

Understanding Democracy as a Cause of Electoral Reform: Canadian Jurisprudence and Electoral Reform¹

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This paper addresses the question of the sources of electoral reform that lie outside of the partisan political realm. In particular, it examines the case of electoral reforms that have been imposed, or that realistically might be imagined to be imposed, by the courts in Canada. The paper consists of three major sections. The first introduces the idea of judicial review as a source of electoral reform. The second lays out the major cases relevant to electoral reform that have been decided by the Canadian courts. The third attempts to impose some theoretical consistency on the Canadian jurisprudence in this field,² and to suggest the possible consequences of adherence to this line of development.

Introduction

In an often cited article, Kenneth Benoit (2004: 363) presents a theory that “predicts that electoral laws will change when a coalition of parties exists such that each party in the coalition expects to gain more seats under an alternative electoral institution, and that also has sufficient power to effect this alternative through fiat given the rules for changing electoral laws.” In a similar vein, Josep Colomer (2005: 2) presents “a logical model and discussion of the choice of electoral systems in settings with different numbers of previously existing political parties.” These articles take clear positions on two long-standing and related debates. First (and most obviously the case with Colomer, but certainly implicit in Benoit) - and following a line dating at least to John Grumm’s 1958 article on the adoption of PR in Europe - they argue that party systems are best understood as a cause rather than a consequence of electoral systems. Second, like much of the current literature on electoral reform, they assume that the desire of parties to maximize seats (or power more generally) in the relatively short-run, rather than values or fairness, is the primary motivating influence behind electoral reform.

In fairness, Benoit is quite careful to present his theory “as *a* model of electoral system change, rather than ... as *the* model” (373, italics in original), and to recognize that the parsimony

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² It should be admitted at the outset that this may be a Sisyphean task. On one hand, collegial courts, like any voting body, are subject to Arrow’s General Impossibility Theorem, and so it is may be wishful thinking to assume that there is any underlying collective rationality to be discovered. On the other hand, the composition of the courts changes over time; in particular with reference to the jurisprudence discussed here, Supreme Court Justice Iacobucci retired in 2004.

that is the hallmark of this genre of theorizing often comes at the expense of descriptive/predictive accuracy. As many authors have shown (e.g., van der Kolk 2007; Katz 2005), raw seat maximization is not always the primary motivation even for electoral law changes that directly alter the expected distribution of seats among parties. Moreover, as Renwick (2008) has shown, values can become relevant to party preferences regarding electoral reform even if their ultimate objective is seat maximization; reforms that are perceived by the public to be unfair or excessively self-interested may cost enough votes to result in fewer seats even after translation through a more advantageous electoral formula.

There are, however, two additional assumptions in these articles, as in much of the literature on electoral reform. The first is that attention should be focused on “major” reforms at the national level, generally defined as a shift from one to another of the twelve types of electoral systems identified by Reynolds et al. (2005: 35-118), possibly supplemented by changes in electoral formula within the category of list PR or substantial changes in district magnitude (e.g., Lijphart 1994; Mozaffar 2008). While rarely stated explicitly, this assumption is implicit in the selection of cases for analysis. Ironically, the changes in electoral law that may have the greatest effect on outcomes in low magnitude, especially single member, district systems - the redrawing of district lines, potentially involving both malapportionment and gerrymandering, or reform of the method by which lines are drawn - virtually are never included in the “major” category. Similarly downplayed or ignored outright are reforms to a wide range of electoral regulations, including such things as official recognition/registration of political parties, control of political finance and campaign practices, or registration of voters that, like electoral formula, can be manipulated to substantial partisan advantage (see, e.g., Schaffer 2008), indeed possibly altering the balance of seats among parties more substantially than some reforms that conventionally are included in the “major” category.

The other assumption is that parliament is the most/only significant source of electoral reform. This is not to say that the impetus or ideas for reforms must originate in parliament. As Benoit (2004: 378) notes, “An interesting issue in its own right will be what is and who determines the universe of electoral arrangements considered as alternatives.” But in the majority of the literature, this is understood as being prior to, rather than part of, the reform process - as must be the case if the assumption that the process is driven by party self-interest is to be maintained. In a forthcoming book, Renwick (forthcoming; see also Renwick 2008) makes an important advance in distinguishing between reforms rooted in elite majority imposition (for which the Benoit/Colomer models would be most appropriate) and reforms rooted in elite-mass interaction (primarily those in which the imperative for a reform, if not its particular content, is imposed on the elite by referenda³).

³ In this respect, one might distinguish between the cases of New Zealand and Italy. In New Zealand, although the shift from SMP to MMP ultimately was secured by the passage of a referendum that the party elites hoped would be defeated, that process was initiated through the miscalculations of those elites themselves. In Italy, on the other hand, while the ultimate decision as to the new electoral system was made by parliament, the decision that there would be a new electoral system was made by a referendum over which the elites of the parties nominally in power had no control.

Judicial Review as a Source of Electoral Reform

Especially if one relaxes the assumption that only “major” national-level reforms count (and potentially even without relaxing that assumption), however, the assumption of parliamentary primacy must increasingly be questioned for reasons beyond the possibilities of referenda. In particular, in recent decades courts in many countries have abandoned Justice Felix Frankfurter’s admonition that “Courts ought not to enter this political thicket” (*Colegrove v. Green* 1946), and have been actively involved in shaping electoral law. Although to date there has been no case (to my knowledge) of a “major” national-level reform imposed by court action, this is hardly beyond the current realm of possibility⁴, and reforms of equivalent gravity certainly have been imposed sub-nationally in the United States⁵ and in Germany. Courts in Germany (e.g., BVerfGE 20, 300 [1968]), Canada (e.g., *Figueroa v. Canada (Attorney General)* [2003] 1 S.C.R. 912), and the United States (e.g., *Buckley v. Valeo* [1976] 242 U.S. 1) have either themselves reshaped through remedial orders or reading into the text of existing statutes, or compelled parliaments to reshape within strict limits imposed by the courts, party finance regimes. In other cases, regulations concerning use of the broadcast media for election campaigning have been subject to judicial revision (e.g., *Australian Capital Television Ltd. v. Commonwealth of Australia* [1992] 177 CLR 106).

The involvement of the courts in turn challenges the assumption that electoral reform is motivated and shaped by partisan self-interest rather than political values. While some might question the political neutrality of courts (especially Americans in the wake of the *Bush v. Gore* decisions), it is clear that courts have to be concerned with values, even if only as window dressing. Moreover, as with so-called hybrid regimes that ultimately succumbed to pressure to give substance to what they had intended to maintain as “facade elections” (e.g., Sogindolska 2006), even politically biased courts are likely to become trapped by their own jurisprudence. Especially in the more securely established liberal democracies, the increasing power and activism of courts (see, e.g., Stone Sweet 2001, 2004) coupled with the modus operandi of courts makes them important institutions linking electoral reform to ideas about the meaning and proper functioning of political parties, representative institutions, and elections in a democracy.

⁴ For example, if the European Court of Human Rights had ruled in favor of the applicants in *Yumak & Sadek v. Turkey* (a case seeking to overturn a 10% threshold for representation), or if the Supreme Court of Canada were to rule in favor of the applicants in *Joan Russow and the Green Party of Canada v. The Attorney General of Canada et al.* (a case seeking to overturn the use of SMP in parliamentary elections). In an abstract review of proposed changes to that country’s electoral law, the Czech constitutional court rejected the use of small multimember districts with a modified d’Hondt formula as involving excessive departure from constitutionally mandated proportionality (Art. 18) - *Sbirka zákonů České Republiky 2202* (2001), cited in Williams (2005).

⁵ These have been primarily involved with efforts to secure/deny representation of racial minorities. Examples include court-ordered use of cumulative voting or overturning systems of at-large election, both of which qualify as movement from one to another of the Reynolds, Reilly, and Ellis categories. An attempt to have the use of SMP declared unconstitutional for provincial elections in Québec (*Gibb c. Québec (Procureur général)* [2005] was dismissed in the Cour supérieure as not “bien fondée”.

The Canadian Cases

In this paper, I look at courts as a source of change in electoral arrangements, focusing particularly on the case of Canada. I chose this case for a number of reasons. One is that the idea of judicial review is relatively recent in Canada, effectively dating only from the Constitution Act of 1982.⁶ As a result, the body of judicial decisions relevant to elections both is manageable, and is particularly shaped by late 20th and early 21st century concerns. Moreover, Canada has a system of party/parliamentary government, which may make insights from the Canadian case more directly applicable to the European cases that traditionally have been the source of most data for electoral systems research.

A second reason for a Canadian focus is that the structure of the Canadian constitution has forced/encouraged Canadian courts to deal in an especially direct way with questions of values. The Canadian Charter of Rights and Freedoms (Schedule B of the Constitution Act of 1982 - henceforth simply the Charter) guarantees a number of rights, including most relevant to this paper:

s. 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

But while this right is more strongly entrenched than many others (in the sense that it is not subject to the parliamentary override of s. 33 - the “notwithstanding clause”⁷, and is not limited within the text by such modifiers as “unreasonable”⁸), it is still limited by section 1:

s. 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as

⁶ Before 1982, Canada, like the UK, operated under a system of parliamentary sovereignty. Canadian courts could invalidate an act of Parliament only if it violated the division of powers between the federal and provincial governments.

⁷ 33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

One should note that freedom of speech/press/conscience, freedom of assembly or association (s. 2) and the guarantees of equal protection and equal benefit of the laws (s. 15) all are subject to parliamentary override.

⁸ For example the guarantees against unreasonable search and seizure in s. 8 or arbitrary arrest in s. 9.

can be demonstrably justified in a free and democratic society.

The result is that the courts have to address explicitly the meaning and requirements of “a free and democratic society” in ruling on the constitutionality of impugned legislation or practices.

The third and fourth reasons for the focus on Canada are more personal. On one hand, I have been personally involved as an expert witness for the governments of Canada and Ontario in two of the cases involved here (*Joan Russow and the Green Party of Canada v. The Attorney General of Canada et al.*, which has not come to trial, and *De Jong v. Ontario (Attorney General)* 287 D.L.R (4th) 90, respectively). On the other hand, I believe that some of the jurisprudence of the Canadian courts has been fundamentally misguided on the subject of elections, and that the reforms resulting from the courts’ decisions have potential unintended consequences that have not been given adequate attention. This last point is raised in the final section of this paper. This section reviews the major cases in which the Canadian courts have confronted questions concerning election systems. Before doing so, however, it is necessary to discuss a fundamental aspect of Canadian constitutional jurisprudence.

