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The Charter of Rights and Party Politics

The Impact of the Supreme Court Ruling in *Figueroa v. Canada (Attorney General)*

Heather MacIvor

Strengthening Canadian Democracy

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Heather MacIvor teaches Canadian politics and political theory at the University of Windsor. She has published on electoral reform, party leadership selection and women in politics. She is presently completing a book about the Charter of Rights.

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IRPP
1470 Peel Street, Suite 200
Montreal, Quebec H3A 1T1
Telephone: 514-985-2461
Fax: 514-985-2559
E-mail: irpp@irpp.org

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Strengthening Canadian Democracy / Renforcer la démocratie canadienne

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Since the 1960s, increased levels of education and changing social values have prompted calls for increased democratic participation, both in Canada and internationally. Some modest reforms have been implemented in this country, but for the most part the avenues provided for public participation lag behind the demand. The Strengthening Canadian Democracy research program explores some of the democratic lacunae in Canada's political system. In proposing reforms, the focus is on how the legitimacy of our system of government can be strengthened before disengagement from politics and public alienation accelerate unduly.

Depuis les années 1960, le relèvement du niveau d'éducation et l'évolution des valeurs sociales ont suscité au Canada comme ailleurs des appels en faveur d'une participation démocratique élargie. Si quelques modestes réformes ont été mises en œuvre dans notre pays, les mesures envisagées pour étendre cette participation restent largement insuffisantes au regard de la demande exprimée. Ce programme de recherche examine certaines des lacunes démocratiques du système canadien et propose des réformes qui amélioreraient la participation publique, s'intéressant par le fait même aux moyens d'affermir la légitimité de notre système de gouvernement pour contrer le désengagement de plus en plus marqué de la population vis-à-vis de la politique.

Strengthening Canadian Democracy / Renforcer la démocratie canadienne

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Introduction

On June 27, 2003, the Supreme Court of Canada issued its ruling in *Figueroa v. Canada (Attorney General)*. In a unanimous decision, the Court struck down the 50-candidate threshold for party registration under the *Canada Elections Act* (*CEA*).[1] It found that the threshold violated the democratic rights in section 3 of the Canadian Charter of Rights and Freedoms, and that this violation could not be justified under section 1.[2] The effect of the invalidation was suspended for 12 months so that Parliament could amend the Act in conformity with the Charter values identified by the Court. In October 2003, the government tabled its legislative response, Bill C-51, which was renamed C-3 after prorogation and reintroduction in February 2004. The Bill is designed to fill the legislative void that the *Figueroa* ruling would create if it were allowed to take effect on June 27, 2004.

Under Bill C-3, political parties of all sizes will be eligible for inclusion in the register of parties. They will be entitled to the two benefits explicitly addressed by the Supreme Court: the power to issue tax receipts for donations, and the right to identify their candidates on the ballot. The remaining benefits of registered status — including the right to retain surplus funds from their candidates and a share of the free advertising time provided by Canadian broadcasters — were not addressed in *Figueroa*, and the degree to which they were affected by the ruling is not yet clear.

Media coverage of the decision and its aftermath has been scarce. *Figueroa* was portrayed simply as a victory for Miguel Figueroa, leader of the Communist Party of Canada (CPC);[3] only the *Globe and Mail* considered the broader implications of the ruling. The Bill — as C-51 or C-3 — has been nearly invisible in the media, despite the significance of the impending changes to the *CEA*. The purpose of this paper is to

bring wider attention to *Figueroa*'s impact on Canada's election law. It presents the legal and political background of the case and discusses the policy issues presented to the Supreme Court. It then summarizes the majority opinion of the Court[4] and situates it in the broader context of Charter jurisprudence. The paper concludes by analyzing Bill C-3, the government's legislative response to *Figueroa*, and briefly discussing a few issues that the Bill does not address. It also considers the possible impact of the *Figueroa* ruling in light of the current interest in institutional reform.

The Legal Background: Judicial Interpretation of Democratic Rights

Section 3 of the Charter states that "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." Before the proclamation of the Charter, these rights were protected by statutory and common law. They could be granted, or denied, at the whim of federal and provincial governments. Over time, the worst abuses of the franchise — the denial of voting rights to women, Aboriginal Canadians, and citizens of Asian ancestry — were eliminated. Consequently, the entrenchment of democratic rights in 1982 was viewed as a symbolic gesture, not as a significant constitutional change (see, for example, Boyer 1981, 31 n. 23, 85; Russell 1982, 31). Indeed, section 3 was the least controversial item in the 1968-82 negotiations. Its text changed only once: the phrase "without reasonable distinction or limitation" was deleted in the spring of 1981 (Bayefsky 1989, 821).[5] The introduction of section 1, the "reasonable limitations" clause, allowed the drafters to remove many (but not all) of the internal qualifications on the rights and freedoms listed in the Charter.[6] Henceforth, restrictions on the right to vote or to seek public office would have to be justified, if at all, under section 1.

Before the Supreme Court issued its decision in *Figueroa*, it had had few opportunities to interpret section 3. Only five previous cases — the *Saskatchewan Boundary Reference*, *Haig*, *Harvey* and the two *Sauvé* rulings[7] — had turned on the meaning and application of either the right to vote or the right to run for office. These rulings are briefly summarized in table 1.

The Court's jurisprudence on section 3 raises basic questions: Should judges make binding decisions about democratic processes? Which Charter value(s) should take priority in judicial evaluations of election laws? Should freedom trump fairness, or vice versa? Or should we try to balance the two?

The Role of Judges in the Electoral Process

The answer to the first question is obvious in cases — for example, *Haig*, *Harvey* and *Sauvé* — where the law deliberately denies an explicit section-3 right to a particular individual or group. Under those circumstances, the Charter speaks clearly, and the courts have little choice but to enforce it. Section 24(1) of the *Constitution Act, 1982* permits anyone whose Charter rights have been "infringed or denied" to "apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." Section 52(1) states that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The framers obviously intended the courts to resolve conflicts between the Charter and ordinary statutes in favour of the former. The entrenchment of democratic rights, their immunity from the legislative "override" in section 33 and the choice of "a free and democratic society" as the benchmark for justification under section 1, collectively instruct the courts to defend voting and office-seeking with all possible vigour.[8]

But not all disputes over election law are so clear-cut. Section 3 of the Charter is silent on most aspects of electoral organization and activity. It does not mention political parties, interest groups, campaign finance or the rules for drawing electoral boundaries. Is it legitimate for courts to answer questions about these issues?

There are two primary arguments against judicial participation in disputes over election law. First, the "argument from democracy" holds that "self-government must entail self-government about self-government." In other words, democracy only thrives where "decisions about how the people are to govern themselves are made by those people on a continuous basis" (Schauer 1994, 1336). If democracy means "rule by the people," then presumably the people (or their elected representatives) should make the rules. For those who take the opposite view — that judges can, and should, resolve disputes over electoral processes — the unfitness of legislators to make their own rules forces citizens to rely on the courts to police democracy. When left to their own devices, they argue, politicians will manipulate the rules of the

Table 1
Pre-*Figueroa* Jurisprudence on Section 3 of the Charter

Case	Legal issues	Disposition	Remedy
Reference re Prov. Electoral Boundaries (Sask.), [1991] 2 SCR 158	Did disparities in population size among electoral districts violate the right to vote?	No (majority ruling by McLachlin J): s.3 guarantees relative parity of voting power, which must be balanced against competing factors such as geography; it guarantees effective representation in government and the legislature	None
Sauvé v. Canada (Attorney General), [1993] 2 SCR 438	Did a law that prohibited voting in federal elections by all prison inmates violate the right to vote?	Yes (unanimous judgment delivered orally by Iacobucci J): the prohibition violated s.3 and was not saved by s.1	Immediate nullification of s.51(e) of the *CEA*
Haig v. Canada; Haig v. Canada (Chief Electoral Officer), [1993] 2 SCR 995	Did residency requirements for voter eligibility violate the right to vote in the 1992 referenda?	No (majority ruling by L'Heureux-Dubé J): s.3 guarantees "the right to play a meaningful role in the selection of elected representatives," not the right to vote in a referendum	None
Harvey v. New Brunswick (Attorney General), [1996] 2 SCR 876	Did a New Brunswick law prohibiting persons convicted of election offences from seeking office for five years violate the right to run for public office?	No (unanimous): the infringement of the right to run for office was justified under s.1	None
Sauvé v. Canada (Chief Electoral Officer), [2002] 3 SCR 519	Did a law that prohibited voting in federal elections by federal prisoners violate the right to vote?	Yes (majority ruling by McLachlin CJ): the infringement could not be justified under s.1; deference to Parliament was inappropriate because the purpose of the law was to deny a crucial democratic right	Immediate nullification of s.51(e) of the *CEA*

electoral game to serve their own interests.[9] Just as the game of hockey establishes rules long before the Stanley Cup playoffs and assigns referees to identify and punish violations, the game of politics has preset rules that demand swift, unbiased enforcement. In the absence of such rules, individual ambition and partisan self-interest can distort the electoral process and deny outsiders the opportunity to compete.

The second argument against the judicial resolution of electoral disputes claims that judges lack both the competence and the constitutional mandate to police the electoral process. They should remain above the partisan fray and leave political questions to the legislative and executive branches of government. This controversy reflects the broader debate over the proper relationship between courts and legislatures. In recent years, the concept of dialogue between the two branches of government has generated a cottage industry among political scientists, legal experts and judges themselves.[10] The argument is that the Charter — section 1, in particular — requires courts and legislatures to work together to ensure that laws conform to the Constitution. The legislative and executive branches perform "first-order" Charter duties: they are obliged to draft and scrutinize proposed laws, and to perform their various administrative functions, in full compliance with the Charter. The judicial branch is required to review these laws and administrative acts as part of its "second-order" responsibilities; when protected rights and freedoms are infringed in a way that cannot be justified by countervailing social values, the courts must impose appropriate remedies (Slattery 1987, 708-9).

We generally expect the two political branches to carry out their first-order tasks in a reasonably objective and fair-minded way. But this is not always the case with electoral law, where "procedural decisions are made largely by selecting the procedures most likely to favour those doing the selecting" (Schauer 1994, 1336). Consequently, legislators and Cabinet ministers are more likely to fail in their first-order Charter duties when their own interests are directly involved. The primary responsibility for ensuring that elections conform with the Constitution thus falls to the courts, in their second-order capacity. Judicial deference to Parliament may not be appropriate in matters of electoral process.[11] In the words of Chief Justice McLachlin, "The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination."[12]

Fairness and Freedom: Egalitarians versus Libertarians

When courts agree to evaluate election laws, which Charter values should they take into account? Should fairness and equality outweigh individual freedom, or vice versa? Colin Feasby designates the two poles of this debate as the egalitarian and libertarian models, respectively. The egalitarian position holds that democratic rights are only meaningful when every vote and every voice carries a roughly equal weight in the electoral process; "a state of affairs in which some voices may be more influential than others, or have more power in fact to produce political outcomes than others, is suspect" (Schauer 1994, 1341). As John Rawls put it, "the fair-value of the political liberties is required for a just political procedure, and...to ensure their fair-value it is necessary to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from controlling the electoral process to their advantage" (Rawls 1987, 76).

