AUTHOR: Please find attached a copy of the proofs of your article. These have been copy-edited and now require your attention. When reviewing your proofs you should:

- Answer all queries raised during the editing of your manuscript (see below).
- Check for any other factual corrections (NB – only minor changes can be made at this stage; major revisions cannot be accepted).

All required corrections should be submitted using the CATS online corrections form. Once you have added ALL query answers and corrections, please press the SUBMIT button.

PLEASE NOTE THAT ONCE YOUR CORRECTIONS HAVE BEEN ADDED TO THE ARTICLE, IT WILL BE CONSIDERED READY FOR PUBLICATION.

<table>
<thead>
<tr>
<th>QUERY NO.</th>
<th>QUERY DETAILS</th>
</tr>
</thead>
</table>
| General Query 1 | As an author you are required to secure permission if you want to reproduce any copyrighted material in your article. For further details, please visit http://journalauthors.tandf.co.uk/preparation/permission.asp. Please confirm that:
|                      | • permission has been sought and granted to reproduce the material in both print and online editions of the journal; and
|                      | • any required acknowledgements have been included to reflect this. |
| General Query 2 | Please confirm that affiliation details for all authors are present and correct. Please note that with the exception of typographical errors/missing information, we are unable to make changes to authors or affiliations. For clarification, please see http://journalauthors.tandf.co.uk/preparation/writing.asp |
| 1 | courts certainly have been imposed reforms of equivalent gravity sub-nationally - courts certainly have imposed reforms of equivalent gravity sub-nationally or: reforms of equivalent gravity certainly have been imposed on courts sub-nationally? From text it’s the former? |
| 2 | van Biezen 2009 please supply reference. |
| 3 | R. v. Big M Drug Mart Ltd., need details? |
| 4 | cited in Ranney 1962 – please give page. |
| 5 | Saskatchewan Reference – need details? |
| 6 | n.11 Iacobucci writes: in Bowman v. United Kingdom? |
Democracy as a Cause of Electoral Reform: Jurisprudence and Electoral Change in Canada

RICHARD S. KATZ

Unlike other policy-makers, courts are forced to give reasons for their decisions that are based in principles rather than raw interests. The jurisprudential democratic theory developed as courts decide cases concerning elections thus becomes an important source of electoral reform. Taking the case of Canada as an example, this article shows not only that courts can play a major role in shaping electoral practice, but also that they do so in a way that privileges expression over decision as the primary democratic purpose of elections.

The majority of the literature on electoral reform shares two characteristics: it focuses on ‘major’ reforms (see Leyenaar and Hazan 2011), and it assumes that parliament is the primary source of electoral reform. The joint effect of these lends credence to Benoit’s (2004: 363) widely cited prediction 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’. This article has two objectives. The first is to show that once the focus on ‘major’ reforms is relaxed, actors other than parliaments can often be important sources of electoral reform. The second is to argue that the reforms mandated by courts are likely to privilege the participatory and expressive rights of citizens understood as individuals over the decision-making or directive rights of citizens understood as a collectivity.

The conventional categorisation of some reforms as ‘major’ is rooted in the questions that were central to the pioneering work concerning electoral systems (e.g. Rae 1967), that is the representation or exclusion of small parties and, above all, the proportionality of the outcome. It has two
problems, however. On one hand, non-‘major’ reforms (for example, redistricting that does not alter average district magnitude) may profoundly influence the electoral chances of small parties, and hence also proportionality. On the other hand, altering the degree of proportionality among parties is not the only important impact of electoral reforms, but reforms that may affect the demographic representativity of parliaments – for example, the imposition of gender quotas (Krook 2009) – or the internal coherence of parties – for example, the introduction of intraparty preference voting (Katz 1980) – are automatically relegated to the categories of ‘minor’ or ‘technical’ (Jacobs and Leyenaar 2011).

