁸⁹ In his decision, Medhurst J. referred to *Buckley*, but was careful to note the differences between the constitutional frameworks existing in Canada and the United States.⁹⁰ In his informal, pre-*Oakes* analysis of section 1 of the *Charter*, Medhurst J. noted the arguments founded on the practical hazard of disproportionate non-participant interference in the electoral process and the principle of equality.⁹¹ He dismissed the former argument as lacking a factual basis, pointing out that in the United States PACs were

⁸² G. Lefevre, "Feinstein and Huffington Run for Senate", online: CNN San Francisco Newsvault <<http://www.cnn.com/news/vault/output/calsenat.html>> (last modified: 8 November 1994).

⁸³ See *supra* note 36 and accompanying text.

⁸⁴ 26 U.S.C.A. § 9001ff. (West 1998).

⁸⁵ 470 U.S. 480, 105 S.Ct. 1459 (1985).

⁸⁶ 518 U.S. 604, 116 S.Ct. 2309 (1996) [hereinafter *Colorado* cited to S.Ct.].

⁸⁷ H. Dewar, "Campaign Finance Bill Buried For Year" *The Washington Post* (11 September 1998) A4.

⁸⁸ (1997) 105th Cong., 1st Sess., S.J. Res. 18.

⁸⁹ *National Citizens' Coalition v. Canada (A.G.)* (1984), 32 Alta. L.R. (2d) 249, 11 D.L.R. (4th) 481 (Q.B.) [hereinafter *National Citizens' Coalition* cited to Alta. L.R.].

⁹⁰ *Ibid.* at 262.

⁹¹ *Ibid.* at 263.

only responsible for "alleged mischief".⁹² While the latter argument was not rejected outright, it was held that the importance of freedom of speech outweighed any competing interests. In so ruling, Medhurst J. specifically rejected the idea that fairness was a relevant concern: "In my opinion the limitation must be considered for the protection of a real value to society and not simply to reduce or restrain criticism no matter how *unfair* such criticism may be."⁹³

The judgment in *National Citizens' Coalition* was delivered shortly before the 1984 federal election. The Liberal government chose not to appeal the decision. The relevant sections of the *Canada Elections Act* were not re-enacted or replaced in the first term of the succeeding Conservative government led by Brian Mulroney. Conveniently, the Conservatives waited until after the 1988 election—an election that was characterized by heavy non-participant spending in favour of free trade, an issue strongly identified with the Conservative party—to re-enact restrictions on non-participant advertising.⁹⁴

2. *Somerville v. Canada (A.G.)*

The restrictions on non-participant spending and advertising, re-enacted after being struck down in *National Citizens' Coalition*, were challenged by David Somerville on behalf of the NCC. In addition, the prohibitions on all advertising in the initial phase of an election and the final two days of a campaign ("blackout" periods) were challenged. At trial, McLeod J. found that the restriction of non-participant spending and advertising as well as the blackout periods were unjustifiable restrictions of freedom of expression. Central factors in his decision were:

- (1) that the entire scheme—namely limits on party spending and advertising, which these sections were aiming to protect—was based on restrictions of freedom of expression;
- (2) the apparent lack of concern of the Chief Electoral Officer about non-participant spending;
- (3) the lack of consideration of the Attorney General of the effect of the lack of restrictions on democracy and the cavalier ignorance of both the Attorney General and his experts of the fact that there were no such restrictions in Alberta provincial elections; and
- (4) inconclusive social science evidence on the question of the necessity of restrictions.⁹⁵

⁹² *Ibid.*

⁹³ *Ibid.* at 264 [emphasis added].

⁹⁴ R. Johnston *et al.*, *Letting the People Decide: Dynamics of a Canadian Election* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 128-29.

⁹⁵ *Somerville v. Canada (A.G.)* [1993] A.J. No. 504 at paras. 25-32 (Q.B.), online: QL (AJ) and summarized in *Somerville*, *supra* note 61 at 249.

On appeal, Conrad J.A., writing for the majority, upheld the trial decision. Conrad J.A.'s analysis is predicated on the view that unfettered free speech is inherently good. Though not explicit, Conrad J.A. is clearly working from an assumption that the libertarian model of election regulation is the regulative ideal. She makes it clear that any tampering with expression in the electoral context must be treated with suspicion: "A manipulated communication system favouring the political parties is, in my view, one of the evils from which the constitutional guarantee provides protection."⁹⁶ In the same spirit, Conrad J.A. characterized the purpose of the non-participant spending restrictions:

[O]ne is led to conclude that the very aim or purpose of this legislation is to ensure that third parties cannot be heard in any effective way and that political parties are entitled to preferential protection. Its objective strikes at the core of these fundamental rights and freedoms, and is arguably legislation which has as its very purpose the restriction of these rights and freedom[s], which can never be justified.⁹⁷

Conrad J.A.'s characterization of the purpose of the legislation is not a deferential or generous interpretation of the motive of Parliament. Instead of such a negative characterization, it was clearly open for Conrad J.A. to invalidate the legislation on the grounds that the means employed by Parliament did not satisfy the minimal impairment aspect of the *Oakes* test and, therefore, had the effect of unjustifiably restricting non-participant activities. Nevertheless, for Conrad J.A., the regulation of electoral speech was not an issue of proportionality, it was more properly one of whether the government had a defensible interest in the administration of the voting process beyond the minimum required to ensure the civility of elections.