In contrast, the libertarian approach brooks no interference with the free exchange of political views, even when that apparent "freedom" is skewed by an unequal distribution of wealth. It "allows those who are more articulate, more engaged, more diligent, and more resourceful (or more full of resources) to have consequently more of a voice in political outcomes" (Schauer 1994, 1341). According to Cass Sunstein, a libertarian view of election laws "should be seen as a regulatory decision to allow disparities in resources to be turned into disparities in political influence" (1995, 98).

The libertarian approach dominates the electoral jurisprudence from the US Supreme Court.[13] It is also reflected in several rulings from Canada's provincial courts. The best-known examples are the "third-party" rulings from Alberta and British Columbia,[14] in which judges struck down restrictions on campaign advertising by interest groups. Unlike its provincial counterparts, the Supreme Court of Canada favours the egalitarian approach to electoral regulation (see Feasby 1998-99). That predisposition was clearly evident in *Libman*:

> [T]he basic objective of the Act at issue is to guarantee the democratic nature of referendums by promoting equality between the options submitted by the government and seeking to promote free and informed voting. In its egalitarian aspect, the Act is intended to prevent the referendum debate being dominated by the most affluent members of society. At the same time, the Act promotes an informed vote by ensuring that some points of view are not buried by others. This highly laudable objective, intended to ensure the fairness of a referendum on a question of public interest, is of pressing and substantial importance in a democratic society.[15]

The egalitarian viewpoint is consistent with the Supreme Court's general approach to Charter rights. As long ago as 1986, former Chief Justice Dickson emphasized the danger of deferring to legislative purposes that undermine equality: "In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."[16] The same principle can apply to organizations, including political parties. The court has made it clear in most instances, though not all,[17] that the Charter should not be used to reinforce economic inequalities; where necessary, it may legitimately be employed to redress imbalances in wealth and power. The competitive advantage of a governing party like the federal Liberals, relative to a small party like the Communists, merits little protection from the Charter.

The split between egalitarians and libertarians is reflected in the debate over the constitutional status of political parties (MacIvor 2002, 479-504). Some judges prefer the "party equality" approach, which treats all political parties as important players in the electoral process, regardless of their relative sizes or ideological positions. When the larger parties exploit their control of the legislature by manipulating election laws to exacerbate the competitive disadvantages of their smaller or newer rivals, party-equality judges will use their powers under the Charter to invalidate or amend such laws.[18] Other judges espouse the "two-tier" approach, which permits the state to treat larger, well-established parties (those in the top tier) more generously than their smaller or newer rivals (the second tier). Such judges are willing to uphold laws that discriminate in favour of larger parties — those with the capacity to form governments or elect sizeable numbers of MPs — and against those that cannot realistically hope to win elections. Consequently, they are reluctant to find that laws designed by the bigger parties to increase their advantage over smaller parties violate the Charter; any violation is justified either by the need to conserve scarce public resources or by the legitimate decision to privilege "political parties which stand a realistic chance of forming a government."[19]

Despite the Supreme Court's egalitarian ruling in *Libman*, which told lower courts that excessively libertarian judgments would be overturned on appeal, the conflict between the two models has persisted for two decades.[20] So the importance of the *Figueroa* case

extends well beyond its implications for the CPC and its supporters (see MacIvor 2003a,b). The appeal gave the Supreme Court of Canada the opportunity to resolve the dispute between egalitarian advocates of party equality and libertarian defenders of two-tier laws — which it did, in favour of the former. To understand why, we need to examine the issues in the case.

The Factual Background of the *Figueroa* Case

The Party Registration Scheme in the *Canada Elections Act*

In Canada, a political party seeking state benefits must apply to the chief electoral officer for inclusion on the list of registered parties. Prior to the *Figueroa* ruling, the criteria for registration were as follows:

(1) A party seeking inclusion on the register of parties had to file a formal application, providing its formal name and logo, the mailing address of its headquarters, the name and address of its leader, and the names of its chief agent and auditor (sections 366-68 of the 2000 *CEA*).

(2) If the application was filed between general elections, the registration could not take effect until after the deadline for candidate nomination in the next campaign (section 370). The party would be declared eligible for registration. To complete the registration process, an eligible party had to nominate at least 50 candidates before the deadline; if it failed to do so, registration would be denied. Parties already listed on the register could only maintain that status by continuing to nominate 50 candidates or more at each election (section 385).

(3) Once registered, the party had to comply with all elements of the election finance regime, including the submission of annual and postelection financial reports to Elections Canada (sections 371-72 and 386-87). Bill C-24, the campaign finance law that took effect at the beginning of 2004, expanded the disclosure requirements significantly. The Act now requires yearly financial reports from every constituency association, and postevent disclosure from party leadership candidates and persons seeking nomination to Parliament by a registered party.

(4) Finally, registered parties must adhere to the spending limits set out in section 422 of the Act.

Although these requirements were fairly onerous, they did not necessarily discourage parties from pursuing registration. When the *Figueroa* decision was issued, there were eleven parties on the register, and another three were eligible to register (or reregister) in the next federal election if they met the 50-candidate threshold.[21]

The regulatory scheme for Canadian political parties dates back to 1970, when the *CEA* was amended to allow parties to identify their candidates on the ballot. To qualify for this privilege, a party had to nominate at least 50 candidates before the deadline for nominations (21 days before election day). Although several amendments were contained in Bill C-215, the number of candidates required for registration was by far the most contentious issue.[22] A Commons committee had unanimously recommended that the threshold be set at 10 percent of the seats in the House of Commons (roughly 27 at that time). The Liberal government wanted to raise the number of candidates to 75. Two arguments were offered in favour of the increase. First, both Liberal and Progressive Conservative MPs argued that a high threshold was needed to keep regional and frivolous parties off the ballot.[23] Second, a Liberal MP reminded the House that the government had promised to introduce public financing for political parties at a later date. If the same registration criteria were used to determine eligibility for both ballot labels and taxpayer-funded subsidies, then a high threshold would be necessary to safeguard the public purse.[24]

After considerable criticism from Opposition MPs — particularly NDP and Créditiste MPs, who castigated the government for discriminating against smaller parties and trying to prevent the emergence of new parties — the minister accepted an amendment that reduced the candidate threshold from 75 to 50. The figure of 50 appears to have been chosen arbitrarily, as a mean between 27 and 75; there is no indication in the record that a 50-candidate threshold reflected anything other than a desire to find a compromise that would permit the speedy passage of the Bill.[25]

The initial debate over the registration threshold is intriguing for at least two reasons. First, it demonstrated that the benefits of registration need not be treated as an indivisible package. Some MPs suggested that those benefits be divided into two categories: inexpensive benefits, such as ballot labels, could be distinguished from the potentially costly subsidies that had been recommended by the 1966 Barbeau Commission. A different threshold could be set for each category of benefits without unduly confusing

voters and political parties.[26] Second, the debate revealed the clash between the party-equality and two-tier approaches to electoral regulation. The strongest assertion of the former position came from Ed Broadbent: "I do not think we should weigh the electoral system against the emergence of new political and social changes in this country, no matter how insignificantly these might be regarded by the rest of us at the outset...It would seem to me that the principle we should recognize in respect of this legislation is the right of one man or two men to begin a political party, obtain nomination through the correct procedure, and following that, have their name and their party listed on the ballot."[27] The minister responded, "we are talking about national political parties and would want some expression of a very substantial political position by having the candidates nominated and put into the field."[28] The claim that a party should demonstrate "a very substantial political position" before gaining access to public benefits is a clear example of the two-tier approach.

The Benefits Flowing from Party Registration

The 1973 *Election Expenses Act* (which took effect after the 1974 general election) introduced a scheme of public benefits for political parties (and candidates). Only registered parties may qualify for these benefits, which have become considerably more lucrative over the years. For the sake of clarity, I will distinguish between two types of benefit: those that flow automatically from inclusion on the register of parties, and those that do not. The automatic benefits are as follows:

(1) *Broadcasting*. Registered parties are eligible for a share of the free air time provided by television networks during election campaigns. They also enjoy an exclusive right to buy the paid time on radio and television that is set aside by law to be sold at the lowest commercial rate. However, nonregistered parties may purchase air time on the free market at whatever rate the broadcaster wishes to charge. Although every registered party is entitled to a share of free and low-cost airtime, those shares are unequal; they are based on the parties' respective vote and seat shares in the previous general election. In the 2000 general election, for example, the governing Liberal Party was awarded 115 out of 396 free minutes, or 29 percent, compared to 10 percent for the NDP, 4 percent for the Green Party, and 1.5 percent for the fledgling Marijuana Party.[29]

(2) *Access to voters' lists*. Registered parties are entitled to receive updated copies of the permanent register of electors once a year. Although the accuracy of these lists is open to debate, their automatic provision to registered parties gives the latter an organizational head start over nonregistered parties.

(3) *Tax receipts*. The official agents of registered parties can issue tax receipts to contributors at any time — unlike candidates, who may only do so during campaigns. The deductible percentage of the donation shrinks as the donation grows. Under Bill C-24, a $400 donation to a registered party generates a $300 tax credit (75 percent); a $1,000 donation produces a credit of $558.33 (56 percent). Nonregistered parties cannot issue tax receipts, which makes it more difficult for them to raise funds.[30]

(4) *Assignment of candidate surpluses*. Under section 473(2) of the *CEA*, a candidate cannot hold unspent campaign funds and reimbursements in her campaign account after the election is over. She must transfer any funds remaining after the payment of outstanding debts to her national party, or, more commonly, to her constituency association. Independent and unaffiliated candidates, a category that includes those belonging to nonregistered parties, may not transfer surpluses and reimbursements (if any) to a political party; instead, they must remit any net balance to the receiver general.

(5) *Ballot labels*. Until 2001, registered parties enjoyed the exclusive right to identify their candidates on the ballot. Bill C-9 (the legislative response to the 2000 OCA ruling in *Figueroa*) amended the *CEA* to extend this right to nonregistered parties with as few as 12 candidates.

When it ruled on Mr. Figueroa's appeal, the Supreme Court focused on the last three of the five automatic benefits just discussed. Neither the broadcasting provisions nor the production of voters' lists were at issue in the case.