Especially once one extends attention beyond the ‘major’ category, however, it becomes apparent that parliament is not the only source of electoral reforms. Of particular relevance for this article, courts have become increasingly relevant to electoral reform. 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 possibility, and courts certainly have been imposed reforms of equivalent gravity sub-nationally.

Courts, Democratic Theory and Electoral Reform

Courts differ from other political actors in that they are compelled to justify their decisions in terms other than the interests of themselves or their ‘constituents’, and moreover their ultimate power rests in part on the consistency over time of the reasons that they give. The result is to force the courts to develop what is in effect a theory of elections in democracy, and then to make that theory a significant input into the process of electoral reform. This is especially evident in Canada, where justifiability ‘in a free and democratic society’ is an explicitly recognised constitutional standard for limiting what might otherwise appear to be absolute rights, but it is effectively true in all countries in which courts rule on questions of electoral law.

To date, much of the discussion of jurisprudence on the subject of elections and democracy has revolved around the distinction between ‘egalitarian’ and ‘libertarian’ models of democratic electoral regulation (see Feasby 1999, 2003; MacIvor 2004; Manfredi and Rush 2008). 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 US 1 [1974]), that third-party advocacy of the election or defeat of candidates could not be restricted without an impermissible violation of the First Amendment. The egalitarian view is associated with the Canadian decisions in *Libman, Figuero*, and *Harper* (see below), in which the ‘trump’ right was protection against an imbalance in spending such that one view could effectively drown out the others. 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.¹

One could, however, pose an alternative, albeit related, dichotomy, between the rights of each citizen as an individual and the rights of citizens, or of a group or category of citizens, as a collective entity. This dichotomy can be illustrated with regard to the treatment of racial minorities in American electoral law. The provisions of the Voting Rights Act (42 USC §1973) designed to assure non-discriminatory voter registration procedures address the individual rights of individual citizens, and have been upheld in those terms. In cases regarding ‘vote dilution’, however, the courts have constructed what can only be described as a group right; the right to ‘elect candidates of their choice’, although justified as an interpretation of the individual right ‘to participate effectively in the political process’, (Thornburg, Attorney General of North Carolina, et al. v. Gingles et al., 478 US 30 [1986]) is a right that can only be exercised collectively.

Expanding beyond protection of disadvantaged groups to consider the whole citizenry, this dichotomy recognises that elections have two distinct roles. On one hand, they are occasions for public debate of issues and for public expression of preferences and opinions. While differing in their emphases, both egalitarian and libertarian views understand elections as occasions for individual political action by citizens. On the other hand, however, elections are also occasions when the people make collective decisions, whether concerning the local selection of representatives or the system-level choice of a government. This poses the question of rights in terms of a collective action problem, raising the possibility that rather than unproblematically furthering the collective function of elections, excessive focus on the individual rights of citizens may undermine their ability to exercise their collective rights as a democratic demos.

In this article I focus primarily on the jurisprudence (or democratic theory) of the Canadian courts for three primary reasons. First, as noted above, the injunction to attend to questions of democracy in the Canadian Charter of Rights and Freedoms is unusually clear and direct. Second, because the Charter, along with the idea of judicial review, only dates from 1982,² the relevant body of judicial decisions is manageable. Third, notwithstanding the limited number of significant cases, Canadian courts have addressed most of the major areas at which electoral reforms have been directed: suffrage; apportionment and diversity of representation; campaigns and finance; ballot access.

My narrow objective in focusing on Canadian jurisprudence is to argue that the Canadian courts have, in fact, over-emphasised individual at the expense of collective rights. Nonetheless, the Canadian case should be taken as exemplary, rather than as important in its own right (except, of course, for Canadians). The more general questions, to be addressed in the
conclusion, are whether this emphasis on individual over collective rights is inherent in the nature of judicial review, and what its implications are for the role of courts in the process of electoral reform.

**Background to the Canadian Cases**

Three particulars of the Canadian constitution should be highlighted at the outset. First, notwithstanding the obvious centrality of political parties in parliamentary systems, and in contrast to many other constitutions (see van Biezen 2009), the Canadian constitution makes no mention of political parties whatsoever.