The Oakes Test: Limiting and Balancing Rights

As established by the Supreme Court of Canada, analysis of the constitutional propriety of a statute alleged to violate the Charter takes place in two parts. The first part requires the court to determine whether a Charter right has been infringed. Particularly for rights like “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ... freedom of peaceful assembly; and ... freedom of association” (s. 2) or “the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein” (s. 3), which have no textual modifiers or qualifications, this is a relatively low bar; essentially any regulation could be seen in some way or other to infringe (limit) these rights.

The finding that a Charter right has been infringed does not, however, necessarily result in the invalidation of the impugned statute. Rather, it triggers what is generally identified in court decisions as a “section 1 analysis” to determine whether the infringement can be “demonstrably justified in a free and democratic society”. This is done by applying the test laid out by Chief Justice Dickson in *R v. Oakes*, 1 S.C.R. 103 [1986]⁹:

69 To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a

⁹ The Oakes case concerned the constitutionality of a provision of the Narcotics Control Act that ordained that a defendant who had been convicted to possession of a narcotic was to be presumed to be in possession for the purpose of trafficking unless the defendant could prove to the contrary (in violation of s. 11(d) - the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal” - of the Charter).

Note that in the application of the Oakes test, the burden of proof shifts. The onus to prove a violation of a Charter right is on the person challenging the law, but the onus to prove justification is on the government.

constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

70 Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

In deciding whether a statute that limits the right to vote is nonetheless valid, the courts must therefore explicitly assess claims by the government that the objectives served by those limits are "pressing and substantial in a free and democratic society" and of "sufficient importance" to justify the limitation of the right to vote.

The Right to Vote: Suffrage and Apportionment

Before the Oakes test comes into play, however, the court has to find that the right to vote has been infringed, and that requires that the meaning of "the right to vote in an election..." (Charter, s. 3) be specified. As in the United States, early Canadian cases on this question concerned direct denials of the vote (in particular, to convicted or incarcerated criminals, but also to holders of offices requiring the appearance of neutrality such as judges), and potential "dilution" of the vote through the processes of malapportionment or gerrymandering. With regard to the first, the Canadian courts took a far more expansive view of the right to vote (perhaps not surprisingly, given that the right to vote is guaranteed by the Charter, whereas the American Constitution only prohibits denial of the right to vote on the basis of specifically named grounds, otherwise leaving the franchise to the states, subject to what may be read into the equal protection clause of the 14th Amendment - for a comparison of American and Canadian constitutional jurisprudence on this point, as well as on redistricting, see Manfredi and Rush 2008), so that today the only Canadian citizen over the age of 18 who can legally be disenfranchised is the Chief Electoral Officer.¹⁰ Beyond the fact that in this series of cases,

¹⁰ On the other hand, perhaps because the Charter refers specifically to voting in "an election of members...", the right to vote in referenda is not so absolute. See *Haig v. Canada*, 2

culminating in *Sauvé v. Canada (Chief Electoral Officer)*, 3 S.C.R. 519 [2002], the Supreme Court of Canada interpreted the right to vote as “one of the most fundamental rights guaranteed by the *Charter*” (para. 13), these cases are of little relevance for more far reaching electoral reform.¹¹

With regard to districting, and reading the right to vote in conjunction with “the right to the equal protection and equal benefit of the law” (*Charter*, s. 15(1), cf. the guarantee of “the equal protection of the laws” in the 14th Amendment to the US Constitution), the Canadian courts have taken neither the strict egalitarian position of American jurisprudence regarding Congressional reapportionment nor the highly limited view that the *Charter* guarantee goes no farther than assuring that every Canadian has an equal right to place a ballot in the ballot box and then to have that ballot counted in the same way as every other ballot in the same box.¹² Rather, the interpretation adopted is that “the right to vote” means “the right to ‘effective representation’” (*Reference Re Provincial Electoral Boundaries (Sask.)* 2 S.C.R. 158 [1991], para. 49).¹³ In the particular case of districting, the right to effective representation was taken to

S.C.R. 995 [1993]

¹¹ See also *Harvey v. New Brunswick*, 2 S.C.R. 876 [1996]: “**37** In the present case the right in issue is the very embodiment of democracy -- the right of citizens to elect their government and the right of each individual to attempt to become part of that government.”

¹² “The maxim that a full and generous construction must be given to *Charter* rights and freedoms precludes a narrow, technical view of the right to vote. More is intended than the bare right to place a ballot in a box.” *Dixon v. British Columbia (Attorney General)* 59 D.L.R. (4th) 247 [1989] An illustration of the narrow view can be found in the Voting Rights Act jurisprudence of US Supreme Court Justice Clarence Thomas. “I cannot adhere to the construction of § 2 embodied in our decision in *Thornburg v. Gingles*. I reject the assumption implicit in that case that the terms “standard, practice, or procedure” in § 2(a) of the Voting Rights Act can be construed to cover potentially dilutive electoral mechanisms. Understood in context, those terms extend the Act’s prohibitions only to state enactments that regulate citizens’ access to the ballot or the processes for counting a ballot.” (*Holder v. Hall* 114 S. Ct. 2619 [1994])

¹³ This case involved provincial legislative boundaries drawn by a boundary commission that was constrained by statute to construct 29 urban, 35 rural, and two northern constituencies. The scheme slightly over-represented rural constituencies (53% of the seats v. 50.4% of the population) and quite significantly over-represented the northern constituencies. The majority decision in this case (upholding the statute as not in violation of s. 3) was written by Justice (later Chief Justice) Beverley McLachlin, and draws heavily from her opinion written as Chief Justice of British Columbia in *Dixon v. British Columbia (Attorney General)* 59 D.L.R. (4th) 247 [1989]). Note that this decision involved a specific rejection of the American jurisprudence:

As I noted in *Dixon*, supra, at p. 409, democracy in Canada is rooted in a different history than in the United States:

Its origins lie not in the debates of the founding fathers, but in the less absolute recesses of the British tradition. Our forefathers did not rebel against the English tradition of democratic government as did the Americans; on the contrary, they embraced it and changed it to suit their own perceptions and needs. (para 58)

allow, or perhaps even to require, departure from strict numerical equality:

... such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed. (para. 54)

To say that “voter parity” may be an impediment to effective representation, or even that “our legislative assemblies [should] effectively represent the diversity of our social mosaic”, does not yet define “effective representation.” Certainly, legislative assemblies effectively representing social diversity could be understood in at least three ways: that the assemblies themselves should be demographically diverse; that the districts from which representatives are chosen should be diverse, even if the representatives themselves remain overwhelmingly “middle aged, middle class, white males”; that representatives should have a strong incentive to speak for diverse interests within their districts, even if there is little difference between the demographic composition of one district and another. There is some evidence that Justice McLachlin was not overly optimistic about the third of these, when she says:

effective representation and good government in this country compel those charged with setting electoral boundaries sometimes to take into account factors other than voter parity, such as geography and community interests. The problems of representing vast, sparsely populated territories, for example, may dictate somewhat lower voter populations in these districts; to insist on voter parity might deprive citizens with distinct interests of an effective voice in the legislative process as well as of effective assistance from their representatives in their "ombudsman" role. (para. 61)

In other words, distinctive demographic or geographic characteristics of a district may themselves justify departures from a strict one-(wo)man-one-vote standard, presumably because the characteristics of the district’s population will determine the interests that are represented – even by the representative as ombudsman. More importantly, this passage echoes her observation earlier that:

[o]urs is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative; as

Dixon involved legislative districts with extremely divergent populations - ranging from 91% under the mean to 143% over the mean. While explicitly rejecting “the petitioner's submission that s. 3 of the Charter requires absolute -- or as near as practicable to absolute -- equality of numbers of electors within electoral districts”, Justice McLachlin found that the “factors relied upon by the Attorney General in support of deviation from strict proportional representation fall far short of justifying deviations of the magnitude of those found in British Columbia.”

noted in *Dixon v. B.C. (A.G.)*, [1989] 4 W.W.R. 393, at p. 413, elected representatives function in two roles -- legislative and what has been termed the "ombudsman role". (para. 49)

This suggests that however one resolves the myriad questions associated with the concept of representation (see Katz 2003 for an elaboration on these questions), effective representation is somehow provided by representatives in legislative assemblies - that is, by those who win elections.¹⁴

The Right to Vote: Campaigns and Participation

As the court's jurisprudence regarding elections developed, this apparent focus on winners has been substantially undermined. The grounding of decisions in the right to vote, and the placing of "effective representation at the heart of the right to vote" remains, but what might be called the "locus of representation" has shifted away from the legislative assembly toward the election itself, while the emphasis on representatives has been diminished. As Justice McLachlin continued in the *Saskatchewan Reference* decision:

The concerns which Dickson C.J. in *Oakes* associated with a free and democratic society -- respect for the inherent dignity of the human person, commitment to social justice and equality, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals in society -- are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity. Respect for individual dignity and social equality mandate that citizen's votes not be unduly debased or diluted. But the need to recognize cultural and group identity and to enhance the participation of individuals in the electoral process and society requires that other concerns also be accommodated. (para. 62)

In particular, the idea that "the [enhanced] participation of individuals in the electoral process" is part of effective representation and therefore also of the right to vote (or, alternatively, that the right to vote is the right to an effective vote as a means to achieving effective representation) has shifted attention from the outcome of the vote to the process leading up to that vote. The occasion for this shift in emphasis was a series of cases concerning provisions of the *Canada Elections Act* (especially those concerning various aspects of electoral or party finance) and both federal and provincial statutes concerning ballot access that could be seen to favor the large or established parties over small or new parties.

Libman v. Quebec: Although relating to a referendum campaign rather than to an election per se (and recalling that *Haig* made a distinction between referenda and legislative elections), the early direction in this area was set in the 1997 case of *Libman v. Quebec (Attorney General)* 3 S.C.R. 569. In this case, the Supreme Court of Canada had to balance the freedoms of expression and association, both of which were limited by the Quebec Referendum Act in essentially banning campaigning by any group that did not affiliate itself with one of the two national committees (one for and the other against the referendum question) against the objectives of promoting equality between the two options and thus a free and informed vote.

¹⁴ Recall also the reference to "ensur[ing] that our legislative assemblies effectively represent the diversity..." in para 54, quoted above.