While the nonautomatic benefits are available only to registered parties, they may only be claimed by parties that enjoy significant electoral success. There are two major benefits in this category.

(1) *Reimbursements*. Only registered parties can qualify for public reimbursement of 60 percent of their declared election expenses. However, a party is only entitled to reimbursement if it wins at least 2 percent of the national total (almost 260,000 valid votes in 2000) or 5 percent of the vote in the constituencies where it has run candidates (section 435 of the *CEA*). (Candidates are also entitled to partial

reimbursement of campaign expenses if they win at least 15 percent of the valid vote in their ridings; this provision applies to all candidates, including independents and those representing nonregistered parties.)

(2) *Annual allowances*. Bill C-24 established a new system of direct public subsidies to registered parties (section 435.01), and these were paid out for the first time in early 2004. The amount of each party's annual allowance is determined by the number of valid votes it received in the previous general election at a flat rate of $1.75 per vote. The vote thresholds for the allowances are the same as those for reimbursements.

Mr. Figueroa's constitutional challenge to the *CEA* did not directly impugn the nonautomatic benefits flowing from registered-party status.

The First Round in the Battle: 1993-99

In 1993, shortly before Parliament was dissolved for a general election, it adopted Bill C-114, *An Act to Amend the Canada Elections Act*.[31] The Bill made several changes to the *CEA*, only two of which will be discussed here. First, it raised the candidate deposit from $200 to $1,000[32] and stipulated that only half that amount would be returned to a candidate who won less than 15 percent of the vote in his or her constituency. The other half would be returned after the candidate's official agent submitted a complete financial report. In effect, most independent and minor-party candidates — and many from the larger parties — would pay a $500 penalty just for seeking public office. Second, Bill C-114 required the chief electoral officer to liquidate any registered party that failed to nominate 50 candidates during an election campaign and was thereby struck from the register. The party would be forced to wind down its affairs, sell off its assets and remit any net balance to the federal government.

The combined effect of these two amendments was potentially devastating for smaller parties, which were now forced to raise at least $50,000 in the first few weeks of a campaign — the cost of nominating 50 candidates with a deposit of $1,000 each — in order to survive. Any candidate who failed to win at least 15 percent of the vote would forfeit half of his or her deposit. Together, these provisions inflicted serious damage on parties with little money: at the exact moment that finding 50 candidates became a matter of life and death, the $500 penalty made it more difficult to persuade people to run for Parliament. No such difficulty confronted the wealthier parties, which passed the Bill into law hastily and with a minimum of public discussion.[33]

Bill C-114 took effect in time for the 1993 general election. At the time, Miguel Figueroa was the new leader of the Communist Party of Canada. The party was at a low ebb. The collapse of the Soviet bloc and the eruption of factional conflict weakened the organization and sapped its resources. In the six general elections since 1970, the Communists had never failed to nominate 50 candidates. But in 1993, they only managed to field 8 candidates before the deadline. The chief electoral officer struck the CPC from the register of parties and ordered it to begin liquidating its assets. Mr. Figueroa fought back, filing suit against the federal government. He argued that the 50-candidate threshold violated several provisions of the Charter of Rights, and that these violations were not justified under section 1.

As noted earlier, Mr. Figueroa did not challenge the nonautomatic benefits of registered status. Nor did he impugn the broadcasting provisions or the entitlement to voters' lists. He focused on the denial of tax credits, ballot labels and candidate surpluses to parties with fewer than 50 candidates. Mr. Figueroa also challenged the mandatory liquidation of deregistered parties and the 15 percent vote threshold for the return of half the candidate deposit. In effect, he posed the following questions to the Ontario Court (General Division):

(1) Did the 50-candidate threshold for registration — and for the resulting benefits of ballot labels, tax credits and candidate surpluses — violate freedom of expression (section 2[b]), freedom of association (section 2[d]), the right to vote and to run for office (section 3), or equality rights (section 15[1])?

(2) Did the mandatory-liquidation provision and/or the reimbursement of half the candidate deposit only to candidates who won at least 15 percent of the vote violate any of the Charter sections mentioned in question 1?

(3) If the answer to questions 1 or 2 is "Yes," then are any or all of the violations "demonstrably justified in a free and democratic society" (section 1)?

(4) If the answer to question 3 is "No," then what are the appropriate remedies for the Charter violation(s) arising from the 50-candidate threshold? Should that particular criterion for registered status be severed from the rest of the *CEA* and declared invalid? Other possible remedies included the imposition of varying thresholds for different benefits, "reading down" from 50 candidates to some lower number, and "reading in" a substitute

criterion for registration (for example, a higher number of signatures).

Figueroa's case was heard by Madam Justice Molloy in January 1998. Her decision and reasons for judgment were issued in March 1999.[34] Justice Molloy found for Figueroa on all points and applied remedies that amended the *CEA* in several key respects. Although a brief summary cannot do justice to Molloy's lengthy decision, the following points are the most relevant for the purposes of this paper.

(1) Justice Molloy found that the 15 percent vote threshold for full repayment of candidate deposits limited the right to run for office (section 3 of the Charter) by deterring serious candidates who could not afford to risk losing $500. She quoted the Lortie Commission's observation that the threshold was "often too high for all but the winner and the runner-up,"[35] and she noted that "Candidates who have no realistic expectation of garnering 15% of the vote may nevertheless have a useful and important role to play in the electoral process."[36] Justice Molloy concluded that the violation of section 3 could not be saved under section 1, because there was no "rational connection" between the 15 percent threshold and the apparent objective of weeding out "frivolous" candidates. She "read down" the *CEA* to delete the vote threshold and to provide for the automatic repayment of the full deposit upon compliance with the reporting requirements of the Act.

(2) The 50-candidate threshold for party registration was also found to be an unjustified infringement of section 3. Justice Molloy pointed to "a general consensus that smaller parties make a valuable contribution to the political process," referring to the Lortie Commission's claim that "many Canadians want the electoral process to be made more accessible to the non-traditional parties so that voters have a broader choice in the selection of their elected representatives."[37] A law that discriminates against smaller political parties is, prima facie, unconstitutional, because it impairs the right to vote for one's party of choice and the right to run for office on a level playing field. Although a Charter violation "prescribed by law" can only be justified if it serves some pressing and substantial objective, no such objective was advanced by the government. Justice Molloy concluded that the real objective of the threshold was to enhance the relative advantages already accruing to larger and wealthier parties: "the defendant's focus is not truly on the rights and responsibilities created by registration, but rather on its reluctance to extend the benefits of registration to smaller parties." Her remedy was to "read down" the threshold from 50 candidates to two. However, she was careful to point out that this lower threshold for registration would only apply to the benefits at issue in the case — namely, the issuance of tax receipts and the labelling of candidates on the ballot. The other automatic benefits, and by extension the nonautomatic benefits, would continue to require the nomination of 50 candidates. Echoing the Commons debate of 1970, Justice Molloy observed, "There is no valid reason why the same threshold must apply with respect to all benefits."[38]

(3) Justice Molloy held that the denial of tax credits to nonregistered parties violated the right to run for office. She was not suggesting that the government provide financial support to political parties, but rather that "if the government decides to extend a financial benefit to assist *some* candidates in an election, the benefit must be equally available to *all*" (emphasis added). She observed that "The ability of a political party to communicate its platform to voters and potential supporters is directly related to its financial resources." It follows that parties with more money to spend can give their candidates a distinct advantage in electoral competition. So a law that deprives some parties and their candidates of an effective fundraising tool (that is, the issuance of tax receipts) renders the entire electoral system unfair and thereby impairs the right to run for office. Moreover, "Permitting tax credits only for contributions to the larger parties sends an implied message to taxpayers that those parties are more worthy of support and indirectly channels financial support away from smaller or emerging political parties."[39] No specific remedy was required, because the reduction of the candidate threshold from 50 to two brought the tax-credit provisions within the scope of constitutionality.

(4) Justice Molloy found that the denial of ballot labels to parties with fewer than 50 candidates violated the section-3 right to cast an informed vote. It also violated the right to run for public office by prohibiting certain candidates from stating their party affiliations. There was no need to address the effects on freedom of expression, because the government had already conceded a prima facie violation of section 2(b).[40] She held that the restriction on ballot labels served no legitimate purpose and concluded that the lower threshold should apply to this particular registration benefit.

(5) Finally, Justice Molloy struck down the mandatory-liquidation provision of the *CEA* as an unjustified violation of sections 2(b), 2(d) and 3. Not only did it prevent parties from engaging in their core functions — presenting policy platforms, nominating candidates for office, informing the public discourse — but it also barred their members from collectively exercising their right of political expression.[41] Although Justice Molloy agreed that the protection of the public purse — the stated objective of the liquidation rule — was a "pressing and substantial objective," the provision was neither rationally connected to that objective nor minimally impairing of the infringed rights and freedoms. She declared it invalid.

The 1999 *Figueroa* ruling is a clear example of the party-equality approach. Justice Molloy did not distinguish among parties according to size and wealth; instead, she assumed that even the smallest party can make a valuable contribution to an election campaign — but only if it can afford to do so.

The federal government did not appeal two elements of Molloy's ruling: the automatic liquidation of deregistered parties and the vote threshold for the return of candidates' deposits. In 2000, the *CEA* was amended to remove these provisions. Under the amended law, candidate deposits are returned in full upon submission of the required documents to Elections Canada. A party that failed to nominate 50 candidates by the deadline would be "suspended" from the register (section 385). It would be eligible to apply for reregistration immediately, although its application could not be put into effect before the nomination deadline in the next general election. While suspended, the party could not receive any of the benefits of registered status; however, many of its reporting obligations continued to apply.

The Ontario Court of Appeal, 2000: One Step Forward, Two Steps Back

When the Ontario Court of Appeal (OCA) ruled on the *Figueroa* case in August 2000,[42] it dealt with the two issues appealed by the Crown: the constitutionality of the 50-candidate threshold, and the restriction of ballot labelling to the candidates of registered parties. A three-judge panel found that the 50-candidate threshold did not violate section 3 of the Charter; it therefore overturned Justice Molloy's two-candidate remedy and restored the higher criterion for registration. The invalidation of the ballot-label provision was upheld. The OCA ordered Parliament to enact a new, lower threshold for ballot labels without specifying a number. Bill C-9, which amended the *CEA* to require at least 12 candidates as a prerequisite for ballot identification, received royal assent in June 2001. Because the ballot-label ruling followed Justice Molloy's reasoning, I will focus here on the appeal court's analysis of the 50-candidate threshold.