Second, the constitutional rights directly relevant to elections, the ‘right to vote in an election of members of the House of Commons’ (s. 3 of the *Charter*) and the ‘freedom[s] . . . of opinion and expression . . . [and] of association’ (s. 2 of the *Charter*), are guaranteed only to individuals. Canadian jurisprudence on the subject of elections predominantly involves the elaboration of the individual right to vote.

Third, the constitution makes two explicit references to the possibility that these rights may be limited. Perhaps most peculiar to the Canadian case, but also of secondary relevance to the subject of electoral law, the section 2 rights just listed (as well as many other basic rights guaranteed by the *Charter*) are, under section 33 (the ‘notwithstanding clause’), subject to parliamentary override. The more significant limitation is the provision of section 1 of the *Charter* already cited, that all of the *Charter*’s ‘rights and freedoms . . . [may be] . . . subject . . . to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

The question of justification is addressed by Canadian courts in two parts. The first part requires the court to determine whether a *Charter* right has been infringed. Particularly for rights that have no textual modifiers or qualifications, this is a relatively low bar. The finding that a *Charter* right has been infringed then triggers 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 two-pronged test laid out in *R v. Oakes* (1 SCR 103 [1986]): that the objective served be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’ (citing *R. v. Big M Drug Mart Ltd.*, at 352); and that the means chosen are ‘rationally connected to the objective’, impair the right in question as little as possible, and produce effects that are proportional to the previously identified important objective.

The Right to Vote Means the Right to Effective Representation

The first cases in which the Canadian courts could be said to develop a theory of elections in democracy concerned legislative apportionment. Here 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.\(^6\) Rather, the interpretation adopted is that ‘the right to vote’ means ‘the right to “effective representation”’ (Reference Re Provincial Electoral Boundaries (Sask.), 2 SCR 158 [1991], para. 49).\(^7\) In the particular case of districting, the right to effective representation was taken to allow, or perhaps even to require, departure from strict numerical equality:

> 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. (para. 54)

To say that strict numerical equality 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’. Justice McLachlin did this in part when she wrote earlier in the same decision 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 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, effective representation still is provided by representatives in legislative assemblies – that is, by those who win elections.

**Campaigns and Participation**

As the court’s jurisprudence regarding elections developed, this apparent focus on winners was substantially undermined. The placing of ‘effective representation at the heart of the right to vote’ remains, but the focus shifted away from the legislative assembly toward the election itself, thus significantly altering the meaning of ‘effective representation’.

The key case in entrenching the shift in emphasis was Figueroa v. Canada (Attorney General) (1 SCR 912 [2003]), which 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 the party a number of valuable advantages, including the right to have the party’s name listed with its candidates on ballots.\(^5\) The significance of the shift is highlighted by the changing reasons given by the judges of the application, appellate, and supreme courts.

Justice Anne Molloy of the Ontario Court (General Division)\(^9\) (43 OR (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 two-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’ (para. 61). 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, see also para. 94).

The Ontario Court of Appeal (50 OR (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 the threshold. Although the application court and the Court of Appeal cited the same evidence regarding the importance of political parties to Canadian democracy, the analysis was quite different. Justice Molloy stressed the role of ‘parties’ (unmodified) in mobilising 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, emphasised the importance of ‘national parties’ in structuring campaigns and forming governments (esp. 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 EHRR CD 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 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, with reasons delivered by Justice Frank Iacobucci, 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 that this did not refer ‘to a collective interest in a desired end product of the electoral process that results in majority government’ (para. 23). Notwithstanding reference to ‘an effective representative in the legislative assembly’, his primary concern was with the process of individual constituency contests rather than with outcome, either at the national or the local level:

25. . . 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.

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, but only that of ‘ensuring that the electoral process results in a viable outcome for our form of responsible government’ (respondent’s factum, para. 79) is of concern here. Although he found that the government failed to produce convincing evidence that majority government is the only viable form for Canada (para. 81), his argument went beyond this factual question.