The Court accepted the validity both of spending limits in general and that the limit on independent spending must also be stricter than that granted to the national committees. Since it cannot be assumed that each option will benefit from the same amount of independent spending in its favour, such spending must be restricted to preserve a balance in the promotion of the options and favour an informed and truly free exercise of the right to vote. (para 54)

The Court further found that the provision allowing groups to affiliate with the national committees satisfied the minimum impairment test for those advocating a “yes” or a “no” vote on the referendum, and that if this were the only question, the restrictions on expression and association might have been saved under s. 1. Libman’s committee, however, was advocating abstention, which precluded affiliation, and left them virtually barred from participation. Since this bar could not be severed from the rest of the statute, the entire regime of “regulated expenses” was overturned.

Figueroa v. Canada: The key case in entrenching the shift in emphasis from representation in an assembly to participation in elections, however, was *Figueroa v. Canada (Attorney General)*, 1 S.C.R. 912 [2003], in which Miguel Figueroa, the leader of the Communist Party of Canada, challenged the sections of the *Canada Elections Act* that required a political party to nominate candidates in at least 50 constituencies in order to obtain, and then to retain, registered party status – which would give them a number of advantages, including the right to issue receipts that would make donations made outside of the election period tax deductible,¹⁵ for their candidates to transfer unspent election funds to the party (otherwise, these funds would be transferred to the Receiver General), and to have the party’s name listed with its candidates on ballots. (The case also challenged the legality of the deposit of \$1000 required of each candidate, half of which would be returned on completion of the financial reporting requirements of the *Act*, but the other half of which would be returned only if the candidate received at least 15% of the vote in his or her district. The trial judge found this to violate the Charter, and Parliament amended the law to make the deposit fully refundable on satisfaction of the reporting requirements. I return to this aspect of *Figueroa* in the next section.)

In addition to “judicially amending” the statute to make the candidate’s deposit fully refundable (para 157), Justice Anne Molloy of the Ontario Court (General Division)¹⁶ [43 O.R. (3d) 728] in 1999 held that the 50 candidate threshold was inconsistent with s. 3 of the Charter, and could not be saved under s. 1; she ordered that the 50 candidate threshold be read down to a 2 candidate threshold. In particular, she found that while there was no affirmative obligation to mitigate inequality of resources,

fairness requires that if the government decides to extend a financial benefit to assist some candidates in an election, that benefit must be equally available to all. Therefore, although there was no obligation on the government to provide indirect funding to all political parties through the tax credit incentive scheme, once that benefit was provided, fairness requires that it be provided equally. (para 61)

¹⁵ Other provisions of the law gave this right to candidates within the context of an election regardless of the registration or not of their parties, or indeed whether they were partisan or independent candidates..

¹⁶ This court was later renamed the Ontario Superior Court of Justice.

She also found that it was inconsistent with the citizens' right to vote, because by denying voters information about the party affiliation of each candidate, it limited their access to information that would allow them to cast their ballots in a meaningful way (para. 98, citing *Re Thomson Newspapers Company Limited and Attorney General of Canada*; see also para. 94)

The Ontario Court of Appeal [50 O.R. (3d) 161] reversed the decision regarding the 50 candidate threshold in 2000, holding that the threshold was not inconsistent with s. 3, except as it denied the right to identify their party affiliation on the ballot to candidates of parties that failed to meet threshold. Although the application court and the Court of Appeal cited the same evidence regarding the importance of political parties to Canadian democracy – including excerpts from the 1992 report of the Royal Commission on Electoral Reform and Party Financing (the Lortie Commission), an affidavit from Prof. Peter Aucoin, and the parliamentary debates concerning the original determination of the 50 candidate threshold – the analysis was quite different. Justice Molloy stressed the role of “parties” (unmodified) in mobilizing voter support, formulating policy positions, and communicating with voters (esp. para. 57), often couched in terms of the benefits to “a candidate” (singular). The Court of Appeal, however, emphasized the importance of “national parties”

16 Political parties dominate the national political scene. It is no overstatement to observe that Canada owes its early survival to the existence of strong national political parties. The vast majority of candidates are selected by political parties. Their campaigns are, to a large degree, structured and financed by political parties. The government, which emerges from the electoral process, is formed by the winning party, led by a Prime Minister chosen by that party and reflects the policies of that party. Canadians have traditionally voted for or against political parties as much as they have voted for or against individual candidates. (para. 16)

going on to stress testimony referring to “responsible government” and “party government” (para 17 and 76). The Court of Appeal distinguished between the functions served by political parties at local and national levels, in particular citing the position of the European Commission in *Bowman v. United Kingdom* 22 E.H.R.R. C.D. 13, at 18 [1996] that the primary purpose of elections is “to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will”, that is, to choose a government (para 76). This being so, the Court concluded that “that the 50-candidate requirement affords an appropriate distinction between political parties who by seeking to play a meaningful role in the electoral process enhance effective representation and those parties who do not seek to play such a role” (para. 86), so that there was no s. 3 violation in restricting the financial benefits of registration to the former group of parties.

Ultimately, the Supreme Court of Canada, in an opinion delivered by Justice Frank Iacobucci, agreed with the trial judge, except that rather than substituting a 2 candidate threshold the Court held that the objectives advanced by the government to justify the 50 candidate threshold “do not justify a threshold requirement of any sort...” (para. 92) Referring to the Court of Appeal’s understanding of “effective representation” as relating to a choice of government, he wrote

23 With respect, this is not how I understand McLachlin J.'s statement that the purpose of s. 3 is effective representation. In my view, McLachlin J. was not referring to a collective interest in a desired end product of the electoral process

that results in majority government. Rather, my colleague emphasized the right of each citizen to an effective representative in the legislative assembly. She wrote, at p. 183: It is my conclusion that the purpose of the right to vote enshrined in s. 3 of the Charter is not equality of voting power per se, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative. [First emphasis added by Iacobucci; second emphasis in McLachlin's original.]

Continuing, and emphasizing that, notwithstanding the reference to "an effective representative in the legislative assembly", he sees the primary concern to be with the process of individual constituency contests rather than with outcome, either at the national or the local level:

25. ...the right to effective representation contemplates more than the right to effective representation in Parliament or a legislative assembly....[t]his Court has already determined that the purpose of s. 3 includes not only the right of each citizen to have and to vote for an elected representative in Parliament or a legislative assembly, but also the right of each citizen to play a meaningful role in the electoral process.

26. Support for the proposition that s. 3 should be understood with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government, is found in the fact that the rights of s. 3 are participatory in nature. Section 3 does not advert to the composition of Parliament subsequent to an election, but only to the right of each citizen to a certain level of participation in the electoral process....

29. It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy.... [T]he democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process.¹⁷

Having definitively shifted the focus from collective choice of the citizens to the participation rights of each individual citizen, Justice Iacobucci had no trouble finding that the 50-candidate threshold infringed s. 3 of the Charter (para. 58).

The question then was whether any threshold could be saved under s. 1. The government raised a number of objectives in justification, including "to protect the public purse as a sustainable source for the funding as a key component in the whole election financing regime of

¹⁷ This view may be contrasted with that assumed by Downs (1957:7): "The political function of elections in a democracy, we assume, is to select a government. Therefore rational behavior in connection with elections is behavior oriented toward this end and no other." In particular, the kind of expressive function to which Justice Iacobucci refers in these paragraphs is consigned by Downs to the category of irrationality.

the *CEA*” (respondent’s factum, para. 59)¹⁸, but only that of “ensuring that the electoral process results in a viable outcome for our form of responsible government” (para 79) is of concern here.¹⁹ Although he found that the government failed to produce convincing evidence that majority government is the only viable form for Canada²⁰ (para 81), his argument went beyond this factual question. According to his reasoning, in order to advance the goal of majority government, “the legislation must interfere with the right of individual citizens to play a meaningful role in the electoral process to such an extent that it increases the likelihood that candidates nominated by national parties will be elected, thereby decreasing the likelihood that candidates nominated by regional or marginal parties will be elected” (para 80).

88 ... As discussed above, this legislation has a significant impact on the capacity of candidates nominated by non-registered political parties to communicate their ideas to the electorate. This, in turn, undermines the capacity of individual citizens to introduce ideas and opinions into the public discourse that the electoral process engenders, and to exercise their right to vote in a manner that accurately reflects their preferences. This, however, is not the only effect of the 50-candidate threshold. If the legislation is, in fact, rationally connected to the stated objective, it must do more than interfere with the right of individual citizens to play a meaningful role in the electoral process in order to obtain this objective: it must interfere to such an extent that it results not only in the election of individual candidates who would not otherwise have been elected, but also in the election of

¹⁸This apparent claim of excessive expense was essentially dismissed out of hand by Justice Iacobucci (para. 68), but see the discussion of the judgement of the Ontario Court of Appeal in *Longley v. Canada (Attorney General)* below.

¹⁹In fact, the emphasis that Justice Iacobucci placed on single party majority cabinets appears seriously to oversimplify, if not distort, the government’s argument:

60. All political parties, including smaller parties, play an important role in Canadian elections. However, the extent to which parties can ultimately play a role in the process of parliamentary representation and the formation of the government depends on the extent to which they aggregate interests, accommodating different views within and structure electoral choice, all of which is related to the number of candidates they field. (respondent’s factum)

While the factum observes that parties with only a small number of candidates cannot provide the electorate a “government option”, and appears to favor pre-electoral intraparty compromise and coalition formation because the results are directly voted upon by the electorate (para 61), the same paragraph also recognizes the role of non-majority parties in the formation of government or opposition coalitions. Moreover, the European sources cited in support of the need for coherence all are drawn from multiparty systems, and can hardly be understood to be arguing the necessity of single party government, even as they warn of the dangers of a parliament “split into many small groups, which would make it more difficult or even impossible to form a majority” (para 62, citing *Bavarian Party* case from Kommers 1997: 187, BVerfGE 6, 84 [1957]).

²⁰At the time of the decision there had been eight federal minority governments (and there have been more since) without Canada collapsing.

majority governments that would not otherwise have been elected. As noted above, it is difficult to reconcile legislation that seeks to have this effect with the principles that are integral to a free and democratic society. Legislation that violates s. 3 for this purpose does great harm to both individual participants and the integrity of the electoral process itself.