As a consequence of circumstance and government decisions not to appeal these cases in the first fifteen years after the introduction of the *Charter*, no significant consideration of the *Canada Elections Act* nor of any provincial referendum or elections law occurred in the Supreme Court of Canada.⁹⁸ Before *Libman*, it was unclear whether the egalitarian vision of election regulation was compatible with the *Charter*. The ultimate fate of election regulation could not be known and one could be forgiven after the Alberta cases for mistaking the fate of election regulation in Canada for that of the United States following the landmark decision *Buckley*. The striking down of restrictions on non-participant expenditures in *Somerville* had the effect of destroying the balance of the regulatory scheme.⁹⁹ Moreover, the reasons offered by the Court of

⁹⁶ *Supra* note 61 at 266.

⁹⁷ *Ibid.*

⁹⁸ The Supreme Court had the chance to consider whether or not the funding provisions of the *Manitoba Elections Finances Act*, S.M. 1982-83-84, c. 45 infringed freedom of expression in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385. In that case, however, the Court declined to consider the merits of the case due to a lack of evidence.

⁹⁹ This opened the way for non-participant advertising in the 1997 federal election and led British Columbia to cease enforcing the provisions of the British Columbia *Election Act* restricting non-participant spending.

Appeal in *Somerville*, if they had been left to stand, would have been a significant obstacle to reconstructing anything but a *laissez-faire* model of election regulation. After *National Citizens' Coalition*, but before *Somerville*, the apparent effect of the *Charter* on the *Elections Act* moved one British observer to remark, "rather than protect and promote democratic principles, the Charter, like the [United States] Bill of Rights, could serve ultimately to frustrate them."¹⁰⁰

III. *Libman v. Quebec (A.G.)*

Libman arises out of the unique tensions and circumstances of Canadian and Quebec politics. After the embarrassing failure of the Meech Lake Accord, Quebec premier Robert Bourassa committed his government to holding a referendum on any proposed constitutional amendments in the future. In 1992, the provincial premiers and the federal government reached a provisional agreement to amend the constitution known as the Charlottetown Accord. True to Bourassa's commitment, Quebec decided to hold a referendum on the Charlottetown Accord. Subsequent to Quebec's decision, the federal government chose to hold a Canada-wide referendum under the newly enacted *Canada Referendum Act*.¹⁰¹ Despite the decision to hold a national referendum, in Quebec the Charlottetown Accord was put to a vote under the provincial *Referendum Act*.¹⁰²

The Quebec *Referendum Act* was designed in 1978 by the Parti Quebecois government to administer a vote on the sovereignty of Quebec. The Quebec referendum law was written carefully to ensure that during votes there is strict equality between the options so that the outcome of the vote is "clean, clear and fair."¹⁰³ The drafters recognized that the appearance of fairness would be necessary so that the result would have legitimacy in the eyes of those called upon to recognize Quebec's sovereignty. The even-handedness of the referendum law is a source of pride for many people in Quebec and has been affectionately called by some "l'héritage de Lévesque".¹⁰⁴ The historical connection to René Lévesque and the practical effect of spending restrictions—keeping money from the rest of Canada out of any referendum campaign—dictate that any legal challenge to the law is politically sensitive.

Robert Libman, the plaintiff, was at the time of the commencement of litigation the leader of the Equality Party, a provincial political party that fights for "English rights" and against such things as Quebec's French language sign laws. To him, Lévesque's vaunted referendum law was not fair at all. Libman was dissatisfied with

¹⁰⁰ K. Ewing, *Money, Politics, and Law: A Study of Electoral Campaign Finance Reform in Canada* (Oxford: Clarendon Press, 1992) at 231.

¹⁰¹ S.C. 1992, c. 30.

¹⁰² R.S.Q., c. C-64.1.

¹⁰³ L. Fitterman, "Quebec Court of Appeal upholds decision against Libman's challenge to referendum law" *The [Montreal] Gazette* (4 August 1995) A10.