Ontario Appeal Court Justice Doherty, who wrote for the unanimous panel, was clearly influenced by the two-tier approach to party regulation. He identified three key roles for political parties in the democratic system: to "structure electoral choice and thus make the vote meaningful"; to "provide mechanisms for political participation and thus enhance democratic self-government"; and to "organize elected representation in Parliament and thus contribute to the effective operation of responsible government."[43] He concluded that "the primary reason for elections is to choose a government."[44] Justice Doherty also reasoned that "the purposes served by political parties in the electoral process which enhance effective representation...become operative only where political parties assume a meaningful level of participation in the electoral process...The number of candidates fielded in an election is one measure of a political party's level of participation in that particular election. Political parties who are *prepared* to extend the energy and resources necessary to run candidates in a significant number of constituencies can be taken as being more involved and committed to that process and the eventual government of the country than can a party that nominates only a handful of candidates."[45]

This two-tier reasoning is flawed in two respects. First, Justice Doherty ignored the procedural benefits of elections: public discussion of alternative policies, the educative effect of party platforms and the political mobilization of citizens. Second, he overlooked a crucial flaw in the two-tier model: the fact that a party must not only be "prepared" but also *able* to "run candidates in a significant number of constituencies" in order to qualify for registration. The quoted passage implies that any party that chooses to do so can run 50 candidates and thus qualify for the benefits of registered status. In reality, larger and/or wealthier parties may have little difficulty in setting up 50 constituency associations, holding nomination meetings and raising $50,000 to pay the deposits. But others, through no fault of their own, may lack the resources to fulfill these legal obligations. In particular, a party that cannot issue tax receipts as an incen-

tive for potential donors may have a hard time raising the necessary funds.

The party-equality ruling of Justice Molloy recognized the disparity in resources between larger and well-established parties and their smaller or newer rivals. In contrast, Justice Doherty implied that the threshold imposed no serious barrier to registration for parties with the wherewithal to provide "effective representation," and that parties that lacked that wherewithal were quite properly excluded from public benefits. The fact that the law itself might make it impossible for a party to perform the functions identified by Justice Doherty went unacknowledged.

November 2002: The Supreme Court Hears the Case

In October 2000, Mr. Figueroa and his lawyers appealed the OCA's restoration of the 50-candidate threshold to the Supreme Court of Canada. Leave to appeal was granted in March 2001. In September 2001 Chief Justice McLachlin issued six constitutional questions to be addressed by the court. The last four went unanswered,[46] so only the first two are reproduced here:

(1) Do sections 24(3)(a) and 28(2) of the *Canada Elections Act*, RSC 1985, c. E-2 (now sections 370[1] and 385, SC 2000, c. 9) limit the section-3 Canadian Charter of Rights and Freedoms rights of candidates or supporters of nonregistered political parties by requiring that, in order to become and remain a registered political party, a party must nominate candidates in at least 50 electoral districts in each general election?

(2) If the answer to question 1 is in the affirmative, is this limitation reasonable and demonstrably justified in a free and democratic society under section 1 of the Charter?[47]

Although the first question was worded broadly, the Court declined to consider the entire registration scheme and all of the associated benefits. It confined its analysis to the issues raised by Mr. Figueroa: the power to issue tax receipts for political contributions, the forfeiture of campaign surpluses by candidates of nonregistered parties[48] and the inclusion of party labels on the ballot. Although the third issue had already been decided by the OCA, and the *CEA* amended in consequence, the Supreme Court was bound to answer the questions that Mr. Figueroa had posed in 1993 (when the 50-candidate rule still applied to ballot labels).

Does the 50-Candidate Threshold Violate the Right to Vote or to Run for Office?

Mr. Figueroa's lawyer, Peter Rosenthal, asked the Supreme Court to restore Justice Molloy's ruling on the constitutionality of the 50-candidate threshold. Relying on *Libman*, he asked the Supreme Court to endorse Justice Molloy's finding that "providing benefits only to parties whose ideas are popular or mainstream is the very antithesis of a true democracy."[49] He argued that the 50-candidate threshold violated the rights of both minor-party candidates and "voters who wish to support smaller parties." The latter violation arose from the denial of tax credits to parties with fewer than 50 candidates. This deprived a small party's supporters of a benefit available to supporters of other parties while reducing the means available to their chosen party and thus "lessening the possibility that their candidates will be elected." He concluded that section 3 "protects the rights of all voters and candidates, including those supporting or representing parties that have little or no chance of winning the election."[50]

Whereas the case for the appellant relied on the *Libman* ruling, the case for the respondent — the Government of Canada, represented by the Department of Justice — was based on the *Saskatchewan Electoral Boundaries* precedent. Roslyn Levine QC sought to persuade the Court to uphold the OCA's restoration of the 50-candidate threshold. She argued that the key function of political parties is to "aggregate the interests of the voting public" and thereby provide "effective representation." In effect, she suggested that a single-party majority government was the most appropriate electoral outcome for Canada, and that an electoral regime that favoured larger parties promoted that outcome.

Levine described the 50-candidate threshold as "a valid measure" of a party's ability to aggregate voters, as well as a necessary protection for "the integrity of the electoral financing regime." A permissive registration scheme that made it easy for parties to qualify for tax-credit privileges could threaten "the sustainability of the public purse for this and other election financing purposes." Moreover, it might allow dishonest people to create and register fictional parties purely for the purpose of issuing fraudulent tax credits for "political donations." Levine also pointed out that the rights in section 3 "are exercisable only by individuals, not by political parties," and she argued that "the threshold for political parties has no bearing at all on an individual's ability to exercise either right."[51]

If the 50-Candidate Threshold Infringes Section 3, Then Is the Infringement "Demonstrably Justified in a Free and Democratic Society"?

The section-1 arguments in both facta were rather cursory. The lack of substance in the respondent's factum is surprising, given the government's evidentiary burden at the second stage of Charter analysis. Once the plaintiff (in this case, Mr. Figueroa) has established that a particular law violates his or her Charter rights, the onus shifts to the sponsoring government to prove that the violation is justified. Under the *Oakes* test[52] and its subsequent modifications,[53] the respondent must defend the impugned law on four separate grounds:

(1) the law must serve a "pressing and substantial" policy objective that is proven to be sufficiently important to warrant infringing a Charter right (alternatively, the government has to demonstrate a "reasoned apprehension of harm" arising from the invalidation of the impugned law);

(2) the law must be "rationally connected" to that objective;

(3) the law must impair the Charter right as little as reasonably possible, in light of alternative measures that might have been chosen to achieve the same objective; and

(4) the harm caused by the Charter infringement must be proportional to both the beneficial and deleterious effects of the law.

In his factum, Mr. Rosenthal argued that the government had not met the first element in the *Oakes* test: the identification of a policy objective that was sufficiently "pressing and substantial" to justify a Charter violation. At the Court of Appeal, the government had identified two objectives of the 50-candidate threshold: "to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will," and "to protect the public purse by drawing a clear line between parties which have demonstrated a serious enough engagement in this crucial role to be entitled to the state's direct and indirect financial support and those not so entitled."[54] Implicit in the second objective was an additional concern: if party registration were made too easy, unscrupulous people would use it to defraud the government by issuing tax receipts for phony political donations.

Unlike its earlier submission to the OCA, the government's factum to the Supreme Court of Canada failed to present any clear and specific objectives for the threshold. Instead, it referred to a "pressing and substantial concern" — that is, "to enhance the effectiveness of Canadian elections, in both their process *and* outcome."[55] Levine interpreted *Libman* to mean that "enhancing the integrity of the *outcome* of a democratic process...amounts to a pressing and substantial concern."[56]

These "concerns" do not withstand scrutiny. First, as Rosenthal pointed out, the threshold could only be said to "channel currents of thought" by "[making] it more difficult for less popular views to be heard by the electors."[57] Second, the principal means of providing "indirect financial support" to parties is the tax credit, which benefits individual contributors and not parties per se. Third, while the cost of the political tax credits is far from negligible,[58] it is difficult to see how a law designed to encourage Canadians to participate in politics can be viewed as a threat to the public purse. Moreover, as Rosenthal pointed out elsewhere in his factum, "the issuance of tax credits by a party is in proportion to the number of contributors to the party, and a frivolous party is not likely to attract many contributors."[59] (Recall that "direct" financial support, such as reimbursements and annual allowances, was not an issue in the case at bar.)

Fourth, the claim that the number of candidates is a valid measure of popular support for a party is dubious, at best. As Justice Molloy pointed out, the 50-candidate rule would deny registered status to "a party with a million members but only 49 candidates,"[60] whereas a party with 100 members would be eligible as long as half of its members agreed to stand for election. This argument is not entirely hypothetical. The Natural Law Party had the financial resources to run 69 candidates in the 2000 general election; collectively, those candidates won only 0.1 percent of the popular vote. Fifth, the government's interpretation of *Libman* as a primarily outcome-oriented ruling is inaccurate. The crux of the court's unanimous ruling is that "the pursuit of an objective intended to ensure the fairness of an eminently democratic *process*...is a highly laudable one."[61]

Sixth, and finally, the various "objectives" or "concerns" attributed to the threshold by the government do not meet the standard established by Chief Justice McLachlin in the 2002 *Sauvé* ruling. She pointed out that

> precisely because they leave so little room for argument, vague and symbolic objectives make the justification analysis more difficult...At the end of the day, people should not be left guessing about why their Charter rights have been infringed. Demonstrable

> justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process. As this Court has stated, the objective 'must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective.'[62]

The second stage of the *Oakes* test, establishing a rational connection between the objective and the impugned law, received considerably more attention in the government factum. Levine claimed that the threshold "encourages parties to aggregate interests to be more representative" and "protects the integrity of the election financing regime, by ensuring that it is only used for [the] intended electoral purposes."[63] She concluded that these goals are rationally connected to the stated objectives. For the appellant, Rosenthal offered two counterarguments. First, he pointed out that the threshold was already in place "before there was any direct or indirect state financial support for political parties."[64] Therefore, the government could not claim a rational connection between the 50-candidate rule and the protection of the public purse.[65] Second, Rosenthal suggested that "any true concern with protection of the public purse would produce rules dealing directly with the use of public monies, and any such rules would apply to all parties, large and small."[66] In other words, the true purpose of the threshold was not to ensure accountability for public funds, as the government claimed, but to protect the interests of the larger parties under the cloak of fiscal responsibility.