It would appear that three principles underlie this conclusion. First, that “it is constitutionally required to maximize one admittedly important value – that of individual participation – alone.” (Justice LeBel dissenting at para. 103) Second, that in order to play a meaningful role, a voter must have as wide a range of choices as possible, so that he or she can vote for a candidate/party with which he or she is in substantial agreement, ignoring the possibility that by voting for a sure loser the voter is denying him/herself the opportunity to play a meaningful role in the real choice.²¹ Third, and not sitting entirely consistently with Justice Iacobucci’s claim (at para 44) that “Whether that vote contributes to the election of a candidate or not, each vote in support of that approach or platform increases the likelihood that the issues and concerns underlying that platform will be taken into account by those who ultimately implement policy, if not now then perhaps at some time in the future”, the goal of a “viable outcome” can only be achieved by altering who wins; enhancing the clarity, legitimacy, or decisiveness of the winner’s victory does not count.

Harper v. Canada: While *Figueroa* was working its way through the courts in Ontario, the question of third-party²² spending that had been raised in *Libman* arose again, this time in the

²¹ “The right to play a meaningful role in the electoral process includes the right of each citizen to exercise the right to vote in a manner that accurately reflects his or her preferences.” (para 54)

In contrast to political scientist Maurice Duverger (1959: 226) who identifies votes cast for candidates who have no hope either of winning or of coming in second in an SMP election as “wasted” (see also Downs 1957; Cox 1997), Iacobucci writes: “In each election, a significant number of citizens vote for candidates nominated by registered parties in full awareness that the candidate has no realistic chance of winning a seat in Parliament -- or that the party of which she or he is a member has no realistic chance of winning a majority of seats in the House of Commons. Just as these votes are not “wasted votes”, votes for a political party that has not satisfied the 50-candidate threshold are not wasted votes either.” (para 45) In this context, Iacobucci has to be understood to refer to votes for minor parties, and not just to votes for the party that comes in second in a riding, votes that Duverger et al. would not regard as wasted.

²² It is important to note that in this context the phrase “third parties” does not refer (as it does, for example in discussions of Duverger’s Law) to political parties that are not one of the top two contenders in a single member electoral district, but rather to all political actors (generally individuals or interest groups) who are not themselves contestants in the election. In the case of *Libman*, “third parties” would include any participant other than the two national committees. As summarized by Justice R. M. Cairns, who originally heard the case in the Alberta Court of Queen’s Bench, the case involved three challenges: to the third-party spending limits; to reporting and disclosure requirements; and to an election day ban on election advertising. (*Harper v. Canada (Attorney General)* 6 C.P.C. (5th) 362 [2000] para. 25.) Ultimately, only the third-party limits proved contentious (the other two were unanimously

context of elections as such. The law in question (*CEA* s. 350) limited the spending by a third party to no more than \$150,000 per general election, of which no more than \$3,000 could be spent to promote or oppose the election of a candidate or candidates within a single district; s. 351 prohibited attempts to circumvent these limits either by splitting into multiple third parties or by acting in collusion with other third parties.²³ The applicants alleged that these limits infringed on their s. 2 rights of expression and association as well as on their s. 3 right to vote. Relying in part on *Figuroa* (in the case of the trial judge, it was the opinion of the Ontario Court of Appeal - the case not yet having reached the Supreme Court of Canada), the courts ruled that these limits did not infringe rights under s. 3, and indeed that they enhanced them²⁴, but that the limitations did infringe on s. 2 rights. Ultimately, the Supreme Court ruled that the limitations were saved by s. 1, largely by identifying fair elections and the rights to an effective vote and to effective electoral participation as paramount values in a “free and democratic society”.

More specifically, Justice Bastarache, writing for the majority, identified three objectives that third parties might be pursuing in an election: to influence the outcome by pointing out the strengths or weakness of particular candidates or parties; to add an additional perspective with regard to the issues that were being raised by the candidates; to insert an additional issue into the debate (para 55). In quoting from the Court’s decision in *Libman*, he emphasized the importance of spending limits “to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard”²⁵ and that “the advocacy of issue positions inevitably has consequences for election discourse and thus has partisan implications” (para 61). He then gave explicit recognition to the “egalitarian model of elections... premised on the notion that individuals should have an equal opportunity to participate in the electoral process” (para 62) that had been articulated in commentary on *Libman* (Feasby 1999).²⁶ Quoting from *Figuroa*, he highlighted the expressive function of electoral participation for the individual citizen, and suggested that “Greater participation in the political discourse leads to a wider expression of beliefs and opinions and results in an enriched political debate, thereby enhancing the quality of Canada’s democracy” (para 70), and again cited *Libman* to argue that “the voter has a right to be ‘reasonably informed of all possible choices.’” (para 71) Later, in the context of freedom of expression, he reiterated the same views (para 84) in citing

upheld by the Supreme Court of Canada as infringing s. 2 rights, but saved under s. 1 – 1 S.C.R. 827 [2004], para. 47, 48, 147) or of significance for the argument in this paper

²³ Prior attempts to limit third-party spending had been struck down twice before, both times in Alberta: *National Citizens’ Coalition Inc. v. Attorney General of Canada* 32 Alta. L. R. (2d) 249 [1984]; *Somerville v. Canada (Attorney General)* 184 A.R. 241 [1984].

²⁴ For example, “It cannot be forgotten that small parties, who play an equally important role in the electoral process, may be easily overwhelmed by a third party having access to significant financial resources.” (para 116)

²⁵ Justice Bastarache later (para 121) quoted *Libman* (again adding his own emphasis): “Freedom of political expression, so dear to our democratic tradition, would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices.”

²⁶ This model was also reported in commentary to underlie the Court’s decision in *Figuroa*. See Feasby 2003; MacIvor 2004; Manfredi and Rush 2008.

Chief Justice Dickson in *R v. Keegstra* 3 S.C.R. 697 [1990]:

Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.

The question with regard to the right to vote was whether the limits involved were so stringent as to deny meaningful participation. Referring to *Libman*'s conclusions that expression (as manifested by spending) could be limited in the interest of fairness and that third parties could be held to stricter limits than the "main contenders", Justice Bastarache concluded that they were not:

74....Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome. In fact, such an understanding of "meaningful participation" would leave little room in the political discourse for the individual citizen and would be inimical to the right to vote. Accordingly, there is no infringement of s. 3 in this case...²⁷

With regard to freedom of expression, the question was whether the objectives of "first, to promote equality in the political discourse; second, to protect the integrity of the financing regime applicable to candidates and parties; and third, to ensure that voters have confidence in the electoral process" were sufficiently pressing and substantial, and the means chosen sufficiently rationally connected to the objectives, and minimally impairing and proportional to the harm to expression caused. He concluded that they were.

As already observed, Parliament amended the law regarding the return of candidate deposits in response to Justice Molloy's ruling in the Ontario Court (General Division). In response to the Supreme Court's invalidation of the party registration scheme then in force, Parliament passed Bill C-3, which came into force in May 2004.²⁸ Under that law, a party can become federally registered by submitting its name; the names and addresses of its leader, at least three officers, its auditor, and its chief agent, along with the names, addresses, and signatures of 250 voters who are members; and a declaration from the leader that one of the party's fundamental purposes is to participate in public affairs by endorsing one or more of its members as candidates and supporting their election. Thereafter, it is required to endorse at least one candidate at each general election in order to maintain its registration.

Longley v. Canada: While *Figueroa* was still under review in the Supreme Court, Parliament also enacted a major reform of Canada's political finance regime as part of the prime minister's "Eight Point Action Plan" on government ethics.²⁹ That reform (identified in the

²⁷ It is significant to note that in Justice Bastarache's view, the right to meaningful participation could be satisfied with something far short of the ability to determine the outcome, whereas in Justice Iacobucci's opinion in *Figueroa*, nothing short of the power to determine the outcome would even satisfy the requirements of rational connection.

²⁸ See:

www.parl.gc.ca/common/Bills_ls.asp?lang=E&ls=c3&source=library_prb&Parl=37&Ses=3

²⁹ While not directly relevant to this paper, in the context of the broader workshop, it might be opined that this reform package was at least in part motivated by awareness of the impending Quebec sponsorship scandal (which did not come to wide public attention until 2004).

literature as Bill C-24 – see, for example, Young et al. 2007), among other things essentially banned political contributions from corporations and unions while limiting contributions from individuals, and established in compensation a system of public subventions whereby any registered (a qualification the import of which changed almost immediately with the *Figueroa* decision and then the passage of Bill C-3) party that received at least 2% of the national vote, or 5% of the vote in the constituencies that it contested would receive C\$1.75 per year for every vote obtained in the previous general election, paid quarterly and adjusted for inflation.³⁰

In the most recent case in this series, in 2006 a number of small parties, led by Blair Longley of the Marijuana Party, challenged these thresholds, relying on the ruling in *Figueroa* that “legislation that exacerbates a pre-existing disparity in the capacity of the various political parties to communicate their positions to the general public is inconsistent with s. 3” (*Figueroa*, para 54) The questions before the courts were whether the thresholds in Bill C-24 and those barred in *Figueroa*, and whether the advantages denied by Bill C-24 to parties that failed to reach the vote threshold (the quarterly allowance) and the advantages of registered party status denied to parties that failed to meet the pre-*Figueroa* threshold of nominating 50 candidates, were sufficiently similar as to make *Figueroa* dispositive in this case as well.³¹ Justice Theodore Matlow, the application judge in *Longley v. Canada (Attorney General)* 82 O.R. (3d) 481 [2006] found that they were (para 18, 19), specifically ruling against the government’s claims that there was a significant difference between the “point of entry” threshold of *Figueroa* and the “point of access” threshold in Bill C-24 (para 26) and also against the government’s claim that Bill C-24 served to further the objective “to maintain public confidence in the integrity of the electoral process” (which the courts had previously determined in *Harvey* to be a “pressing and substantial” concern, but which Justice Iacobucci had found to be impaired rather than advanced by the 50 candidate threshold [*Figueroa* para 89] (para 27). Accordingly, Justice Matlow declared the sections of the *Canada Elections Act* establishing the threshold to be null and void and of no force or effect, and ordered that the Marijuana Party, as well as the other applicant

³⁰ The 2% and 5% thresholds had been established in 1996 as barriers for registered parties to be reimbursed for a portion of their election expenses. This was in response to payment of over \$700,000 to the Natural Law Party, which many saw to have been using the electoral process (and subsidy) to advertise its philosophy of transcendental meditation, and its related fee-based programs, rather than to participate in public debate of public issues.