¹⁰⁴ See e.g. P. Gravel, "L'héritage de Lévesque" *La Presse* (11 October 1997) B2; and D. Monière, G. Bouthillier & P. de Bellefeuille, "Leur democracy et la nôtre" *Le Devoir* (28 October 1997) A7.

both of the alternatives in the referendum and wanted to conduct an independent campaign promoting abstention from voting. The referendum law, however, prevented him from doing this. The "fairness" elements of the referendum procedure, implemented largely through the creation of a "national" umbrella committee for each option, effectively deny funding to and prohibit the spending of unaffiliated individuals and groups. Only the national committees and affiliated groups are allowed by the law to incur "regulated expenses". Regulated expenses include the "cost of any goods or services used during the referendum period to promote or oppose, directly or indirectly, an option."¹⁰⁵ Groups or individuals wanting to independently promote one option or another must, if they want to be permitted to incur "regulated expenses", become affiliated with the respective national committee.¹⁰⁶ Individuals like Libman who do not favour either option are faced with the choice of affiliating with either of the national committees promoting options that they do not believe in, or forgoing the ability to make "regulated expenses". The expenses that fall within the exceptions to regulated expenses are inconsequential in the context of modern campaigning.¹⁰⁷ An unaffiliated third party like Libman is effectively precluded from mounting any sort of meaningful campaign.

A. Quebec Superior Court

In the Quebec Superior Court, Libman and the Equality Party challenged all of the sections of the Quebec *Referendum Act* and the Quebec *Election Act*¹⁰⁸ for (i) limiting political donations and expenditures, (ii) requiring that "regulated expenses" be incurred through national committees, and (iii) restricting the spending of unaffiliated individuals and groups supporting neither option, on the basis that these sections violated the freedoms of expression and association and the right to equality as protected by the *Charter*.¹⁰⁹ Libman also argued that these sections were contrary to similar rights protected by the Quebec *Charter of Human Rights and Freedoms*.¹¹⁰ In response to Libman's challenge to the general limits on political donations and expenditures, Michaud J. found that these restrictions violated freedom of expression but were justifiable:

¹⁰⁵ Quebec *Referendum Act*, s. 402.

¹⁰⁶ *Ibid.*, s. 416.

¹⁰⁷ Exceptions are outlined in *ibid.*, s. 404. Exceptions include (i) news, editorials, and other coverage in regularly published newspapers or periodicals; (ii) previously planned books; (iii) public affairs programming on television or radio; (iv) reasonable out of pocket meal and lodging expenses; (v) reasonable out of pocket transportation expenses; (vi) objective explanation of the Act; (vii) day to day expenses of maintaining two offices; (viii) interest on any loan to an official agent; and (ix) costs of a meeting up to \$600.

¹⁰⁸ R.S.Q., c. E-3.3.

¹⁰⁹ The impugned sections include *Referendum Act*, ss. 22, 25, 36-38; and *Election Act*, ss. 91, 402-405, 406(1)-(3), 412-417, 426, 430.

¹¹⁰ R.S.Q., c. C-12.

Il n'est pas contesté que la limitation des dépenses référendaires par le gouvernement a été décrétée dans un but louable, soit celui de tenter de donner aux deux options des moyens comparables de s'exprimer et d'empêcher que les plus puissants, par un barrage publicitaire, s'approprient un résultat favorable.¹¹¹

Michaud J. was less impressed with Libman's argument that the national committee framework violated freedom of expression and association. He concluded that, assuming the by-laws set out by the national committees were constitutional, the general principles of affiliation laid out in the *Referendum Act* were consistent with both freedoms because they allow for independent activity, albeit regulated. Libman's third argument, that the freedom of expression and association of individuals and groups not supporting either option was violated, was accepted by Michaud J. He found, however, that the violation was justifiable under section 1 of the *Charter*. In this conclusion he seems to have been influenced by the Quebec government's expert witness Professor Aucoin, whose report praised the *Referendum Act*:

The Quebec law ... stands as a model of democratic process to other jurisdictions in Canada and to political democracies abroad. Quebec is a pioneer in this regard as Quebec and other Canadian electoral laws have been in other respects. ... The interest of other jurisdictions in the Quebec and Canadian models indicates that we are leading the [pack] with "best practices" and that others, in time, will likely follow.¹¹²

B. Quebec Court of Appeal

At the Quebec Court of Appeal, Libman dropped his challenge to the overall restrictions on donations and expenditures and instead focused on the sections outlining who could incur regulated expenses.¹¹³ In the context of election jurisprudence, this was an important concession in that it amounted to an acknowledgement that the government has a genuine interest in limiting private donations and campaign spending generally. Consequently, the question before the Quebec Court of Appeal was a much more limited one, namely, whether the restriction of the expenditures of unaffiliated individuals and groups violated *Charter* rights and, if so, whether such a violation was justifiable.

In separate judgments, Delisle and Brossard JJ.A. agreed that the restrictions in question violated Libman's freedom of expression and association, while Bisson J.A. only found that the impugned sections violated his freedom of expression. All three judges concluded that the government's objective in limiting regulated expenses to national committees and affiliated groups was pressing and substantial. In separate reasons, both Delisle and Bisson JJ.A. decided that the means employed by the refer-

¹¹¹ *Libman v. Quebec (A.G.)*, [1992] R.J.Q. 2141 at 2147 (S.C.), online: QL (AQ) [hereinafter cited to R.J.Q.].

¹¹² *Ibid.* at 2158.