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 majority governments that would not otherwise have been elected. Legislation that violates s. 3 for this purpose does great harm to both individual participants and the integrity of the electoral process itself.

Three principles appear to underlie this conclusion. First, that ‘it is constitutionally required to maximise 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. Third, 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.

While Figueroa was working its way through the courts in Ontario, the case of Harper v. Canada raised the question of third-party spending that had been addressed for referenda in Libman v. Quebec (Attorney General) (3 SCR 569), this time in the context of elections as such. The applicants alleged that the limits imposed by the Canada Elections Act infringed on their s. 2 rights of expression and association as well as on their s. 3 right to vote. Relying in part on Figueroa (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 them, 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’.

In quoting from the Court’s decision in Libman, Justice Bastarache emphasised the importance of spending limits ‘to prevent the most affluent from monopolising election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard’ (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). Quoting from Figueroa, 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).
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.16

With regard to freedom of expression, the question was whether the objectives ‘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.

The final case in this series, Longley v. Canada, challenged the system of quarterly financial allowances to parties that win at least 2 per cent of the vote nationally, or 5 per cent of the vote in the constituencies that they contest, introduced in 2003 (see Young and Jansen 2011). In 2006 a number of small parties 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 this system and those barred in Figueroa, and whether the advantages denied 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 50-candidate threshold, were sufficiently similar as to make Figueroa dispositive in this case as well. Justice Theodore Matlow, the application judge in Longley v. Canada (Attorney General) (82 OR (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 the system challenged (para. 26) and also against the government’s claim that the system served to further the objective ‘to maintain public confidence in the integrity of the electoral process’ – which Justice Iacobucci (Figueroa, para. 89) had found to be impaired rather than advanced by the 50-candidate threshold (Longley, para. 27). Accordingly, Justice Matlow
declared the sections of the Canada Elections Act establishing the threshold to be of no force or effect.

Justice Matlow’s decision was appealed to the Court of Appeal for Ontario (88 OR (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). 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 satirising 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 enhancing ‘the integrity of the electoral process and of its electoral financing regime . . . because public money is directed towards genuine electoral and political endeavours’ (para. 81) as one of the salutary effects of the impugned thresholds. Moreover, he concluded that this objective could not be achieved through audits or enforcement action by the Chief Electoral Officer (para. 68, 69).

Justice Blair also found the nature of the threshold to be different from that in Figueroa. 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, m]eeting 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 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 line from *Figueroa* to *Longley* primarily concerned access to material benefits. An alternative line begins with the claim that lay at the heart of *Figueroa* – that being compelled to nominate 50 candidates would impose a substantial burden on small parties. Because she found the imposition of this burden 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 threshold to two 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.

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 judgment in the parts of *Figueroa* that did reach the Supreme Court (*De Jong v. Ontario (Attorney General)*, 287 DLR (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 the funds that could otherwise have been used for campaigning on behalf of the party’s candidates and ideas.

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 (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]’ \(17^{\text{para. 55}}\).

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 favour) on s. 3 grounds. He introduced his statement of reasons by quoting extensively from Justice Iacobucci’s reasons in *Figueroa* and Justice Bastarache’s reasons in *Harper* regarding the danger that ‘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)

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). 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). However, pointing to Justice Iacobucci’s judgment in *Figueroa*, 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. 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 (para. 61). He also accepted that a deposit requirement was rationally connected to the objective of reducing frivolous candidacies. The government’s case failed, however, on the tests of minimal impairment and proportionality. On the first, Justice Perell quoted the Lortie Commission\(^{18}\) 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). On the second:

\[79. \ldots \text{Accepting that the deposit requirements have the salutary effect of reducing the number of frivolous candidates that would interfere with the political discourse of the electoral process, this salutary effect is overcome by the deleterious effects of diminishing the capacity of political parties to present their ideas and opinions to the public and of exacerbating the pre-existing disparity in the capacity of smaller parties to communicate their positions to the general public}\]
by diverting funds that could be used to communicate a political message.