³¹ An additional question was whether political parties have the status of legal entities entitled to sue or to be sued for all purposes under Canadian law, or whether the *Canada Elections Act* (s. 504(a)) gives them that status only for purposes of proceedings under the *Act*. The trial court found that parties did have the capacity to bring a stand-alone Charter challenge in their own names, but this was reversed on appeal. Among other things, this illustrates an important aspect of Canadian law - that the French and English versions of bilingual federal statutes have equal authority, but subject to a general rule that when the two versions differ in breadth, the more restricted or limited meaning is to be preferred. Where the English text speaks only of “judicial proceedings or a compliance agreement”, the French refers to “des procédures judiciaires ou à une transaction dans le cadre de la présente loi”. The Court of Appeal took the last phrase in the French to suggest an intent to set a limit on the legal personality granted to parties.

parties in the case, were entitled to recover the payments to which they would have been entitled from January 1, 2004 in the absence of a threshold.

Justice Matlow's decision was appealed to the Court of Appeal for Ontario (88 O.R. (3d) 408 [2007]). Not surprisingly, the Court of Appeal found the thresholds to infringe s. 3, but they also found that the thresholds were saved by s. 1, and accordingly reversed Justice Matlow's order.

In the first place, the Court of Appeal understood the objective of preserving the integrity of the electoral process by guarding against the misuse of public funds quite differently than either Justice Iacobucci in *Figueroa* or Justice Matlow in *Longley*. These two judges had apparently taken this to relate primarily to the "cost efficiency" of the measures in question (*Figueroa* para 68; Justice Matlow in *Longley* para. 20) and to the danger of illegal or fraudulent financial transactions, for which they saw the minimally impairing remedy to be reporting requirements and audits (*Figueroa* para 78; Justice Matlow in *Longley* para. 28).³² In his statement of reasons for the Court of Appeal, Justice Robert Blair focused instead on Parliament's objective to "ensure that groups who choose to register as political parties, but who have little intention of engaging in true electoral competition or in the political discourse of the day – for example, parties interested only in satirizing the political process (the Rhinoceros Party), or in using the process to promote their commercial interests (the Natural Law Party) – are not able to access public funds to do so." (para 54) In the final (proportionality) element of the *Oakes* test, he included the fact that

they guard against the subversion of the electoral process by groups that register as political parties for commercial, satirical or other non-political purposes. The integrity of the electoral process and of its electoral financing regime is enhanced because public money is directed towards genuine electoral and political endeavours (para 81)

as one of the salutary effects of the impugned thresholds. But having found restricting the use of public funds to "genuine electoral and political endeavours" to be a pressing and substantial objective, he concluded that it was an objective that could not be achieved through audits or enforcement action by the Chief Electoral Officer without "serious potential for unwarranted interference in the internal affairs and policies of a political party" (para 68) or "potentially jeopardizing the role of the Chief Electoral Officer as the impartial administrator of the *Act*." (para 69)

Justice Blair also found the nature of the threshold to be different from that in *Figueroa*.

³² A continuing point of contention is how wide a "margin of appreciation" (to use the phrase from the jurisprudence of the European Court of Justice) should be afforded the Parliament, and in particular to what degree the requirement that an infringement be "minimally impairing" allows the courts to weigh alternative means of achieving Parliament's objectives. Compare, for example, appellate Justice Blair in *Longley* ("I am satisfied that it would not be appropriate for us to interfere with [Parliament's] choice of means in these circumstances, even though another reasonable alternative, not invoking a threshold, might be conceivable." (para 78) with the decisions in *Figueroa* and *De Jong* (see below) to invalidate statutes in part on the ground that the court could imagine less impairing alternatives (auditors rather than thresholds, and signatures rather than deposits, respectively).

In *Figueroa*, the 50 candidate threshold effectively represented a barrier to entry, a threshold that had to be crossed in order to “become entitled to key public funding and informational benefits. ... [in contrast, meeting the s. 435.01(1) thresholds merely entitles a political party to additional public funding benefits...”(para 62). While this might appear to be a distinction without a difference (as indeed it appeared to Justice Matlow), in his analysis of the equal protection (s. 15) claim also raised by Longley, Justice Blair made it clear that he thought otherwise:

The differential treatment is vote-based only, depending upon the amount of electoral support a party receives during an election....Anyone is free to join or support whatever political party he or she wishes. Anyone is free to hold and espouse whatever political beliefs he or she chooses. Whether their preferred political party does, or does not, receive the quarterly allowance is an entirely separate matter, in my view. (para 98)

In 2008, the Supreme Court of Canada dismissed an application for leave to appeal this decision, leaving the C-24 thresholds for direct subventions in place, but the point at which providing financial aid to some parties but not to others would become impermissible still unresolved.

The Right to Vote: Ballot Access

The line from *Figueroa* to *Longley* was primarily concerned with access to money, or other material benefits. An alternative line begins with the fact that in a sense lay at the heart of *Figueroa* – that being compelled to nominate 50 candidates, particularly under the regime in force at the time the litigation was initiated which meant that a small party could expect to lose \$500 in each constituency in which it had a candidate would impose a substantial burden on such parties. Because she found the imposition of this burden as a precondition for receiving material and informational benefits to infringe upon the s. 3 rights of the candidates and supporters of small parties, and their consequent absence from the political arena to infringe on the s. 3 rights of other voters, Justice Molloy reduced the burden by lowering the threshold to 2 candidates. Subsequent legislation made the deposit fully refundable on submission of the required reports – for candidates to the federal parliament. However, eight of the provinces continued to require deposits from candidates for their legislative assemblies, with those deposits refundable only to candidates who received a specified share of the votes.³³

De Jong v. Ontario: In 2007, Frank De Jong, the leader of the Green Party of Ontario, challenged the provincial deposit, relying primarily on Justice Molloy’s ruling in *Figueroa* with regard to deposits (which, because of changes in the law, was never reviewed by an appellate court) and Justice Iacobucci’s judgement in the parts of *Figueroa* that did reach the Supreme Court. *De Jong v. Ontario (Attorney General)* 287 D.L.R. (4th) 90 [2007] The main thrust of De Jong’s claim was that the deposit requirement forced each Green Party candidate, and perhaps more significantly forced the Green Party as a whole, to divert a substantial portion of their funds that could otherwise have been used for campaigning on behalf of the party’s candidates and ideas.

³³ The deposits and conditions for return were: Ontario (\$200, 10% of the vote cast); Saskatchewan and New Brunswick (\$100, 50% of the vote of the elected candidate); Alberta and Prince Edward Island (\$200, 50% of the vote of the elected candidate); British Columbia, Nova Scotia, and Newfoundland (\$100, 15%).

The government responded that the deposit requirement would only represent an infringement of s. 3 if it prevented a citizen from “playing a meaningful role in the electoral process” and that it did not do that, given that it could be structured so that the tax-credit-adjusted deposit would only be \$50 (respondent’s factum para 42, 43) – or that if there were an infringement, it was “trivial and insubstantial” (para. 52). Moreover, the government claimed that whatever disadvantages were suffered by individual candidates, it was illegitimate to try to make a cumulative claim on behalf of their party. With regard to De Jong’s claim of infringement of his s. 2 right of expression, the government argued that there would be an infringement only if the disadvantages De Jong claimed to have suffered were content based, and that more generally, while s. 2 gave De Jong the right to express his views on political matters, this section (as opposed to s. 3) did not give him the “right to hold a particular position, such as an electoral candidate, so that he might [do so].”³⁴ (para 55)

Justice P.M. Perell of the Ontario Superior Court of Justice largely ignored De Jong’s s. 2 claim, and decided the case (in his favor) on s. 3 grounds.³⁵ He introduced his statement of reasons by quoting extensively from Justice Iacobucci’s reasons in *Figueroa* and Justice Bastarache’s reasons in *Harper*. Most of this is already familiar, but after quoting from Justice Bastarache’s judgement in *Harper* – particularly with regard to the danger that

If a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be drowned out; see *Libman*, supra; *Figueroa*, supra, at para. 49. Where those having access to the most resources monopolize the election discourse, their opponents will be deprived of a reasonable opportunity to speak and be heard. (Perell, para. 31, citing *Harper*, para. 72)

He then put quite a different spin on the argument (one that for this jurisprudence is uncommon in its attention to the possibility of a plurality of messages rather than a monopoly producing the ill effect), recognizing that “it is a legitimate concern that the electoral discourse not be flooded with messages so that some voices are drowned out.” (para 32)

In Justice Perell’s analysis, the government made three claims with regard to s. 3: that the deposit “would not interfere with the ability of a serious candidate to play a meaningful role in the electoral process” (para 35); that there was no evidence that the Green Party or any of its candidates actually had been deterred (para 36); and that only the effect on individual candidates, and not the effect on their parties, should be considered (para 37). In light of the rulings in *Figueroa* and *Harper*, Justice Perell agreed with the government that the \$200 deposit did not restrict the participation of individual candidates, either in theory or in practice, sufficiently to contravene s. 3. (para 48) He further agreed that there was no evidence that any serious candidate had been deterred (para 49).³⁶ However, pointing to Justice Iacobucci’s judgement in *Figueroa*,

³⁴ Citing the Court in *Baier v. Alberta* (citing Justice L’Heureux-Dubé in *Haig*) “the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones.”

³⁵ See para. 30, which observes that in *Harper* the Supreme Court had found a s. 2 infringement, but been divided regarding whether the statute was saved under s. 1, with the majority deciding that it was.

³⁶ In reaching this conclusion, the judge observed that “None of the political scientists,

he agreed with De Jong that the aggregate impact on the Green Party was both relevant and sufficient to constitute a contravention of s. 3, so that it was necessary to proceed to a s. 1 analysis.

The first question was whether the objective of protecting the integrity of the electoral process by deterring frivolous candidates was pressing and substantial. Pointing to the conclusions of the Lortie Commission, American court decisions regarding “ballot clutter”, and the testimony of the government’s witnesses, in what I believe is the only Canadian court recognition of the possibility that the electoral process could be undermined by having too many candidates, he concluded that it was.

60 Professor Katz testified that "while democratic principles require that access to candidacy not be unduly restricted, there is a complementary danger that allowing an excessive number of candidates will confuse rather than clarify the issues, and preclude serious debate among candidates."