¹¹³ *Libman v. Quebec (A.G.)*, [1995] R.J.Q. 2015 (C.A.), online: QL (AQ) [hereinafter cited to R.J.Q.].

endum law were proportional to the objectives and therefore constitutional. Accepting Michaud J.'s conclusion that any independent campaign would directly or indirectly benefit one of the options, Delisle J.A. found that the legislature's choices were reasonable:

Si le législateur prend la peine de réglementer les comités nationaux dans leurs dépenses et leur financement afin que chacun puisse se retrouver sur un pied d'égalité, il serait illogique que certains groupes, désirant faire bande à part, puissent faire une campagne à leur guise. Ils avantageraient ou désavantageraient une option en permettant de plus importantes dépenses en sa faveur.¹¹⁴

Brossard J.A., however, differed from his colleagues and found that the limits were not justifiable because they did not satisfy the minimal impairment element of the *Oakes* test. In his view, there was nothing to stop the National Assembly from providing a reasonable limit on expenses for independent individuals and groups that would be consistent with the overall objectives of the legislation.¹¹⁵

C. Supreme Court of Canada

At the Supreme Court, Libman's fortunes took a turn for the better. The Supreme Court held, *per curiam*, that the contested sections of the referendum law violated Libman's freedoms of expression and association. The Court, as is now customary in freedom of expression adjudication, established that what the appellant was prevented from doing amounted to expression—as does any communicative effort short of violence—and found that the impugned law did, indeed, restrict that expression.¹¹⁶ In the course of this perfunctory analysis, the Court reaffirmed that political expression was of “paramount importance” to Canadian democracy.¹¹⁷ In one short paragraph it was also noted that “[f]reedom of association is ... infringed for similar reasons.”¹¹⁸

From this benign conclusion, the Court moved on to its section 1 *Charter* analysis—the meat of any freedom of expression case. The court began by adopting a deferential stance,¹¹⁹ accepting the Quebec government's interpretation of the objective of the *Referendum Act* and affirming its importance.¹²⁰ In considering the rational connection of the chosen means to the objective of the *Referendum Act*, the Supreme Court adopted the analysis of the Lortie Commission and the opinion of the Quebec government expert Professor Aucoin¹²¹ to the effect that the limitation of spending by independent individuals and groups is necessary to maintain the fairness of elections. Despite holding the government's objective to be worthwhile and the means chosen to

¹¹⁴ *Ibid.* at 2051.

¹¹⁵ *Ibid.* at 2043.

¹¹⁶ *Supra* note 4 at 406.

¹¹⁷ *Ibid.* at 404.

¹¹⁸ *Ibid.* at 406.

¹¹⁹ *Ibid.* at 408.

¹²⁰ *Ibid.* at 407–408.

¹²¹ *Ibid.* at 414.

be rationally connected to the objective, the Court found that the section restricting unregulated expenses allowed to unaffiliated groups did not satisfy the minimal impairment element of the *Oakes* test.¹²² The Court was swayed by the fact that unregulated expenses were limited to such things as transportation costs and the costs of a public meeting. Such a limited scope for expenditure precluded unaffiliated groups from printing and distributing flyers, pamphlets, or posters—the customary means available to cash-poor campaigns. Consequently, the Court declared the offending sections of no force or effect. This was a personal victory for Robert Libman in his struggle.¹²³ It was also, despite the result, a defeat for those who promote a libertarian conception of democracy and value freedom above fairness in election regulation.¹²⁴

IV. *Libman* and an Emerging Post-Charter Theory of the Administration of Democracy

Elections and referenda are related, but clearly different, processes. As such, it would have been quite easy for the Supreme Court to treat referenda as a discrete subject matter and attempt to limit the interpretive scope of its decision as is often done. While the decision would likely have taken its rightful place in the canon of Canadian election jurisprudence regardless of the Supreme Court's feelings on the matter, *Libman* is a remarkable decision precisely because the Court makes it very clear that the principles outlined in the decision are intended to apply to elections as well. The Court notes that "[a]lthough the referendum system is different from the electoral system ... the same principles underlying election legislation should in general be applicable to referendum legislation."¹²⁵ This is followed by a statement that the Lortie Commission's justification for regulating election spending should apply *mutatis mutandis* to referendum controls.¹²⁶ Such comparisons are inevitable given the paucity of referendum jurisprudence; however, the comparisons made by the Court are not couched or qualified. Indeed, given the the blatant nature of the comparison, the Supreme Court seems almost to be scolding the lower courts responsible for the earlier line of election cases. This is most evident in the way that the Court went out of its way to point out its admiration for the object of a piece of legislation not in issue, the *Canada Elections Act*, which it describes as "highly laudable",¹²⁷ and its explicit disagreement with the Alberta Court of Appeal's decision in *Somerville*.¹²⁸ Although arguments can be made for different treatment of referenda and elections,¹²⁹ the Supreme Court intends that they be considered together.

¹²² *Ibid.* at 425.

¹²³ J. Dion, "Robert Libman savoure sa victoire" *Le Devoir* (10 October 1997) A7.

¹²⁴ G. Fraser, "'Gag Law' ruling infuriates citizens coalition" *The Globe and Mail* (13 October 1997) A4.