In ruling in De Jong’s favour, 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.

Courts and Electoral Reform in Canada and Beyond

As this review shows, Canadian courts have been either directly or indirectly a significant source of electoral reform – regarding suffrage, apportionment, ballot access, political finance – even if none of the reforms rises to the level of ‘major’ as conventionally defined. Indeed, in Figueroa 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). 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.

This final section of the article addresses three questions. First, can the jurisprudence of the Canadian courts be synthesised into a coherent theory of elections in democracy? Second, to what extent is this jurisprudence, and in particular its privileging of individual over collective rights, the result not of Canadian sensibilities, but of liberal constitutionalism more generally? And third, what are the implications for electoral reform both in Canada and beyond?

The idea of ‘party government’ or ‘responsible government’ is generally taken for granted in analyses of Canadian government – including in the Lortie Commission report to which the courts make repeated approving reference. This conception of democracy not only sees the electorate as the ultimate principal in a principal–agent relationship, and thus as the ultimate chooser of the general orientation of their government, but also sees 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.

This, however, is not the model adopted by the Supreme Court of Canada. On one hand, the court has tended to dismiss the nature of national parties as alternative potential governments. Notwithstanding the common association of single member plurality (SMP) elections with the ‘Westminster’ model of two-party, responsible party, government (Lijphart 1999), the
presence of the Bloc Québécois as a non-coalitionable separatist party and the continuing survival of the New Democratic Party (NDP) as a significant national third party make it essentially impossible that Canadian elections would simply be a choice between two alternative majorities. This presents two realistic possibilities. As has happened in Canada, there can be single-party governments, whether with or without a majority of the seats in Parliament, but almost inevitably without the votes of a majority of the electorate.\textsuperscript{19} Alternatively, 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 \textit{Figueroa}, but both require 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 \textit{Figueroa} allude, but which the Supreme Court itself did not appear to take seriously.

On the other hand, the significance of the distinction between government and opposition benches depends in part on how one understands the parliamentary process in the first place, and relates 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, deliberate, and then use their judgement to choose the best course of action? 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 the 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. 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.

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.

If legislative assemblies are made up of 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 *Figueroa*, 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 co-opt the supporters of those views into their own coalitions.

In the party government model, elections are ultimately: about choice rather than debate; contests between national parties rather than local candidates; a single national event rather than a collection of simultaneous local events; and about aggregation of interests rather than weighing of arguments. While recognising that the conventional liberal rights are essential to free and fair elections, the model ultimately requires recognition that these individual rights may legitimately be limited to further the conditions that allow the people to make a meaningful collective choice.

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 thrust is evident in the Court’s 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; 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. The overall result is a vision of elections 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.

The second thrust, a profound elitism with regard to what should happen after the election, is implicit in this. In particular, breaking the link between elections and the aggregate composition of the resulting assembly – coupled with the emphasis on representation of the social mosaic – leaves the legislature without an explicit policy mandate. On one hand, inconsistency
in the options offered to the voters in different constituencies leaves the meaning of a vote ambiguous: even if voting for the NDP were in some sense a vote for a consistent NDP programme wherever it was cast, its meaning would still be ambiguous, because it would not be a vote for the NDP programme 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 from a particular region, 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.

This democratic theory, with its privileging of a wide range of individual choice at the ballot box, but considerable independence assumed to be exercised on the basis of rational deliberation in Parliament, shares much with the democratic theory of John Stuart Mill, or more generally with nineteenth century radical liberalism. In that respect, it is part of the same ideology that privileged individualism and rights, as opposed to earlier views that privileged community and obligations. In the judicial realm, this implied that the judiciary was to protect individual rights against state intrusion, even when the state claimed to be protecting the collective interest. Obviously, there were, and remain, limits to the degree to which the rights of the individual must always prevail over the needs of society, but this bias in favour of the individual is part of the complex of ideas that justifies judicial review in the first place.