61 One does not have to be Aristotle to appreciate that there are two kinds of vices, one of deficiency and the other of excess, and I am satisfied that the Attorney General has shown that subsections 27(5) and (6) of the Election Act have a pressing and substantial objective of deterring the excess participation of candidates who would impair and not contribute to the political discourse of the electoral process.

After rehearsing the analysis the led Justice Molloy to conclude that the federal deposit requirements impugned in *Figueroa* were not rationally connected to the objective of reducing frivolous candidacies (that they were both over-inclusive in interfering with serious candidates and under-inclusive in failing to deter frivolous candidates) (para.62, 63), Justice Perell came to the opposite conclusion, finding no evidence that serious candidates had been deterred (noting that the Greens had, in fact, contested all but one district in the previous two Ontario provincial elections) (para.64), and that:

66 While it is true that a frivolous candidate of whatever financial means may not be deterred by the deposit requirement, he or she might be. It strikes me that the conventional wisdom going back at least to 1874 that a deposit will deter some frivolous candidates is not irrational and it is just common sense that a person will be more careful if they have something to lose, even if the loss is largely symbolic.

The government’s case failed, however, on the tests of minimal impairment and proportionality. On the first, Justice Perell quoted the Lortie Commission to the effect that financial obstacles ought not to be used to discourage candidacy as well expressing the opinion that a “signature requirement is a more effective and a more desirable means of achieving the government's objective of deterring frivolous candidates” (para.72), finding that

75 ...there is no coming to terms about the meaning of what is a serious and what

including the two political scientists who testified for Mr. de Jong; namely, Professor Lawrence LeDuc, and Professor Emeritus Frederick J. Fletcher, a professor of political science at York University (who also was a witness in *Figueroa*), were aware of any empirical evidence that established that deposit requirements actually prevented a serious candidate from running for election.” (para 49)

is a frivolous candidate. The evidence of the experts was speculative and in the nature of thought-experiments, but in my opinion, the evidence was satisfactory to support the conclusion that the use of signatures would be a means to test candidate seriousness without imposing a financial burden on the candidates and without interfering with the capacity of his or her political party to communicate its message to the electorate.

(With regard to the diversion of funds, see also para.69.) On the second:

79 Once again, I generally agree with Molloy J.'s comments, although I would refocus them to the focal point of the legislation's interference with a political party's capacity to communicate its message. Accepting that the deposit requirements have the salutary effect of reducing the number of frivolous candidates that would interfere with the political discourse of the electoral process, this salutary effect is overcome by the deleterious effects of diminishing the capacity of political parties to present their ideas and opinions to the public and of exacerbating the pre-existing disparity in the capacity of smaller parties to communicate their positions to the general public by diverting funds that could be used to communicate a political message.

In ruling in De Jong's favor (except for his claim of damages, which were not awarded), Justice Perell observed that "Ontario will now have that opportunity to obtain a ruling from an appellate court should it appeal my judgment." (para.88). In the event, Ontario decided not to appeal.

Court Imposed Electoral Change

As this review shows, Canadian courts have been either directly or indirectly a significant source of electoral reform, even if none of the reforms rises to the level of "major" as defined with reference to Reynolds et al. or Lijphart. They have expanded the suffrage to include virtually all adult Canadians. They have set limits on the population disparities that can be tolerated in legislative apportionments. They have forced Parliament to alter the requirements for parties to become registered, and hence to gain access to a variety of benefits. They have forced at least the province of Ontario to alter the ballot access requirements for its own legislative elections. While they did not force a revision of the political finance regime, Parliament clearly acted as it did with the Supreme Court's decision in *Figuroa* at the forefront of their attention.

As noted above, in *Gibb*, the Cour supérieure of Québec rejected an opportunity to impose a "major" reform, and in *Figuroa* the Supreme Court might be taken to have renounced any such ambition with its pronouncement that "the Charter is entirely neutral as to the type of electoral system..." (para. 37) (although Justice McLachlin's comments about the values of a free and democratic society being better met by some electoral systems than others might be read the other way). Regardless of the Court's ambitions, however, once a case is brought to court the judicial system is forced to make a decision (given that even dismissal out-of-hand is a decision to leave the status quo intact) consistent with the Supreme Court's jurisprudence. That being so, it is worth asking whether that jurisprudence might be leading down a path that would ultimately force the courts to conclude that only the result of a "major" reform could be consistent with its understanding of the rights guaranteed by s. 3 of the Charter. Although not attempting a

definitive answer, the final section of this paper is, at least, informed by this question.

Electoral Reform and Democracy in Canadian Jurisprudence

To date, much of the discussion of Canadian (and American) jurisprudence on the subject of elections and democracy has revolved around the distinction between “egalitarian” and “libertarian” models. (See Manfredi and Rush 2008; Feasby 1999, 2003; MacIvor 2004.) The distinction is classically illustrated with regard to the regulation of campaign spending by third parties. The libertarian view is represented by the US Supreme Court’s ruling in *Buckley v. Valeo*, 424 U.S. 1 [1974] with respect to “independent expenditures” (those made in support of or opposition to a candidate, but without the connivance of the candidate). In *Buckley* (at p. 48), the Court ruled that “Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation,” and thus could not be restricted without an impermissible violation of the First Amendment rights of the third parties. The egalitarian view is associated with the Canadian court’s decisions in *Libman*, *Figuro*, and *Harper*, in which the “trump” right (neither qualified in the text of the Charter nor subject to parliamentary override) was not free speech, important though it may be, but the right to vote – expanded to be the right to effective representation, which was held to include the right to have a range of views presented to the voter, but also to include protection against an imbalance in spending such that one view could effectively drown out the others.³⁷ Although the objective is a “level playing field,” however, the justification has been in terms of the individual’s right to cast a vote that is effective *because* it is informed. In other words, both the libertarian and the egalitarian views focus on the protection of the individual rights of the individual citizen.³⁸

Particularly in the Canadian case, in which demonstrable justification in “a free and democratic society” is a (the) constitutionally legitimized ground for abridging the individual rights that sometimes are taken to be the very definition of democracy,³⁹ it is necessary to go beyond this distinction to understand the conception of democracy that appears to underlie the country’s jurisprudence in this area. Against the background of the summary of the Canadian case law in the previous section, this section addresses two major questions. First, to what extent can a coherent vision of democracy be teased out of these decisions – and what is it? Second,

³⁷ “[T]he State can restrict the voices which dominate the political discourse so that others may be heard as well. In Canada, electoral regulation has focussed on the latter by regulating electoral spending through comprehensive election finance provisions. These provisions seek to create a level playing field for those who wish to engage in the electoral discourse. This, in turn, enables voters to be better informed; no one voice is overwhelmed by another.” *Harper v. Canada*, para.62)

³⁸ To the extent that attention is devoted to the contrast between Canadian and American law, rather than the contrast between egalitarian and libertarian models of democracy, it is worth noting that in these cases it is the rights of the American *speaker* but the rights of the Canadian *audience* that appear to be paramount.

³⁹ See, for example, the frequent use of Freedom House scores as the operational definition of democracy.

and even more speculative, what would be the implications for reform in the future if this vision were to be applied to an even broader range of questions than has been the case to date?

Although these may appear to be lawyer-like (or at least legal-scholar-like) questions, I am taking a somewhat different approach. To somewhat overstate the difference, for a lawyer, the decisions of the highest court must be seen to be correct, because there is no further appeal⁴⁰, because lower courts are bound by the precedents of their superiors, and because under the principle of *stare decisis* courts are reluctant to disturb what appears to be settled law. Thus if the application of precedent appears to be leading to an undesirable outcome, the lawyer must accept the prior decision as correct, and find a way to distinguish the present case so that the precedent no longer is applicable. As an outsider to the legal profession, I am under no such constraint, and so can infer from finding that an undesirable outcome follows from prior decisions, that those decisions (or more generally, the principles on which those decisions were based) were wrong in the first place. It is also permissible for me to devote at least as much attention to questions that the courts have not addressed, but should have addressed, as to those they did, even if their failure to address those questions is the result of the failure of the litigants to raise them.

The Right to Vote, Elections and Democracy

Once the right to vote has been understood to mean the right to effective representation, and elections have been placed at the center of the democratic edifice, it becomes crucial to address four big questions. First, and recognizing that neither is likely to be effectively achieved without some attention to the other, is the primary purpose of an election, and hence the primary justification for the right to vote in that election, to encourage participation and debate by, and for the enlightenment of, individual citizens, or is it to allow the citizens to make a collective decision about who will govern them and how they will be governed? Second, who or what are the contestants of elections: candidates as individual citizens per se; or candidates as the champions of local parties or as the individual advocates of particular bundles of policy proposals or ideologies; or candidates as the local representatives of political parties that span districts in advocating policies and ideologies; or candidates as the local representatives of parties that beyond their policy platforms also support teams of leaders who embody alternative prospective governments? Third, and recognizing that the answer may be different for debate than it is for decision, and also must differ depending on whether what is conventionally identified as “a general election” is seen as a single event with local components or as a series of simultaneous but independent local events, what is the appropriate level or locus for the objectives of elections to be pursued: the individual constituency or the legislative assembly? Fourth, given that elections necessarily involve decisions, whether one focuses on individual decisions by individual voters or individual representatives, or on collective decisions by electorates or legislatures, should the process be understood primarily as one of rationally weighing arguments or as one of fairly aggregating preferences?

Debate or Choice: As indicated above, it would appear that after the *Saskatchewan Reference* case, the focus of Canadian jurisprudence regarding the right to effective

⁴⁰ As Justice Robert Jackson described the US Supreme Court: “We are not final because we are infallible, but we are infallible only because we are final.”

representation shifted away from decision and toward debate, or, to the extent that decision remains a focus, it increasingly became the decision of the individual voter to cast his/her ballot for a particular candidate or party, rather than the collective decision of the electorate to place a particular candidate in the legislature as the representative of their district, or the leaders of a particular party in executive office (either alone or in coalition with the leaders of other parties).⁴¹ This is most clear in the passage already quoted in full from Justice Iacobucci's reasons in *Figueroa*: "Section 3 does not advert to the composition of Parliament subsequent to an election, but *only* to the right of each citizen to a certain level of participation in the electoral process..." (para.26, emphasis added); later in the same decision he equates "decreasing the capacity of the members and supporters of the disadvantaged parties to introduce ideas and opinions into the open dialogue and debate that the electoral process engenders" with infringement of the right to vote. (para. 53) But it is also apparent in the stress placed on the "right of *each citizen* to participate in democratic discussion" by Chief Justice McLachlin in her dissent in *Harper* (para. 13, emphasis in original), the view already quoted from Justice Bastarache's reasons in the same case that "Greater participation in the political discourse..[will enhance] Canada's democracy" (para.70). Even more, it is apparent in the regularity with which information regarding as broad a range of alternative views as possible, regardless either of their popularity or of their veracity,⁴² is understood to be essential to effective participation, and hence to the right to vote.