¹²⁵ *Supra* note 4 at 409.

¹²⁶ *Ibid.* at 413.

¹²⁷ *Ibid.* at 414.

¹²⁸ *Ibid.* at 414, 427.

¹²⁹ See e.g. J.R. Saul, *Reflections of a Siamese Twin: Canada at the End of the Twentieth Century* (Toronto: Viking, 1997) at 48-52 where it is argued that referenda are tools of demagoguery and artifi-

A. Libman and the Modified Egalitarian Approach to Election Regulation

1. "Fairness" and Equality

The immediate question before the Supreme Court in *Libman* was the constitutionality of the restrictions on non-participants in the *Quebec Referendum Act*, but the transcendent issue was whether the conception of "fairness" as it has developed in Canada was compatible with the *Charter*. In its characterization of the purpose of the Quebec legislation, the Court implicitly indicated that these two questions were related by affirming the Quebec government's interpretation of the goals of the *Referendum Act*:

[T]he objective of the Act is, first, egalitarian in that it is intended to prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources. What is sought is in a sense an equality of participation and influence between the proponents of each option. Second, from the voters' point of view the system is designed to permit an informed choice to be made by ensuring that some positions are not buried by others. Finally, as a related point, the system is designed to preserve the confidence of the electorate in a democratic process that it knows will not be dominated by the power of money.¹³⁰

This is, if nothing else, a classic statement of the objective of fairness as it has come to be understood in the context of the *Canada Elections Act*. The identical nature of the notion of fairness as it is expressed in the *Canada Elections Act* and in the *Quebec Referendum Act* was underlined and endorsed by the Court when it said, "it is our view, that the objective of Quebec's referendum legislation is highly laudable, as is that of the *Canada Elections Act*."¹³¹

Perhaps more important than the Court's affection for the idea of fairness is the theoretical justification for the concept that is offered. Following the lead of the Lortie Commission, the Court firmly anchored the principle of electoral "fairness" in the *Charter* guarantee of equality. The Court held, in very Rawlsian terms, that the democratic value of fairness "is related to the very values the *Canadian Charter* seeks to protect, in particular the political equality of citizens that is at the heart of a free and democratic society."¹³² Grounding fairness in equality is an important rhetorical shift that changes the analysis from that of justifying the infringement of an important freedom to one of balancing competing rights. The equality referred to by the Court, however, was not section 15 *Charter* equality, it was merely an interpretive concept. As the Court suggested, political equality referred to the right of each voter to have a

cially simplify complex decisions into simple yes or no options. Indeed, Saul argues, referenda are the antithesis of democracy.

¹³⁰ *Supra* note 4 at 408.

¹³¹ *Ibid.* at 414.

¹³² *Ibid.* at 416.

roughly equal influence on the electoral process irrespective of each individual's wealth:

Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions so that election discourse is not dominated by those with access to greater financial resources.¹³³

Distilled to its essence, the argument for equality can be seen to be rooted in the idea that in a democracy, the government is chosen by the people where each individual has only one vote. In Canada, however, it is now settled that a dogmatic approach to equality of voting power is not required by the constitutionally guaranteed right to vote. McLachlin J. expressed this view in *Reference re Electoral Boundaries Commission Act (Saskatchewan)*¹³⁴ where she noted that the idea of "effective representation" that lies at the heart of the right to vote is made up of two elements which, arguably, can be viewed as different aspects of equality: (i) relative parity of the voting power, and (ii) other factors such as geography, community history, and minority representation.¹³⁵ McLachlin J.'s view of voting equality—that is, formal equality tempered by practical and social concerns—is compatible with the version of equality that is embodied in the notion of "fairness" expressed by the Supreme Court in *Libman*. In the abstract, the concept of fairness would seem to be akin to Rawls' notion of the "fair value" of political liberties.

Libman clearly indicates that fairness is rooted in equality, but it is silent as to whether there are other aspects to fairness that might justify election laws aimed at refining the electoral process but not at limiting inequality. In *Thomson Newspapers*, the majority clarified the meaning of fairness as it is expressed in *Libman* and limited its scope of application. Fairness, it would seem, only applies to the mitigation of the influence of wealth and does not extend to the limitation of other influences. In other words, it is likely that fairness can only be successfully invoked when equality interests are at stake. The majority in *Thomson Newspapers* felt that the publication of opinion polls in the latter stages of elections did not pose a sufficient threat to the electoral process to justify the degree of deference accorded to Parliament in *Libman*. Central to this conclusion was the fact that the alleged harm came from random errors in polls and not from a concerted effort to deceive the public.

Using a contextual approach, Bastarache J. found that the harm caused by the influence of opinion polls was not as great as that posed by the influence of wealth and, therefore, Parliament was not allowed the same latitude to control the harm. In order for limitations to be justifiable under this approach, the harm that is sought to be controlled must be a form of social injustice stemming from a systemic cause. Bastarache J. drew a comparison between the rationale for limiting pornography, hate speech, and advertising directed at children and the influence of wealth in elections: "In each of

¹³³ *Ibid.* at 410.