The third stage of the *Oakes* test, the "minimal impairment" analysis, is fraught with difficulty for the sponsoring government. A study of Supreme Court rulings between 1986 and 1997 found that 60 percent of the laws that failed the *Oakes* test did so because they were not "minimally impairing" of the relevant Charter right or freedom (Trakman, Cole-Hamilton and Gatien 1998, 140, table 1). Rosenthal offered no argument on this point. For the government, Levine contended that the threshold had little effect on the ability of political parties to form, operate and compete for votes. She noted that the CPC itself had run more than 50 candidates in every election from 1974 until 1993, and that it was able — despite its nonregistered status in 1993 and 1997 — to meet the criteria for reregistration in 2000. She also pointed out that candidates, regardless of party status, can issue tax receipts throughout the campaign period.[67]

The last stage of the analysis — the balance between harmful and beneficial effects — received no attention from the appellant. The respondent concluded by arguing that Canada's electoral law is a model for democracies everywhere and reiterating the claim that benefits should be confined to "parties serving the public function of fielding a reasonable and sufficient number of candidates to play an important role in both the process and outcome of elections."[68]

In sum, the arguments before the Supreme Court reflected a straightforward clash between the party-equality and two-tier approaches to political parties. The appellant and the respondent also differed over the relative importance of process and outcome in the judicial review of election law. Ms. Levine did not attempt to counter Mr. Rosenthal's egalitarian argument with a libertarian analysis, perhaps because *Libman* demonstrated that the libertarian approach was a nonstarter at the Supreme Court of Canada. Levine relied instead on the principles of fiscal responsibility and political aggregation to justify the 50-candidate threshold.

June 2003: The Supreme Court Rules on *Figueroa*

The Meaning and Purpose of Section 3 of the Charter

The majority opinion, authored by Justice Iacobucci, was supported by Chief Justice McLachlin and Justices Major, Bastarache, Binnie and Arbour. Iacobucci began by defining the purpose of section 3, as required by the Court's purposive and contextual approach to Charter rights. The former requires a judge to determine the purpose for which a particular Charter guarantee was adopted — "to delineate the nature of the interests it is meant to protect."[69] The latter obliges the judge to restrict the Charter analysis to the specific interests engaged by each individual case. This helps judges to strike a reasonable balance between Charter values and competing social interests by acknowledging that "a particular right or freedom may have a different value depending on the context." Moreover, "the value to be attached to it in different contexts for the purpose of the balancing under section 1 might also be different."[70] So Iacobucci undertook a purposive analysis of the right to vote, not in the abstract, but in the context of Canada's political system and traditions.

As we have seen, the OCA relied heavily on Justice McLachlin's ruling in the *Saskatchewan Boundary*

Reference, which defined the purpose of the right to vote as a guarantee of "effective representation." In turn, Justice Doherty interpreted "effective representation" to mean "the production of a one-party majority government." In other words, the purpose of section 3 was to encourage a particular kind of electoral outcome. Iacobucci rejected that interpretation of section 3. Instead, he adopted the purpose defined by former justice L'Heureux-Dubé in *Haig*: "to grant every citizen of this country the right to *play a meaningful role in the selection of elected representatives* who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate."[71] Iacobucci concluded that the guarantee of voting rights protects "the right of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government."[72]

Iacobucci linked the guarantee of "meaningful participation" to the freedom of political expression guaranteed by section 2(b) of the Charter. The value of full and wide-ranging political debate, especially during an election campaign, is both intrinsic and instrumental; it "ensures not only that policy makers are aware of a broad range of options, but also that the determination of social policy is sensitive to the needs and interests of a broad range of citizens."[73] Consequently, Iacobucci rejected Justice Doherty's claim that elections are solely about producing governments; instead, they are "the primary means by which the average citizen participates in the open debate that animates the determination of social policy."[74]

Does the Threshold Violate Section 3?

Justice Iacobucci reformulated the central question of the case as follows: "whether the 50-candidate threshold interferes with the capacity of individual citizens to play a meaningful role in the electoral process." Then he divided it into two separate issues: "First, do the members and supporters of political parties that nominate fewer than 50 candidates play a meaningful role in the electoral process? And if so, does the restriction on the right to issue tax receipts for donations received outside the election period, to transfer unspent election funds to the party and to list their party affiliation on the ballot papers interfere with the capacity of the members and supporters of political parties that nominate fewer than 50 candidates to play a meaningful role in the electoral process?"[75]

At this stage of his analysis, Iacobucci explicitly returned to the party-equality model adopted by Judge Molloy. Because "all political parties are capable of introducing unique interests and concerns into the political discourse," the state cannot arbitrarily discriminate for or against parties based on "their capacity (or lack thereof) to participate in the governance of the country subsequent to an election."[76] Consequently, a law that makes it difficult, if not impossible, for smaller parties to participate effectively in election campaigns violates section 3.

Iacobucci pointed out that smaller parties "tend to dissent from mainstream thinking and to bring to the attention of the general public issues and concerns that have not been adopted by national parties." Although they may not form governments, they provide "a most effective vehicle for the participation of individual citizens whose preferences have not been incorporated into the political platforms of national parties."[77] He concluded, "there is no reason to think that political parties that have not satisfied the 50-candidate threshold do not act as an effective outlet for the meaningful participation of individual citizens in the electoral process. There is no correlation between the capacity of a political party to offer the electorate a government option and the capacity of a political party to formulate a unique policy platform for presentation to the general public."[78]

Iacobucci concluded that the 50-candidate threshold "interfered with" the rights of smaller parties — more precisely, the rights of their candidates and (potential) supporters — because it barred them from inclusion on the register of parties and thus denied them the automatic benefits provided under the *CEA*. By reinforcing the competitive advantage of the larger parties over their smaller rivals, the registration scheme "diminishes the capacity of the individual members and supporters of [smaller] parties to play a meaningful role in the electoral process." Additionally, voters can only play a meaningful role in the electoral process if they know what their choices are — that is, if all parties can communicate their policies and ideologies to the public. Therefore, "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." By reducing the financial resources of smaller parties, the 50-candidate threshold "undermines the right of each citizen to information that might influence the manner in which she or he exercises the right to vote."[79] In sum, the impugned law did more than infringe the rights of the individuals directly involved with smaller political parties; it violated the rights of *all* voters.

Figueroa had proven his argument that the threshold violated democratic rights.[80]

Is the Violation "Demonstrably Justified in a Free and Democratic Society"?

The Supreme Court holds governments to a high standard of justification when section-3 rights have been infringed. In his concurring judgment, Justice LeBel declined even to consider whether a law that infringed democratic rights could be upheld under section 1: "[M]y finding that the legislation infringes s.3 essentially amounts to a conclusion that it is inconsistent with the values of Canadian democracy. It is hard to see how it could nevertheless be shown to be 'justified in a free and democratic society.'"[81]

As already noted, the federal government's factum did not identify persuasive objectives. Iacobucci compiled his own list, extrapolating from the various goals and purposes advanced by Levine. He identified the first objective as "the improvement of the electoral process through the public financing of political parties." While Iacobucci agreed that this objective is "pressing and substantial," he concluded that it is actually counteracted by the 50-candidate threshold: "Legislation that prevents certain political parties from issuing tax receipts or retaining unspent election funds does not encourage individual citizens to donate funds to political parties, but, rather, actively *discourages* the members and supporters of those parties from making such contributions."[82]

The second objective, to protect the public purse by restricting access to the political tax credit, also failed the "rational connection" test. According to Iacobucci, the 50-candidate threshold "has no impact whatsoever upon the potential overall burden of the tax credit scheme on the public purse" because it does nothing to prevent individuals from contributing the maximum amount to political parties. It merely discourages donors from giving money to *smaller* parties.[83] Nor was the law "minimally impairing" of democratic rights. Iacobucci argued that if fiscal responsibility were really a pressing concern, "a more appropriate means by which to address this problem would be to reduce the amount that each citizen is entitled to claim in respect of donations to political parties." This alternative policy would save public money without discriminating against any particular party or parties, and thus would not infringe Charter rights.[84]

Finally, Iacobucci determined that the harmful effects of the threshold outweighed any incidental benefits associated with the restriction of tax-credit privileges.

> [Because] political parties that nominate candidates in fewer than 50 electoral districts typically have a relatively small base of support, one would expect the percentage of political donations received by non-registered parties to be relatively insignificant — as one would thereby expect the savings to the public purse to be relatively insignificant. If the right of individual citizens to play a meaningful role in the electoral process is to be limited for fiscal reasons, the savings would have to be much more substantial than those associated with the restriction on the right of non-registered parties to issue tax receipts to individual citizens for donations received outside the election period.[85]

The third objective of the threshold was to protect the integrity of the electoral regime by preventing frivolous parties from abusing the tax credits. While Iacobucci acknowledged this as a pressing and substantial objective in the abstract, he found that the government had failed to prove that it justified the infringement of section 3: "There would seem to be two possible aspects to this submission. The first is that failure to satisfy the 50-candidate threshold is evidence that a political party has no genuine interest in the electoral process. The second is that the 50-candidate threshold actively discourages organizations that have no electoral aim from seeking registered party status solely for the purpose of obtaining the right to issue tax receipts. Neither aspect of this submission provides a sufficient basis for concluding that the threshold requirement is rationally connected to the stated objective."[86]

In the first place, "the 50-candidate threshold is an inadequate mechanism for determining whether an organization is a legitimate political party, with a genuine intention of participating in the electoral process." Some serious parties may choose not to run candidates in more than a handful of ridings. Others, lacking the resources to field 50 candidates, may nonetheless make a significant contribution to political debate. Nor is the threshold an effective tool for distinguishing genuine political parties from those merely seeking to abuse the tax credits.[87] Second, candidates — whether sponsored by a registered party or not — can issue tax receipts during the campaign period. If interest groups "have not already nominated candidates for the purpose of obtaining this benefit, it seems unlikely that they would nominate candidates for the purpose of obtaining the right to issue tax receipts for donations received outside the election period."[88] Third, registered parties and those that wish to become registered must meet several other obligations, including the submission of audited financial reports. "Absent evidence indicating that these requirements are not sufficient to

prevent [interest groups] from seeking registered party status for the sole purpose of abusing the tax credit scheme, there is no basis for concluding that the 50-candidate threshold actually advances the objective of preventing the misuse of the electoral financing regime."[89]

With regard to candidate surpluses, Iacobucci dismissed Levine's argument that candidates from non-registered parties should forfeit them because they were not required to disclose the amounts. He pointed out that if the parties in question were registered (which most would presumably wish to be, if they could meet the criteria), the nondisclosure problem would vanish. Moreover, the objective of preventing fraudulent tax credits could be more effectively achieved through intensive auditing and strict reporting requirements for parties — measures that would apply equally to all parties, without infringing Charter rights. So this objective, like the first two, failed both the rational-connection and minimal-impairment tests.

The final objective was doomed from the start: "ensuring that the electoral process results in a viable outcome for our form of responsible government." Iacobucci dismissed it out of hand: "Legislation enacted for the express purpose of decreasing the likelihood that a certain class of candidates will be elected is not only discordant with the principles integral to a free and democratic society, but, rather, is the antithesis of those principles."[90] Moreover, the Crown had not proven that single-party majorities are preferable to minority or coalition governments. The federal government had failed to prove that the law was "demonstrably justified in a free and democratic society."