In 2006, the modal single-member federal parliamentary district had 5 candidates, and no district had fewer than 4; 37.8 per cent of the successful candidates won their seats in Parliament with 40 per cent of the vote or less; many voters cast their ballots for candidates/parties that patently had no chance of winning in their districts. If the object of a vote were simply the accurate expression of the preference or considered judgement of the individual voter, this would be unobjectionable. And there is evidence at least in *Figueroa* that the Court largely took this position (para. 44, cited above). Even accepting this as the objective of the vote, and granting that the courts have been correct in their concern that the arguments of the well-resourced might drown out those of the less well endowed, however, one can object that (with the exception of Justice Perell in *De Jong*) they have been blind to the converse danger - that as a result of concern for the inclusion of the weak, serious debate among candidates with a significant chance of election will become impossible, and serious arguments will be lost in an undisciplined cacophony.⁴³

⁴¹ Although I do not do so because it would involve significant "translation" of the language of the courts into the language of political science, the argument of this section could equally have been framed in terms of the debate concerning whether voting should be understood as an act of consumption (indulging a taste for self-expression) or an act of investment (deploying a resource in order to produce a desired outcome). See, for example, Barry 1970.

⁴² On the irrelevance of veracity, see the reasons of Justice L'Heureux-Dubé in *Committee for the Commonwealth of Canada v. Canada*, 1 S.C.R. 139 [1991] cited in *Reform Party of Canada v. Canada (Attorney General)* 123 D.L.R. (4th) 366 [1995], (para. 157, 169).

⁴³ Examples of the potential costs of excessive numbers of candidates would include the early "debates" among aspirants for the US 2008 presidential nominations (for example, the Public Broadcasting forum of Democratic candidates on June 28, in which 8 candidates shared -

But if the object of a vote is to contribute to the choice of a single representative through the SMP electoral system - and although “the *Charter* [may be] entirely neutral as to the type of electoral system in which the right to vote or to run for office is to be exercised” (*Figueroa*, para. 37), that is the system in place - then not just the degree to which individual voters are informed about the policy preferences or ideologies of the competitors, but also the ability of the voters to coordinate their actions, becomes relevant. If, as was likely the case in many of the constituencies won with substantially less than 50% of the vote, a candidate who was not the Condorcet choice (i.e., who would have lost to another candidate in a head-to-head contest) was elected, then has the availability of a wide change of choices furthered the effectiveness of the voters’ ballots, or has it instead hindered the voters’ capacity to secure effective representation? And is furthering the election of a candidate who would have lost in a more restricted field by facilitating the fragmentation of the vote any less a state intrusion than furthering the election of some candidates by discouraging the entry of small parties?

Between Candidates and National Parties: Although the right to candidacy appears in the text of the Charter clearly to be a right of individual citizens, and indeed although the ruling of the Ontario Court of Appeal in *Longley* suggests that Canadian parties do not have the standing to claim Charter rights, the courts have clearly recognized the centrality of political parties to the electoral process. On one hand, they have seen the party label as an important attribute of an individual candidate: as Justice Molloy said in her ruling in *Figueroa*, “it may serve to remind the voter of the principles the candidate stands for even though the name of the candidate might not be recognized by the voter.” (para. 97) While in most cases this meaning will probably span both time and space, however, this argument would apply as well to the only candidate in the country who wanted to identify himself as, for example, the candidate of the “anti-television party”: the policy is explicit in the name. On the other hand, the courts have also recognized the importance of parties as associations of like-minded candidates and supporters that do span time and space, for example in *Figueroa*’s ruling concerning failure to allow candidates of small parties to transfer unspent campaign funds to a central party, or in Justice Perell’s conclusion in *De Jong* that it was appropriate to consider the aggregate cost of deposits to the Green Party and not just the individual cost of deposits to its individual candidates.

What is less consistent with the idea of “party government” or “responsible government” (as generally taken for granted in analyses of Canadian government - including in the Lortie Commission report to which the Courts make repeated approving reference), is the dismissal (particularly in *Figueroa*) of the nature of national (or provincial) parties as alternative potential governments. Notwithstanding the common association of SMP elections with the “Westminster” model of two party, responsible party, government (Lijphart 1999), the presence of the Bloc Quebecois and the continuing survival of the NDP make the idea that Canadian elections would simply be a choice between two alternative majorities unrealistic. This presents two realistic possibilities. On one hand, and what Canada has in fact experienced, there can be single party governments, whether with or without a majority of the seats in Parliament, but

with moderator and questioners - a bit less than 90 minutes), or the decision of the French not to have televised debates among the first round presidential candidates because equal treatment of a large number of candidates - most of whom obviously had no chance of advancing to the second round - would make the event unmanageable.

almost inevitably without the votes of a majority of the electorate.⁴⁴ On the other hand, there could be a coalition government, again either with or without a majority in Parliament or among the electorate. Neither of these requires the kind of deliberately manufactured majority that appeared to concern Justice Iacobucci in *Figueroa*, but both require the kind of attention to a manageable degree of fragmentation in Parliament, and the development of a coherent national political will, to which the Court of Appeal and the government's Supreme Court factum in *Figueroa* allude, but which the Supreme Court itself did not appear to take seriously.

One Election or Many and the Locus of Representation: This, then, implies the answer to the question of whether a general election should be seen as many local events, or one national event. Even when the courts have been concerned with an election as a choice of representative rather than as a public debate, it appears to have been with the individual choices of individual districts.

Certainly, this appears to be the logic of the *Saskatchewan Reference* case. How else to reconcile relative laxity about equal population with the concern for representing the diversity of the Canadian social mosaic except by focusing on the representation of communities? Attention to the ombudsman role of representatives (para. 49, 61) and to “the fact that it is more difficult to represent rural ridings than urban” (para. 78) focus on the relationship between an individual representative and an individual district. Moreover, unless one presses the metaphor of a social mosaic farther than is usually done to emphasize that mosaics are made up of physically separated tesserae (in this case, corresponding to electoral districts), it is hard to see how one could expect the social mosaic to be represented in legislative assemblies composed of people elected from single member districts.

This idea of local elections of local representatives also relates to the question of where representation takes place or is required. The claim that “Representation comprehends the idea of having a voice in the deliberations of government” (*Saskatchewan Reference*, para. 49), raises two questions. As suggested above, most of the courts' thinking about deliberation has focused on the deliberations of voters in their districts, but as this passage recognizes, deliberation also takes place within the government. First, how is this recognition of the importance of having a voice in things that happen in the capital to be reconciled with the near definition of “effective representation” as something that takes place in the context of local campaigns?

Second, where in the capital do the deliberations of government take place? Advocates of electoral reform in Canada have often pointed to the fact that the strong regionalization of both the Liberal and Conservative parties means that whichever party wins an election, the region in which the other party is strong will be under-represented in the government caucus, and may be close to unrepresented in the cabinet.⁴⁵ On one hand, is the requirement that a citizen have effective representation satisfied if the legislature includes one or more MPs (MLAs) of the

⁴⁴ Although it is not surprising that minority governments have been formed by parties that received only a minority of the popular vote, the last Canadian majority government, that of Liberal Jean Chrétien returned to office in 2000 with 57.1% of the seats in the House of Commons, had received only 40.8% of the popular votes.

⁴⁵ For example, in the 2004 general election, only 17 of the 135 Liberals elected came from the four provinces plus three territories west of Ontario. Even in 2000, with 172 Liberals in the House of Commons, only 17 were elected from those provinces and territories.

party, ethnicity/gender, or region of the citizen, even if from another district? On the other hand, does representation on the opposition benches give the citizen a voice in the deliberations of government, or would that require representation in the government caucus, or even in the cabinet? Except for the implicit assumption that every citizen is represented by the MP (MLA) from his or her district, regardless of whether the citizen voted for or against that person, these are questions that the courts basically have not addressed.

Arguments or Interests: The significance of the distinction between government and opposition benches depends in part, however, on how one understands the parliamentary process in the first place, and relates back to the distinction between an election, even in a single district, as a debate or a decision. Are legislative assemblies places in which representatives listen to arguments, weigh them and deliberate, and then use their judgement to choose the course of action that would be best? Or, after having articulated a set of policy proposals in the course of their campaigns, do the winning candidates act in the assembly to enact the policies they have promised, and which the voters have already chosen?

In the first, essentially Burkean, understanding, the primary point of an election campaign is to refine arguments, to shape opinion, and then to allow voters to send a representative in whose judgement and general value orientation they have confidence. But as Burke himself observed, if the representatives come to assembly already firmly committed to particular positions – or to loyally support whatever positions are taken by their leaders – there is not much point in holding parliamentary debates.⁴⁶ In the second, responsible parties, understanding the primary point of an election is to allow the voters to choose, if not the specific policies, then at least the general direction that will be taken by the government precisely by giving a reliable majority to one coalition or another.⁴⁷

⁴⁶ “ But Government and Legislation are matters of reason and judgement, and not of inclination; and, what sort of reason is that, in which the determination precedes the discussion; in which one sett of men deliberate, and another decide; and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?” Speech to the Electors of Bristol, 3 November 1774.