¹³⁴ [1991] 2 S.C.R. 158, 81 D.L.R. (4th) 16 [hereinafter cited to D.L.R.].

¹³⁵ *Ibid.* at 36.

these cases [*R. v. Butler*,¹³⁶ *R. v. Keegstra*¹³⁷ and *Irwin Toy Ltd. v. Quebec (A.G.)*¹³⁸], the type of speech involved systematically and consistently undermined the position of some members of society.”¹³⁹ Furthermore, Bastarache J. stated:

Libman is not dissimilar to *Irwin Toy* in the sense that, under certain circumstances, the nature of the interests (i.e., a single party or faction with a great preponderance of financial resources) of the speakers could make the expression itself inimical to the exercise of free and informed choice by others. The government does not suggest that there is any such systematic or structural danger in the case of opinion surveys.¹⁴⁰

The connection made by Bastarache J. to *Butler*, *Keegstra*, and *Irwin Toy* suggests that in order for electoral speech to be limited under the guise of “fairness”, the speech must be the source of genuine harm to the electoral process and serve an identifiable interest. Bastarache J. emphasized this point by distinguishing the case of opinion poll restrictions from advertising restrictions: “Unlike the advertising cases, this is not a case in which the government is intervening against a powerful interest to prevent expression from being a means of manipulation and oppression.”¹⁴¹

B. “Institutionally Bound” Expression

The Supreme Court’s acceptance of Rawls’ rationale for the regulation of electoral speech in *Libman* was unequivocal. Whether *Libman* can be interpreted as endorsing a reconception of electoral expression is less certain. At the very least, it may be said that the decision is not inconsistent with Baker’s idea of “institutionally bound” expression. Indeed, if it can be inferred that the Court has adopted such a notion, it becomes easier to reconcile the statement that “[p]olitical expression is at the heart of the values sought to be protected by ... s. 2(b)”¹⁴² and the Court’s emphatic conclusion that fairness is essential to the electoral process and that “protecting fairness of referendum campaigns is a laudable objective that will necessarily involve certain restrictions on freedom of expression.”¹⁴³ It would seem that in the consideration of laws or regulations related to elections or referenda where fairness is a relevant concern, the Court will adjust its expectations accordingly. In *Libman*, the Court’s traditional hostility to restrictions of political expression seems to be neutralized by the realization that fairness is a complicated concept that “presupposes that certain rights or freedoms can legitimately be restricted in the name of a healthy electoral democracy.”¹⁴⁴ This is an acknowledgement, at least implicitly, that the idea of fairness com-

¹³⁶ [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 499 [hereinafter *Butler*].

¹³⁷ [1990] 3 S.C.R. 697, 1 C.R. (4th) 129 [hereinafter *Keegstra*].

¹³⁸ [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 [hereinafter *Irwin Toy*].

¹³⁹ *Thomson Newspapers*, *supra* note 6 at 945.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.* at 958.

¹⁴² *Supra* note 4 at 403-404.

¹⁴³ *Ibid.* at 428 [emphasis in original].

¹⁴⁴ *Ibid.* at 410.

prises a balancing of competing rights rather than representing merely a State interest. The importance of political expression and its restriction is not devalued; rather, the competing interests are of one and the same nature—effective political expression—and thus are equally deserving of the Court's protection. When fairness is involved, the discovery that a right or freedom has been restricted is not significant—it is expected.

Whether the acknowledgement that the idea of fairness inevitably entails restrictions can be interpreted as a reconception of expression in the electoral realm or not is open to question. *Thomson Newspapers*, unfortunately, does little to clarify this issue. The majority judgment does not address the matter explicitly. Bastarache J.'s use of contextual interpretation seems to suggest that the timing of the expression—during an election—is significant. His emphasis of the fact that political expression lies at the core of freedom of expression without any reference to the inevitability of restrictions of expression in the electoral context, however, suggests otherwise. This omission can perhaps be understood as an effect of his finding that, because of its random nature, the harm posed by opinion polls is of a different type than that posed by advertising or spending. Essentially, in Bastarache J.'s view, there are no inevitable or concomitant restrictions in the case of opinion polls as the principle of fairness is not engaged because of the lack of systemic inequality or oppression.

Support for the view that electoral speech is indeed institutional speech as conceived by Baker, however tenuous, may be inferred from the distinction made by Bastarache J. between the media as reporter of information and as advertiser.¹⁴⁵ Such a distinction is consistent with Baker's assertion that any expression in the public realm during an election that is not aimed at influencing the result of the election falls outside the bounds of the institution and cannot be a legitimate subject of regulation. Further support for the view that electoral speech is institutionally bound speech can be found in the dissenting judgment of Gonthier J. In his judgment, Gonthier J. clearly indicated that electoral expression should be understood differently than typical political expression: "[Existing Canadian electoral laws] are strong evidence that elections constitute, in our society, a unique event which calls for special treatment in order to promote voter autonomy and rational choice."¹⁴⁶ Despite these indications, it is premature to say that the Supreme Court has endorsed Baker's idea of electoral expression as institutionally-bound speech.