How Much Difference Will the *Figueroa* Ruling Make?

The Remedy Imposed by the Court

The final step in the majority opinion was the imposition of a remedy. Having determined that the 50-candidate threshold and the consequent denial of particular benefits infringed the Charter and could not be saved, the Court could have struck it down immediately under section 52 of the *Constitution Act, 1982*. The unaffected sections of the *CEA*, including those dealing with broadcasting and the nonautomatic benefits, would have remained in force. In practice, however, severing the impugned sections from the rest of the party-registration scheme is easier said than done. Although he tried to limit the application of his ruling, Iacobucci acknowledged that the impact of striking down the 50-candidate threshold would go well beyond the benefits at issue in the *Figueroa* case: "[A]lthough the disposition of this case will have an impact on sections of the *Elections Act* that provide access to free broadcast time, the right to purchase reserved broadcast time, and the right to partial reimbursement of election expenses upon receiving a certain percentage of the vote, I express no opinion as to the constitutionality of legislation that restricts access to those benefits. It is possible that it would be necessary to consider factors that have not been addressed in this appeal in order to determine the constitutionality of restricting access to those benefits."[91]

In the event, the court chose to suspend the effect of the invalidation for 12 months to allow Parliament to bring the *CEA* into conformity with the ruling and to avoid a legislative vacuum. It gave Parliament very little guidance in amending the *CEA*.[92] First, Justice LeBel suggested that "a requirement of nominating at least *one* candidate, and perhaps more, in order to qualify for registration as a party would not raise any serious constitutional concerns."[93] Second, Justice Iacobucci told Parliament that it could compromise the principle of party equality if it could justify the means chosen to do so: "[T]his decision does not stand for the proposition that the differential treatment of political parties will always constitute a violation of s. 3. Nor does it stand for the proposition that an infringement of s. 3 arising from the differential treatment of political parties could never be justified."[94]

Bill C-51 (Now C-3)

The timing of the *Figueroa* ruling was awkward for the federal government. The judgment was handed down while Parliament was in its summer recess and the governing party was in the throes of a leadership contest. The House of Commons was recalled briefly in the fall of 2003, which gave then–Government House Leader Don Boudria the opportunity to table Bill C-51. When the House prorogued in November, C-51 had not yet progressed to second reading; like all pending legislation, it died on the order paper. When the new Martin government recalled Parliament in February 2004, it revived several of these bills, among them C-51.

Now named C-3,[95] and incorporating minor technical amendments, the Bill was briefly debated in the House on February 18. The new government House

leader, the Honourable Jacques Saada, moved that the Bill be referred to the Standing Committee on Procedure and House Affairs (SCPHA) before second reading. He informed the House that the government wanted the Bill to pass quickly, in anticipation of a spring election. Once the legislative vacuum left by *Figueroa* had been filled, the SCPHA would be given a mandate to consider the broader issues raised by the ruling and to draft a Bill that would become the permanent legislative response.[96]

The committee issued its report on March 12.[97] The only substantive amendment was the addition of a two-year sunset on the amendments to the *CEA* contained therein. The apparent purpose of the amendment is to signal the government's determination to replace Bill C-3 with permanent legislation as quickly as possible. The committee narrowly rejected an amendment proposed by NDP MP Lorne Nystrom that would have raised the candidate threshold in the Bill from one to twelve. Mr. Nystrom argued that the one-candidate rule was insufficient to prevent the abuse of public funds. He noted that a 12-candidate threshold would bring the legislation into line with the existing criteria for ballot labelling and official party status in the House of Commons without imposing undue burdens on smaller parties. Seven of the MPs on the committee voted against the amendment, perhaps swayed by the argument that the Supreme Court would not permit a threshold higher than one; the other six voted in favour, signalling the possibility that the new registration scheme would not survive parliamentary scrutiny.[98]

The contents of Bill C-3 reflect two objectives: to bring the party-registration regime in the *Canada Elections Act* into conformity with the Supreme Court ruling in *Figueroa*, and to provide new safeguards against abuse of the tax-credit provisions by groups falsely claiming to be political parties. The first objective is achieved by defining a political party as "an organization one of whose fundamental purposes is to participate in public affairs by endorsing *one or more of its members* as candidates and supporting their election" (section 1). There was no definition of a political party in previous versions of the *CEA*. The new definition is consistent with both rulings in *Figueroa*: Justice Iacobucci concluded that "the objectives advanced do not justify a threshold requirement of any sort," while Justice LeBel sensibly remarked that the nomination of at least one candidate should be regarded as a defining characteristic of a political party.[99] Any group that can demonstrate that it participates in public affairs by nominating at least one candidate in a general election or a by-election is entitled to inclusion on the register of parties.

The second objective is secured by new provisions designed to prevent fraudulent parties from claiming tax credits for donations. These provisions fall into two categories. The first category imposes new reporting duties and organizational criteria on registered parties. To achieve and maintain registered status, a party must have at least four officers, including the party leader (section 4). The leader is responsible for filing an annual statement with Elections Canada affirming that the party meets the new definition (section 15). The requisite number of party members — all of whom must appear on the register of electors — is increased from 100 to 250 (sections 3 and 10). Beginning in 2007, every registered party must submit a list of 250 electors to Elections Canada, accompanied by "their declarations in the prescribed form that they are members of the party," every three years (section 15). These new criteria for registration are added to the existing obligations to file annual financial reports, both for the party as a whole and for each constituency association. If Elections Canada has reason to suspect that a registered party is not a bona fide political organization and the party fails to allay this suspicion, then the commissioner of Canada Elections may seek a court order to deregister the party and liquidate its assets. In making its decision, the court must consider the party's constitution, platform, election expenses, and any relationship between the party and another entity that may benefit financially from fraudulent use of the tax credits (section 23).

The second category of provisions impose criminal penalties for reporting false information. A leader who falsely claims that his party's purpose is to participate in public affairs risks a maximum jail term of five years and/or a $5,000 fine, as does an elector who makes a false claim of party membership (sections 16 and 21-22). Anyone who solicits or accepts a contribution to a registered party with the intent to use the money for nonpolitical purposes — in effect, anyone who deliberately abuses the political tax-credit provisions — will face the same penalty if caught and convicted (sections 17 and 22). The full amount of any questionable donation must be remitted to the receiver general (section 22). The conviction of a party officer for an offense under the Act may result in the deregistration and liquidation of the party (section 22).

Together, the new legal obligations and the penalties for phony parties address the primary concern raised by the federal government in its response to Mr. Figueroa's appeal: to protect the integrity of the election laws, and,

in particular, to prevent the abuse of the political tax credit. The new definition of a political party, and the requirement that all parties demonstrate their conformity with that definition, replaces the 50-candidate threshold as a reasonable criterion for party registration. However, Bill C-3 is silent on at least two major questions, which may be addressed by the SCPHA in its later investigations. The first question concerns the automatic benefits currently provided to registered parties — specifically, whether all such benefits will continue to be provided to all registered parties under the new criteria. The second question is whether the vote thresholds for the two-tier benefits — both automatic and nonautomatic – are still constitutionally valid.

Unsolved Mysteries

As noted earlier, the extension of the full package of benefits to all registered parties was questioned in the initial debate over the registration scheme in 1970. Judge Molloy suggested that the automatic benefits be separated into two types, with different eligibility criteria for each. Bill C-3, with its emphasis on tax credits, suggests that this particular benefit will remain available to all registered parties. The other benefits addressed in the *Figueroa* ruling — the retention of candidate surpluses and the labelling of party candidates on the ballot — will also apply. The status of the other automatic benefits, particularly the right to a share of free and low-cost broadcast time, has yet to be determined. At present, the number of available minutes during each campaign period is capped at 360 in both categories. If the less onerous criteria for registration should produce a large number of new parties, will the amount of broadcast time be increased? Or will Parliament change the law to exclude the smallest parties from the allocation formula? *Figueroa* appears to rule out the latter approach. Justice Iacobucci's emphasis on the process of election campaigning, and his insistence that voters benefit when all parties have a chance to be heard, imply that the latter option would run afoul of the Charter. On the other hand, the Supreme Court — like the majority on the Alberta Court of Appeal in the Reform Party case — might treat broadcasting time as a public resource that may legitimately be denied to smaller parties because of its scarcity. Alternatively, the justices might wish to consider broadcasting issues separately because of their connection to the free-expression guarantee in section 2(b) of the Charter.

The allocation formula for broadcast time is a separate, though related, issue. Under the current *CEA*, each party's share is determined by its performance in the previous general election. This formula reinforces the competitive advantage already enjoyed by the larger and more well-established parties at the expense of their smaller and newer rivals. Although the allocation formula was narrowly upheld by the Alberta Court of Appeal in 1995, the similarities between the party-equality argument of the dissenting judges and Justice Iacobucci's ruling in *Figueroa* casts doubt on its constitutionality.[100]

The vote thresholds for the nonautomatic benefits of registered status may be more likely to survive a Charter challenge. At the rational-connection stage of the section-1 analysis, Justice Iacobucci ruled that the number of candidates fielded by a particular party was not an accurate indicator of the party's value in the electoral process. This finding implies that a more reliable indicator of political value, such as the percentage of valid votes won by each party, would pass constitutional muster. If the Supreme Court accepted the principle of a two-tier distinction among parties for the purpose of awarding public benefits — a possibility, given Iacobucci's statement that differential treatment may not always violate section 3 and that any violations might be justifiable under section 1 — then it should also uphold a valid criterion for that distinction. Whether the current vote thresholds would be considered acceptable is impossible to predict. But if the SCPHA were to recommend higher vote thresholds as a way to compensate for the less onerous registration scheme, then they might trigger a Charter remedy.

Conclusion

Since Mr. Figueroa went to court in 1993, his Charter challenge to the *CEA* has produced several significant changes to Canada's election law. First, he forced the federal government to delete the mandatory-liquidation rule and to refund the full amount of candidate deposits to all registered parties that complied with the reporting provisions. Subsequently, nonregistered parties with as few as 12 candidates were given the right to label those candidates on the ballot. If Bill C-3 takes effect before the impending federal election, as seems likely, then eligible parties with only one or two candidates will be added to the register of parties on the twenty-first day before the vote, entitling them to issue tax receipts, label their candidate(s) and retain any surplus candidate funds.