⁴⁷ In this section, I use the term “responsible parties” to denote those versions of the party government model that in other work I have classified under the general rubric of “individualist popular sovereignty” models of democracy (Katz 1997), plus what Beer (1965) identified as “Socialist Democracy” or that more generally would be identified as the democratic theory of the mass party of integration (Katz and Mair 1995). The same basic argument would apply with only minor changes if “responsible parties” were taken to include versions of party government (for example, Beer’s model of “Tory Democracy”) in which the basis of competition among parties is confidence in their leaders rather than preference for their policies. In all these cases, the presumption is that voters are choosing candidates who will act as representatives of their districts *by acting as agents of their parties*. A classic statement of this position comes from Clement Attlee 1957: 15):

The candidate of one of the major Parties stands for a connected policy and for a certain body of men who, if a majority can be obtained, will form a Government. This is well understood by the electors. If the Member fails to support the Government or fails to act with the Opposition in their efforts to turn the Government out, he is acting contrary to

Clearly, the Burkean view involves choice, and the responsible parties view is best served by an informed electorate. Nonetheless, their understandings of democratic politics are quite different. In the Burkean view, politics is about the pursuit of a single common interest that is, at least in principle, discoverable through rational discussion; in the responsible parties view, politics is about the aggregation through coalition building and compromise (either within a single party or among parties) of individual interests or preferences that are at some level incompatible, but that are all nonetheless equally worthy of respect.⁴⁸

If legislative assemblies are made up of rational and public spirited men and women open-mindedly seeking the commonweal, then effective representation requires that all reasonable arguments be brought to their attention. Obviously, this is most likely to occur if those arguments are espoused by individuals who are members of the assembly, but even in the absence of such members it is reasonable to suppose, as Justice Iacobucci did in *Figuroa*, that the arguments of defeated candidates and the opinions of those who voted for them will be “taken into account by those who ultimately implement policy, if not now then perhaps at some point in the future” (para. 44). If, on the other hand, legislative assemblies are made up of loyalists subject to strong party discipline and acting as instructed delegates, then it is the balance of forces in the assembly that counts. Views that are not directly represented by members whose parties support them are, in effect, not represented at all, except to the extent that parties in the assembly see it to be in their interest to try to coopt the supporters of those views into their own coalitions.

The Court’s Model of Democracy

The “responsible parties” or “popular sovereignty” conceptions of democracy not only see the electorate as the ultimate principal in a principal-agent relationship, and thus as the ultimate chooser (either directly before the fact, or indirectly through the possibility of sanctions that they might impose after the fact) of the general orientation of their government, but also see political parties, elections and election campaigns as the mechanisms through which this principal-agent relationship is constructed and enforced all the way from the electorate to the cabinet room. In contrast, the Canadian courts appear essentially to have adopted a bifurcated model of democracy, with one thrust concerning elections in the constituencies, and the other the functioning of government between elections. The first branch, which is far better developed, draws on a conception of democracy that has more in common with the views of John Stuart Mill than it does with popular sovereignty (Katz 1997: ch. 5).⁴⁹ The second branch also can be seen as drawing on Mill, but as suggested above is also rooted in a kind of thinking that can be seen as based in the thought of Edmund Burke, who, if he were to be characterized as a democrat at all, would have to be identified as a communitarian democrat.

the expectation of those who have put their trust in him.

⁴⁸ Samuel Finer’s definition of politics as what happens when “a given set of persons of some type or other require a *common* policy; and ... its members advocate, for this common status, policies which are *mutually exclusive*” (1974 :8) may be taken as a fair summary of this view.

⁴⁹ In previous work, I classified Mill as a “participationist” democracy, while recognizing large elements of liberal democracy in his thought as well.

The particularly Mill-like quality of the Court's thinking is evident in a number of respects: its emphasis on the informing of the electorate and on the improvement of debate; its combination of near obsession with the universality of the franchise with relative laxity about strict equality (Mill, after all, approved of plural voting); its emphasis on the importance of the participation of citizens in electoral politics; its belief in the value of diversity of opinion. According to the Supreme Court of Canada, voting should be seen as "a route to social development and rehabilitation acknowledged since the time of Mill..." (*Sauvé*, para. 59). All of this suggests a view of democracy as a means to the moral and intellectual improvement of the citizens in addition to, if not rather than, their self-rule. On the other hand, the Court has been more concerned than Mill with the danger that discourse will be dominated by the well-endowed – a problem that Mill largely made to disappear through an intellectual sleight-of-hand through which those endowments which would allow some interests to dominate debate were made indicators of intelligence, which he thought ought to dominate debate – and also concerned that rules the government tried to justify in terms of effective government and clarified debate actually were motivated by a cartel-like desire of the large parties to entrench their own positions. The overall result is a vision of elections in which party labels are indicators of important characteristics of candidates, in which parties are associations of like-minded citizens, in which the intellectual and social breadth of the campaign is more important than the political quality (e.g., whether the representative elected actually has majority support) of the result, and in which diversity of constituencies is important but connections among them less so.

Although only implicit in this, and in some respects more evident in silence than in the text of decisions, is the apparent acceptance of the profound elitism of Mill's conception of what should happen after the election, and it is here that the Court's thinking appears to blend into a Burkean understanding of representation. In particular, the explicit breaking of the link between elections and the aggregate composition or behavior of the resulting legislative assembly – coupled with the emphasis on representation of the social mosaic (which of course would not have concerned Burke) – leave the legislature without an explicit policy mandate. On one hand, inconsistency in the options offered to the voters in different constituencies leave the meaning of a vote ambiguous: even if voting *for* the NDP were in some sense a vote for a consistent NDP program wherever it was cast, its meaning would still be ambiguous, because it would not be a vote for the NDP program *in preference to* the same set of alternatives, or in the same strategic circumstances. On the other hand, even if there is some aggregate policy predilection associated with being a woman, or of some ethnicity, or a westerner, this is likely to be restricted to a few policy areas and, moreover, there is wide variation in the preferences of members of each of these or similar categories: to value descriptive diversity is virtually of necessity either to give priority to the symbolic over the substantive, or to endorse the ideas of virtual representation (e.g., that women in one district can be represented by a woman elected in another) and trusteeship as opposed to delegation.

Wither Elections?

The ideas of Burkean and responsible parties government addressed above clearly are each a distillation and simplification of far more subtle theoretical perspectives. The problem is that while the Burkean view seems to sit far more comfortably with the Supreme Court of Canada's jurisprudence, the responsible parties view seems to be far more compatible with the

realities of Canadian parliamentary politics.⁵⁰ What can be made of this disjuncture of theory and reality?

One view would say that only PR will satisfy simultaneously the requirements of diversity and equality, and allow voters to support the party with which they are in closest agreement in their own (obviously substantially larger than at present) constituency without the substantial risk of sacrificing their individual influence on government composition and direction, and without so muddying the waters that “after ‘the voice of the country had spoken,’ people did not know exactly what it had said...” (Ostrogorski 1902: II, 619, writing about the United States and cited in Ranney 1962).⁵¹ And, of course, Mill himself advocated the single transferable vote form of PR.⁵² In the Canadian context, in which a single party majority under PR is essentially unthinkable, however, this would definitively shift the locus of decision about alternative governments to the legislative assemblies, which is to say to the leaders of the parties. If democracy means only that there is a full and frank exchange of views with the aim of informing a wise and public-spirited elite about the state of popular sentiment, after which they use their own judgement, then this is fine. If, however, democracy means that the people choose their own government (not just those who will choose it for them), and choose (or at least ratify) a particular line of policy (rather than giving a “general power of attorney” to party leaders to negotiate compromises without further reference to the electorate) then this must be recognized as quite undemocratic. Moreover, in making coalition governments the unavoidable norm, PR would have the potential of making the Liberals (as the party in the center of the Canadian left-right spectrum) the senior (because indispensable) partner in *every* conceivable government – hardly a recipe for empowering the electorate, and indeed almost certainly nothing like the vision of democracy that Justice Iacobucci had in mind.

⁵⁰ This is not to say that the reality of Canadian politics is somehow theoretically consistent. See, for example, Carty’s (2002) observations about the inconsistency (at least in terms of “normal” theories in political science) of the near total unity of Canadian parliamentary parties in their voting records in the House of Commons coupled with the near dictatorial control over party policy exercised by their leaders, on the one hand, and the great autonomy and attention to local concerns that characterize constituency candidate selections.

⁵¹ This view is in part taken by the applicants in *Russow*. Their basic claims are that the SMP system violates s. 3 and s. 15 of the Charter because “it makes it much more difficult for women and supporters of smaller parties like the Greens to secure effective representation of their views.” (Applicants’ Factum, para. 2) In these terms, were the case to come to trial, it would force the court to confront the connection between “effective representation” in the context of an election campaign as elaborated in *Figueroa* and “effective representation” on the benches (or in the caucuses) of Parliament.

⁵² This has particular significance in the context of Canadian debates about electoral reform because Mill was a member of the British Parliament that passed the *British North America Act* in 1867. The *BNA* established a system of single member districts in Canada even while most districts in the UK were multi-member. This, plus Mill’s presence in the House of Commons, lends credence to the idea that single member districts were a deliberate choice, and not simply adopted for want to any recognized alternative. (For an example of the latter claim, see the Applicants’ Factum in *Russow*, para. 49.)

The alternative view would be to say that the basic logic underlying particularly *Figueroa* needs to be weakened or abandoned. For example, it needs to be recognized that presenting barriers to the entry or electoral viability of small parties does not disenfranchise their supporters. Rather, it forces them to come to terms earlier in the political process (and more realistically as well) with the fact that the way to participate effectively is within one of the bigger umbrellas of parties that have the potential to form governments; voting for a certain loser, and perhaps even having one or two backbench MPs articulate the views of a small minority, may allow a citizen to feel good without actually contributing to the formulation of policy in any effective way.⁵³ In this view, elections are not primarily about public discourse, but about public decision, and for a large and diverse electorate to come to a coherent decision requires that the number of options from which they choose be limited so that the function of interest aggregation is not entirely sacrificed on the alter of interest articulation. This is, of course, precisely the “British tradition” to which Justice McLachlin referred in *Dixon* and again in the *Saskatchewan Reference*.

In this sense, there is a disjunction not just between the theory underlying the Court’s jurisprudence regarding elections and the real practice of Canadian politics, but within the Court’s jurisprudence itself. It is probably not fruitful to speculate on how these inconsistencies would be resolved were the courts to be compelled to confront them.⁵⁴ It is, however, hard to imagine any resolution that would not have profound implications for the future of electoral reform in Canada, and given the series of defeats of efforts to produce “major” electoral reforms in Canada through legislative action or citizens assemblies, it does appear that the courts remain one of the more likely sources of whatever substantial electoral reform will occur. If the courts ultimately do force a major reform, however, it is as likely to be the result of adherence by future courts to a line of Supreme Court decisions the wider consequences of which were both unforeseen and unintended. And as courts throughout the world are called upon to address issues that previously were left to the “political” branches of government, it will be increasingly important for us to understand the ways in which judiciaries both as a result of intentional efforts to impose a particular ideological preferences and as an unintended result of professional pressures for doctrinal consistency, can become significant sources of institutional reform.

⁵³ In particular, the right to speak does not imply the right to be listened to, or to be taken seriously.

⁵⁴ See note 2, above.

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