C. The Supreme Court's Hierarchy of Interests in Democracy

The idea of fairness is rooted in equality, but it is not equality in a systemic sense. Though it may seem paradoxical, under the rubric of fairness, *Libman* set out a *de facto* hierarchy of interests in the electoral system. Voters' interests are foremost; candidate and party interests are secondary; non-participant interests are tertiary. Among the freedoms that the Court suggests must necessarily be limited in the pursuit of fair-

¹⁴⁵ *Thomson Newspapers*, *supra* note 6 at 971.

¹⁴⁶ *Ibid.* at 899-900.

ness are those of non-participant groups and, to a lesser extent, candidates and political parties. Can this be reconciled with the value of equality that underlies fairness?

For the most part, this hierarchy is based on a common sense analysis of the structure of Canadian electoral democracy. Rawls' argument for the regulation of electoral expression is based upon the basic principle of one person, one vote. Following from this it can be argued that if sovereignty can be seen to reside ultimately with the people, then the most basic expression of the people's will—the vote—is of paramount importance and must inform the regulation of elections. Similarly, the right to stand for election is an essential characteristic of citizenship; therefore, the expression of candidates has a greater claim to protection than that of non-participants. As Dworkin suggests, if the right to be a candidate is to have meaning, regulations must further the ability to be heard.¹⁴⁷ These principles and the idea of a hierarchy of interests in elections is consistent with the Lortie Commission's goals of "promoting the equality and efficacy of the vote"¹⁴⁸ and "strengthening political parties as primary political organizations."¹⁴⁹ Moreover, in *Libman* it is noted that "laws limiting spending are needed to preserve the equality of democratic rights"¹⁵⁰—democratic rights under the *Charter* being the right to vote and the right to be a candidate.

If it is accepted that candidates have a greater interest in elections than non-participants, then it is arguable that this premise may be extended to political parties which are vehicles for the collective exercise of the right to stand for election. The unique role of political parties in the electoral process was emphasized by the Lortie Commission.¹⁵¹ This was also recognized by Kennedy J. of the United States Supreme Court in his concurrence and partial dissent in *Colorado* where the constitutional status of party to candidate contributions was in issue. Kennedy J. wrote:

A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; but in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa.¹⁵²

He continued by emphasizing the unity of interests between candidates and their parties:

We have a constitutional tradition of political parties and their candidates in joint First Amendment activity; we also have a practical identity of interests between the two entities during an election.¹⁵³

In *Libman*, the language used by the Court suggests that the idea of the identity of interests between candidates and parties is assumed: "It is ... important to limit inde-

¹⁴⁷ "The Curse of American Politics", *supra* note 37 at 23.

¹⁴⁸ *Final Report*, *supra* note 12 at 9-11.

¹⁴⁹ *Ibid.* at 11-13.

¹⁵⁰ *Supra* note 4 at 410.

¹⁵¹ *Final Report*, *supra* note 12 at 11-13.

¹⁵² *Supra* note 86 at 2322.

¹⁵³ *Ibid.* at 2323.

pendent spending more strictly than spending by candidates or political parties.”¹⁵⁴ While the preference given to candidates and political parties over non-participants may not be justifiable in terms of equality, it is consistent with the conventions of representative democracy.

The place of non-participants at the bottom of the electoral hierarchy does not mean that their contribution is irrelevant or valueless. Quite the opposite: if the general premise that political expression is central to democracy is accepted, then the voices of non-participants should not be silenced; they should be allowed to speak at a volume that is proportionate to their stake in the process. The Court outlined this view of the position of non-participants by noting that “[w]hile we recognize their right to participate in the electoral process, independent individuals and groups cannot be subject to the same financial rules as candidates or political parties and be allowed the same spending limits.”¹⁵⁵ The Court elaborated on this in the context of the Quebec referendum law by stating that “limits on spending by third parties ... are necessary and must be far stricter than those on spending by the national committees in order to ensure that the system of limits and a balance in resources is effective.”¹⁵⁶

Despite *Libman*’s affirmation of the validity of the objective of controlling non-participant expenditures, the important question of the proper level of spending to be allowed to non-participants will remain a volatile issue as long as the amount permitted effectively precludes access to the mass media. In *obiter*, the Court suggested that the \$1,000 limit recommended by the Lortie Commission and imposed by the *Canada Elections Act* is a practical limit on non-participant spending.¹⁵⁷ With respect, if the Court were to be true to the spirit of a voter-based egalitarian model, non-participant spending should be restricted, but not to the degree permitted by the *Canada Elections Act*. Limits on non-participants should be proportional to both the cost of the means to be heard (*i.e.*, media advertising) and the limits imposed on parties, candidates, or, in the case of referenda, national committees. In a national election, spending limits should allow non-participants to conduct a viable, but modest, campaign that can be heard across the country. Future cases concerning the role of non-participants in elections will likely occur in the context of provincial elections legislation rather than the *Canada Elections Act* as the provisions affecting non-participant spending were not enforced in the 1997 federal election as a result of the *Somerville* decision. Indeed, at least two challenges to the British Columbia *Election Act*¹⁵⁸ on such a basis have been contemplated.¹⁵⁹

¹⁵⁴ *Supra* note 4 at 411.