The practical impact of these developments will only become evident over the next several years. The number of new parties will depend on the willingness of Canadians to form new political organizations (or revive defunct ones) for the purpose of contesting election to the House of Commons; the success of those organizations in attracting the support of voters; and possible future amendments to the *CEA*. The new parties' chances of electoral success, and their influence on Canadian politics and government, will be conditioned by other institutional factors. Our current electoral system, single-member plurality (SMP), makes it difficult for smaller parties to win seats in Parliament unless they command a large proportion of the vote in particular constituencies. In the long term, the psychological effect of SMP discourages supporters of smaller parties, who must choose between voting strategically for the major party that they find least objectionable and dropping out of the active electorate altogether. SMP also manufactures artificial single-party majority governments, whose control over the executive and legislative branches of government excludes opposition MPs from a meaningful role in policy-making.

By the time Bill C-3 was tabled in Parliament, the institutional omens for smaller parties were unusually positive. Electoral reform, long a favourite topic of political scientists, had begun to attract attention from the news media and interest groups. Five provincial governments were seriously considering mixed-member plurality (MMP). The Liberal government in Quebec was committed to introducing an electoral-reform bill in the National Assembly in the spring of 2004 (see Dupuis 2003). At the same time, a citizens' assembly in British Columbia was charged with designing a new voting system, which would be put to the voters in a provincial referendum in May 2005.[101] Ontario Premier Dalton McGuinty promised a similar referendum before the next provincial election, and he established a democratic-renewal secretariat to explore options for reform. New Brunswick's Bernard Lord established a commission on legislative democracy, with a mandate to "examine and make recommendations on implementing a proportional representation electoral system" that would permit "a continued role for directly-elected MLAs representing specific geographic boundaries" — in other words, MMP.[102] In Prince Edward Island, a judicial commission recommended that the province adopt some form of mixed electoral system; that recommendation was being considered by the government of Premier Pat Binns at the time of writing.[103]

At the federal level, the Law Commission of Canada was preparing to issue a major report on electoral reform, which was expected to recommend a moderate form of MMP for elections to the House of Commons.[104] While this is not the first time the national government has been advised to adopt a new electoral system,[105] the move toward MMP in five provinces and the activism of Fair Vote Canada and other groups (Seidle 2002, part 2) may create irresistible pressures for reform. At the same time, newly minted prime minister Paul Martin appeared to be committed to parliamentary reform. He promised to give backbench MPs a larger role in policy-making by relaxing the confidence convention and referring more bills to committee before second reading (for example, Bill C-3).[106]

If any or all of these institutional reforms take effect, the impact of *Figueroa* will be enhanced. Instead of languishing in obscurity on the Opposition benches, MPs from smaller parties could find themselves in a strong bargaining position vis-à-vis a minority or coalition government. Their ideas may be reflected not only in campaign discourse and parliamentary debate but also in the substance of public policy. Canadians who are disaffected with the major parties and who now believe that their votes would be wasted on a candidate from a small party would have a chance to express their true preferences through the ballot box. MMP, on its own, would give political activists an incentive to establish and support new parties; combined with the new party-registration regime and a more powerful legislative branch, that incentive would be all the greater.

It is too soon to say whether a more diverse party system, with or without a more proportional electoral system, would cure the current democratic malaise in Canada. A wider range of political options might reverse the recent decline in voter turnout, at least to some extent (Massicotte 2001). A more representative and influential House of Commons could strengthen Canadian democracy by reinvigorating political debate and reducing the dominance of the governing party. Lowering the barriers to electoral participation may inspire more Canadians to involve themselves in party politics, especially if they decide that party membership can give them more influence on public policy than participation in an advocacy group (Howe and Northrup 2000, 33, table 20). Changing a political culture is a lengthy process with no guarantee of success. But in the current climate of institutional reform, there is reason to expect a more vigorous and engaged electorate, and a closer relationship between civil society and the state, to evolve over the coming years.

Notes

I gratefully acknowledge the excellent editorial suggestions of Paul Howe and the anonymous reviewers. Many thanks to Diane Davidson at Elections Canada for providing valuable information.

1 Supreme Court of Canada 2003, 37; *Canada Elections Act*, 48-49 Elizabeth II, chapter 9, Royal Assent May 31, 2000 (hereinafter *CEA* 2000).

2 Section 3 of the Charter reads: "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." Section 1 reads: "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 can be demonstrably justified in a free and democratic society."

3 On the June 27, 2003 broadcast of "The National," which devoted a few minutes to the case, the reporter focused almost exclusively on Mr. Figueroa and his lawyer. The June 28, 2003 edition of the *National Post* contained a story headlined, "Communists Win Right to Party" (p. A8). The story, written by Janice Tibbetts, was accompanied by a photograph of Mr. Figueroa.

4 There were six justices in the majority, led by Justice Iacobucci. The three justices from Quebec concurred in the result, but they adopted a communitarian interpretation of section 3 that was at odds with Iacobucci's individualistic analysis. There was no dissenting judgment.

5 Compare with the previous draft of section 3, reproduced on page 767 of Bayefsky (1989).

6 Interview with Roger Tassé, former deputy minister of justice and the principal drafter of the Charter, June 24, 2003.

7 *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 SCR 158; *Haig v. Canada, Haig v. Canada (Chief Electoral Officer)*, [1993] 2 SCR 995; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 SCR 876; *Sauvé v. Canada (Attorney General)*, [1993] 2 SCR 438; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] SCC 68 (hereinafter *Sauvé* 2002).

8 See, for example, *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SCR 877, paragraph 79, *per* Bastarache J; *Sauvé* 2002, paragraphs 4 and 44, *per* McLachlin CJ. Note that the dissenting minority in the latter case argued that the exemption of section 3 had no bearing whatsoever on the standard for justification under section 1; see paragraphs 95-96, *per* Gonthier J.

9 See, for example, Schauer (1994, 1336-37, 1339-40); Ely (1980, especially chapters 4-6).

10 See, for example, Hogg and Bushell (1997); Roach (2001); Morton (2001); Manfredi and Kelly (1999). The judicial embrace of the dialogue metaphor is evident in *Vriend v. Alberta*, [1998] 1 SCR 493, paragraphs 137-39, *per* Iacobucci J; and *R. v. Mills*, [1999] 3 SCR 668, paragraphs 57 and 125, *per* McLachlin and Iacobucci JJ.

11 See the debate over "dialogue and deference" between McLachlin CJC and Gonthier J in *Sauvé* 2002, paragraphs 8-9, 13-18, 68, 104-8.

12 *Sauvé* 2002, paragraph 9, *per* McLachlin CJC.

13 The leading case is *Buckley v. Valeo*, 424 US 1 (1976). See also, *inter alia*, *FEC v. National Conservative PAC*, 470 US 480 (1985); *Nixon v. Shrink Missouri Government PAC*, 528 US 377; *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 US 431. However, the United States Supreme Court has recently softened its libertarian position to a degree. See *McConnell, United States Senator, et al. v. Federal Election Commission et al.*, no. 02-1674; argued September 8, 2003, decided December 10, 2003.

14 *National Citizens' Coalition et al. v. Canada (Attorney General)*, Alberta Court of Queen's Bench, [1984] 11 DLR (4th), 481-96; *Somerville v. Canada (Attorney General)*, Alberta Court of Appeal, [1996] 136 DLR (4th), 205-43; *Pacific Press v. A.G. et al.*, [2000] BCSC 0248 (http://www.courts.gov.bc); *Harper v. Canada (Attorney General)*, Alberta Court of Queen's Bench, [2001] ABQB 558 (http://www.albertacourts.ab.ca), which was upheld by the Alberta Court of Appeal in December 2002 (*Harper v. Canada [Attorney General]*, [2002] ABCA 301).

15 *Libman v. Quebec (Attorney General)*, [1997] 3 SCR 569, head notes, *per curiam* (hereinafter *Libman* 1997).

16 *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713, paragraph 141.

17 The obvious exception to this statement is the Court's narrow interpretation of section 2(d), the freedom-of-association clause. Until recently, most of the justices refused to extend Charter protection to organized labour by recognizing either a right to strike or a right to bargain collectively. See, for example, *Reference re* Public Service Employee Relations Act *(Alta.)*, [1987] 1 SCR 313, *per* LeDain and McIntyre JJ; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989, *per* Bastarache J. However, the majority ruling in *Dunmore v. Ontario (Attorney General)*, [2001] SCC 94, appears to signal a move away from that earlier jurisprudence.

18 For examples of the party-equality model, see the dissenting judgment of Conrad JA in *Reform Party of Canada et al. v. Canada (Attorney General)*, Alberta Court of Appeal, March 10, 1995, 123 DLR (4th), 366-445 (hereinafter referred to as *Reform Party v. Canada)*; and the 1999 *Figueroa* ruling (discussed later in the paper).

19 *Reform Party v. Canada*, 368, *per* McFadyen JA (writing for the majority).

20 In the Harper and Pacific Press cases, the courts distinguished *Libman* on the ground that the social-science evidence on which the Supreme Court of Canada based its section-1 analysis had been discredited. This distinction allowed the courts to evade *stare decisis* and adopt the libertarian approach to third-party advertising in election campaigns.

21 The registered parties were the five in the House of Commons, plus the Canadian Action Party, the Communist Party of Canada, the Marijuana Party, the Marxist-Leninist Party, the Natural Law Party and the

Green Party of Canada. The eligible parties were the Christian Heritage Party (which lost its registration status in 2000), the National Alternative Party of Canada and the Ontario Party of Canada.

22 See *Hansard*, May 27, 1970, pp. 7395-413; May 28, 1970, pp. 7439-42; June 9, 1970, pp. 7925-26; June 16, 1970, pp. 8203-6; June 22, 1970, p. 8475; and June 23, 1970, pp. 8507-10.

23 Liberal MP James Jerome, reported in *Hansard*, May 28, 1970, p. 7442; Progressive Conservative MP Michael Forrestall, reported in *Hansard*, June 16, 1970, p. 8206.

24 James Jerome, reported in *Hansard*, May 28, 1970, p. 7441.

25 See the speech of the mover of the amendment, Liberal MP Grant Deachman: "We must compromise in order to arrive at the right figure. It is not really so much a matter of argument as a matter of taste." Reported in *Hansard*, June 23, 1970, p. 8507. See also the minister's response: "There is no magic in the figure [of 50]...I am prepared to accept as a suggestion" (p. 8509). The debate on the amendment concluded with this comment by PC MP Heath Macquarrie, who had earlier opposed raising the threshold from 27: "I hope that this will carry so that we can move on, because I have no desire to spend the first half of the month of July on this legislation" (p. 8510).

26 See, for example, the question from NDP MP Les Benjamin and the answer from Jerome (p. 7442).

27 Reported in *Hansard*, June 23, 1970, pp. 8507-8.

28 Hon. Donald S. Macdonald, President of the Privy Council, reported in *Hansard*, June 23, 1970, p. 8509.

29 A Charter challenge to this allocation scheme, which favours the larger and more established parties over smaller and newer rivals, was narrowly rejected by the Alberta Court of Appeals in 1995. See *Reform Party of Canada v. Canada*.