Beyond this philosophical bias, there is an institutional reason to expect courts to privilege the rights of individuals over those of the collectivity. Simply, courts decide cases, and the vast majority of cases in the field of electoral law are brought by individuals or associations claiming the rights of individuals. On one hand, this means that the cases begin framed in terms of individual rights. On the other hand, even if the state, as respondent in these cases, claims to be representing the public interest, the nature of judicial proceedings tends at least to raise the likelihood that the state actually is speaking for its own institutional interest or else for the interests of those parties that are currently in office (that is, exactly the interests against which individual rights are supposed to protect).

Seen in this light, it is perhaps not surprising that the Canadian courts have privileged individual rights of expression over collective rights of decision, and indeed, since none of these points are peculiar to Canada, this would be the expectation for courts more generally. The result is a likely disjuncture between judicial theories of democracy and the realities of modern parliamentary government. What are the implications for judicial involvement in electoral reform?
One view would say that only proportional representation (PR) will simultaneously preserve both the individual right of equality and allow voters to support the party with which they are in closest agreement in their own 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). 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 recognised as quite undemocratic.

The alternative view would be to say that the basic logic underlying much of judicial decision-making with regard to elections (in the Canadian case, particularly as manifested in Figueroa) needs to be weakened or abandoned. For example, it needs to be recognised 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 may be 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. 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 altar of interest articulation. This is, of course, precisely the ‘British tradition’ to which Justice McLachlin approvingly referred in Dixon and again in the Saskatchewan Reference.

It is probably not fruitful to speculate on how the inconsistencies between theory and practice would be resolved were the courts to be compelled to confront them. It is, however, hard to imagine any resolution that would not have profound implications for the future of electoral reform, 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, at least in that country, 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 in Canada, 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.

Notes

1. Note that in these cases it is the rights of the American speaker but the rights of the Canadian audience that appear to be paramount.

2. Before 1982, Canadian courts could invalidate an act of Parliament only if it violated the division of powers between the federal and provincial governments.

3. For an example of the ongoing debate concerning whether collectivities, or only individuals, are potential bearers of rights, see, for example, Baker (1994).

4. For example, the guarantee against unreasonable search and seizure.

5. In a series of cases culminating in Sauvé v. Canada (Chief Electoral Officer) (3 SCR 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). Although the importance accorded to the right to vote is relevant to the question of proportionality under Oakes, these cases themselves only bar denial of the franchise to relatively small categories of Canadian citizens, such as felons.

6. ‘More is intended than the bare right to place a ballot in a box’ (Dixon v. British Columbia (Attorney General), 59 DLR (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: ‘“standard, practice, or procedure” in § 2(a) of the Voting Rights Act . . . 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]).

7. The Court’s opinion in this case was written by Justice (later Chief Justice) Beverly McLachlin, and draws heavily on the opinion she wrote as Chief Justice of the Supreme Court of British Columbia (Dixon v. B.C. (A.G.), [1989] 4 WWR 393).

8. The case also challenged the legality of the deposit of $1000 required of each candidate. I return to this aspect of Figueroa below.

9. Later renamed the Ontario Superior Court of Justice.

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

11. ‘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 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 Cox 1997; Downs 1957), 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).
12. ‘Third parties’ refers to all political actors (generally individuals or interest groups) who are not themselves contestants in the elections.


14. 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).

15. This model was also reported in commentary to underlie the Court’s decision in Figueroa (see Feasby 2003; MacIvor 2004; Manfredi and Rush 2008).

16. 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.

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


19. The last Canadian majority government, returned to office in 2000 with 57.1 per cent of the seats in the House of Commons, received only 40.8 per cent of the popular votes.

20. Moreover, in the Canadian case, by making coalition governments the unavoidable norm, PR would have the potential of making the Liberals (as the party in the centre 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.

References