¹⁵⁵ *Ibid.* at 412.

¹⁵⁶ *Ibid.* at 425.

¹⁵⁷ *Ibid.* at 425-26.

¹⁵⁸ *Supra* note 27.

¹⁵⁹ See H.E. Maconachie, “The New B.C. *Election Act*: Promoting a Fair Democracy or Stifling Debate?” (1996) 54 *Advocate* 221 at 225; and J. Kavanagh, “Tax Accountant Challenges Election Gag Law” *Canadian Press Wire Service* (24 November 1997), online: QL (CPN).

Conclusion

If *National Citizens' Coalition* and *Somerville* were to be heard by the Supreme Court today, there is little question that the results would be reversed. This is bluntly pointed out in *Libman* where the Court stated that "we cannot accept the Alberta Court of Appeal's point of view because we disagree with its conclusion regarding the legitimacy of the objective of the provisions."¹⁶⁰ The difference between the approaches of the two courts, however, goes far beyond a mere difference in result as to the legitimacy of the objective of limiting non-participant spending. What separates *Libman* from *Somerville* is that the Supreme Court has embraced an egalitarian theory of democracy whereas the Alberta Court of Appeal's decision was informed by libertarian ideals. Although unstated, the Supreme Court's specific disavowal of *Somerville* was surely motivated by an awareness of the impact of *Buckley* on the electoral system in the United States. In *Libman*, the Supreme Court demonstrated that it will not be an impediment to the reasonable regulation of electoral expression.

Libman stands for the proposition that State regulation of spending during elections and referenda to limit the influence of the wealthy is a legitimate objective. Moreover, *Libman* demonstrates that it is possible—even desirable—to place different limits on different groups. The hierarchy of interests in the electoral process that may be gleaned from *Libman* appears to give Parliament room to forge a regulatory scheme that places the interests of citizens as voters and candidates above those of non-participants. A plain reading of the attitude of deference to Parliament found throughout *Libman* also suggests that the range of alternatives open to Parliament may be very wide. Too much emphasis, however, should not be put on this deference as it can largely be attributed to the fact that Parliament followed the carefully considered recommendations of the Lortie Commission. Where Parliament chooses to act without such support, the Court may not be so ready to defer to its wisdom. This is especially the case where the measures adopted can be viewed as favouring the governing party. In *Libman*, the Court noted that the National Assembly had gone "to considerable lengths" studying the proposals and had acted "in good faith" in crafting its referendum law.¹⁶¹ *Libman* should be taken as an invitation to create an egalitarian electoral system and not as a licence to silence unpopular views or political opponents. This conclusion is underscored by the decision in *Thomson Newspapers* where the majority ruled that electoral regulations not founded on egalitarian principles will be accorded little deference.

The egalitarian theory espoused by the Supreme Court involves not only an acceptance of the relevance of political equality as a consideration, but an implicit recognition that the compromising of some rights is inevitable in the context of elections. This approach is encapsulated in the Court's definition of "fairness". The idea of fairness in elections is important and has the potential to blossom into a theoretical

¹⁶⁰ *Supra* note 4 at 427.

¹⁶¹ *Ibid.* at 417.

framework for the judgment of all electoral regulations. Indeed, after *Libman*, the challenge before the courts is to flesh out the meaning of fairness in consideration of other aspects of electoral regulation. In the first post-*Libman* elections case—*Thomson Newspapers*—the Supreme Court was divided over the extent of the acceptable regulation of opinion polls, with the majority finding that the regulations could not be justified under the rubric of fairness. This divide suggests that the boundaries of the idea of fairness remain to be defined. Although *Thomson Newspapers* seems to limit the scope of fairness to equality, the fact that the Court uses the term “fairness” instead of equality throughout *Libman* suggests that the idea may have greater interpretive scope. Tests of other aspects of the *Canada Elections Act* such as the preferential reimbursement of campaign expenses based on a percentage of the popular vote may be developed in future case law.¹⁶² Moreover, the ideas that inform the Court’s egalitarian approach are closely allied to the idea of deliberative democracy—a kinship that perhaps hints at an evolving conception of Canadian democracy as a whole.

¹⁶² The recent case of *Hebert v. Quebec (A.G.)*, [1998] A.Q. No. 3675 (S.C.), online: QL (AQ), where preferential reimbursement of political candidates under Quebec electoral law was challenged under the voting rights in s. 3 of the *Charter*, may provide another forum for the consideration of the egalitarian model as it moves up through the court hierarchy. This case is particularly interesting because it provides the opportunity to consider what is fundamentally a matter of expression under the rubric of the right to vote.