30 This claim is not without its critics. One study found that the tax credits were not a primary incentive for contributing to a party, although their availability tended to increase the size of donations. See Michaud and LaFerrière (1991, 385). However, given William Stanbury's finding that the 1973 law provided "all the main parties [that is, those with the power to issue tax receipts] with vastly larger sums to spend in the years between elections," and the fact that the tax credits in 1985-88 accounted for 29 percent of registered-party income, its impact on party funding appears to be substantial. See Stanbury (1991, 55) and Michaud and LaFerrière (1991, 372).

31 Third session, thirty-fourth Parliament, 40-41-42 Elizabeth II, 1991-92-93, Bill C-114, *An Act to Amend the* Canada Elections Act.

32 The Lortie Commission had recommended that the $200 cash deposits be replaced by $1,000 performance bonds that would be cancelled upon submission of the candidate's postelection financial report. The commissioners pointed out that a $200 penalty was insufficient to motivate compliance with the reporting requirements of the *CEA*, and that it did not begin to cover the cost of enforcing compliance. See Supply and Services Canada (1991, 89).

33 Reform MP Deborah Grey's remarks to the Senate Standing Committee on Legal and Constitutional Affairs reflect the sentiments of the smaller parties (which Reform was at that time): "I believe the reason there has been no opposition to this legislation is because the intent of the amendments is to promote and protect the three established parties currently sitting in the House of Commons, while reducing political competition by making it more difficult for new parties to emerge and challenge the status quo" (Senate 1991, 30).

34 *Figueroa v. Canada (Attorney General)*, Ontario Court (General Division), March 10, 1999, 170 DLR (4th), 647-731 (hereinafter *Figueroa* 1999).

35 Supply and Services Canada (1991, 87).

36 *Figueroa* 1999, p. 671.

37 Supply and Services Canada (1991, 228), quoted in *Figueroa* 1999, p. 680.

38 *Figueroa* 1999, pp. 686-90, 691, 724-25, 729.

39 *Figueroa* 1999, pp. 685, 683, 696.

40 *Figueroa* 1999, p. 699.

41 *Figueroa* 1999, p. 710.

42 *Figueroa v. Canada (Attorney General)*, Ontario Court of Appeal, August 16, 2000 (hereinafter *Figueroa* 2000); accessed at the court's Web site (http://www.ontariocourts.on.ca), April 10, 2002.

43 *Figueroa* 2000, paragraph 73.

44 *Figueroa* 2000, paragraph 76.

45 *Figueroa* 2000, paragraph 79 (emphasis added).

46 Question 3 asked whether the 50-candidate threshold infringed section 2(d), the guarantee of freedom of association. Question 5 concerned a possible violation of the equality rights in section 15(1). Questions 4 and 6 asked whether any violation of these two sections could be justified under section 1. The court ultimately ruled that the threshold violated section 3 and could not be saved, so there was no need to answer the remaining constitutional questions.

47 Supreme Court Bulletin of Proceedings, September 14, 2001, available on-line at www.scc-csc.gc.ca. (click on Ajudgments" and follow the links, then click on "bulletins").

48 Neither Judge Molloy nor Justice Doherty had devoted much attention to the assignment of candidate surpluses, largely because they both focused on the constitutionality of the threshold itself. Once the validity of the threshold had been determined, the resolution of the surplus question was automatic. In contrast, the Supreme Court analyzed the surplus provision as a discrete factor in determining the constitutionality of the entire party-registration scheme.

49 *Figueroa* 1999, p. 688.

50 Appellant's factum, *Figueroa v. Canada (Attorney General)*, dated February 21, 2002, paragraphs 80 and 85.

51 Respondent's factum, *Figueroa v. Canada (Attorney General)*, undated, paragraphs 63, 3-4, 64, and 56.

52 *R. v. Oakes*, [1986] 1 SCR 103, paragraphs 69-71, *per* Dickson CJC (as he then was).

53 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, paragraphs 126-52, *per* McLachlin J

(as she then was); *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 SCR 835, paragraphs 92-97, *per* Lamer CJC (as he then was).

54 Appellant's factum, paragraph 105.

55 Respondent's factum, paragraph 89 (emphasis in original).

56 Respondent's factum, paragraph 89 (emphasis in original).

57 Appellant's factum, paragraph 106.

58 In the 1985-88 period alone, the cost of individual and corporate tax credits amounted to more than $47 million. See Stanbury (1996, table 17.6).

59 Appellant's factum, paragraph 47.

60 *Figueroa* 1999, p. 690.

61 *Libman* 1997, paragraph 42 (emphasis added).

62 *Sauvé* 2002, paragraphs 22 and 23 (citations omitted).

63 Respondent's factum, paragraph 91.

64 Appellant's factum, paragraph 107.

65 This claim is not entirely accurate. As noted earlier in the paper, the threshold was adopted in the expectation that public subsidies would follow shortly, and with the understanding that a high threshold was necessary to ensure that only national parties would benefit therefrom.

66 Appellant's factum, paragraph 107.

67 Respondent's factum, paragraph 94. Levine hinted at another aspect of the minimal-impairment analysis at the beginning of her factum, where she erroneously suggested that the threshold "imposes no costs" on parties seeking registration. This claim overlooks the fact that each candidate must pay a deposit of $1,000, which adds up to an initial cost of $50,000 per party.

68 Respondent's factum, paragraph 98 (emphasis in original).

69 *Hunter v. Southam Inc*., [1984] 2 SCR 145, p. 157, *per* Dickson J (as he then was).

70 *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326, paragraphs 51-52, *per* Wilson J.

71 *Haig v. Canada*, paragraph 61 (emphasis added by Iacobucci J when he reproduced this passage in *Figueroa*).

72 *Figueroa* 2003, paragraph 26.

73 *Figueroa* 2003, paragraph 28.

74 *Figueroa* 2003, paragraph 29. Iacobucci's reference to "the average citizen" highlights an important aspect of his approach to section 3 in *Figueroa*: its emphasis on democratic rights as *individual* rights. The three concurring justices, led by LeBel J, differed on this point. They argued that section 3 "is also inherently concerned with the representation of communities, both the various communities that make up Canadian society and the broader community of all Canadians" (paragraph 101). Moreover, the right to participate in the electoral process is more complex than Iacobucci's judgment acknowledges. The historical context suggests that section 3 is also intended to promote "cohesiveness and the aggregation of political will." Because the 50-candidate threshold "tends to benefit parties with a broad appeal," that is, those with the will and the means to aggregate political preferences, it serves an important purpose and should not be struck down as a violation of purely individual rights (paragraph 98).

75 *Figueroa* 2003, paragraph 38.

76 *Figueroa* 2003, paragraphs 39-41.

77 *Figueroa* 2003, paragraph 42.

78 *Figueroa* 2003, paragraph 45.

79 *Figueroa* 2003, paragraphs 52-54.

80 On this question — whether the threshold violated section 3 — the three concurring justices took different roads to the same conclusion. LeBel argued that the section protected several competing values, which had to be weighed against each other before a violation could be established. In other words, an infringement of the individual right to meaningful participation in the electoral process might be justified by competing collective democratic rights, all of which were protected by section 3. LeBel proposed an internal balancing test, analogous to those already established by the court in relation to other Charter sections. Before a plaintiff could prove a violation of his or her democratic rights, the court would have to be satisfied that the impugned law does not "enhance any of the competing values which contribute to meaningful participation and effective representation." These include "the aggregation of political preferences" and "the promotion of cohesion over fragmentation," both of which, in LeBel's view, were promoted by the party-registration system of which the 50-candidate threshold was a part. Regional representation was equally important, especially in light of Canada's political history and development. But despite the existence of these countervailing values in section 3, LeBel concluded that "the requirement of nominating 50 or more candidates to gain access to the benefits at issue in this appeal compromises the competitive position of some candidates, and their supporters' freedom of choice, to such an extent that it denies those individuals the opportunity for meaningful participation." The threshold was not a sufficiently accurate measure of a party's popular support, and it violated the principle of regional representation by prohibiting the formation of regional parties in provinces other than Ontario and Quebec (the only provinces with more than 50 seats). Thus the finding that the 50-candidate threshold violated section 3 of the Charter was unanimous, even though the reasons differed.

81 *Figueroa* 2003, paragraph 178.

82 *Figueroa* 2003, paragraph 64.

83 *Figueroa* 2003, paragraphs 67-68.

84 *Figueroa* 2003, paragraph 69. In fact, Bill C-24 did the opposite: instead of scaling back the political tax credits, the federal government enriched them.

85 *Figueroa* 2003, paragraph 70.

86 *Figueroa* 2003, paragraph 74.

87 *Figueroa* 2003, paragraph 75.

88 *Figueroa* 2003, paragraph 76.

89 *Figueroa* 2003, paragraph 76.

90 *Figueroa* 2003, paragraph 80.

91 *Figueroa* 2003, paragraph 91.

92 Iacobucci noted that one of the benefits at issue in *Figueroa* — the identification of party candidates on

the ballot — had already been extended to parties with as few as 12 candidates (see the earlier discussion of Bill C-9). He made it clear that unless the federal government advanced more compelling objectives than those that had been offered to justify the 50-candidate threshold, the 12-candidate threshold would meet the same fate (*Figueroa* 2003, paragraph 92).

93 *Figueroa* 2003, paragraph 149 (emphasis in original).

94 *Figueroa* 2003, paragraph 91.

95 Third session, thirty-seventh Parliament, 2-53 Elizabeth II, 2004, Bill C-3, *An Act to Amend the* Canada Elections Act *and the* Income Tax Act.

96 *House of Commons Debates*, February 18, 2004.

97 House of Commons, third session, thirty-seventh Parliament, "Tenth Report of the Standing Committee on Procedure and House Affairs," March 12, 2004.

98 House of Commons, third session, thirty-seventh Parliament, "Minutes of Proceedings and Evidence of the Standing Committee on Procedure and House Affairs," March 11, 2004.

99 *Figueroa* 2003, paragraphs 92 and 149.

100 *Reform Party of Canada v. Canada*, *per* Conrad JA.

101 Information on the citizens' assembly is available at www.citizensassembly.bc.ca/public

102 The commission's mandate is posted at www.gnb.ca/0100/mandate-e.asp

103 For background information and a link to the report by Justice Carruthers, see Prince Edward Island (n.d.)

104 Documents relating to the Law Commission's study of electoral reform are available at www.lcc.gc.ca

105 In 1979, the Task Force on Canadian Unity had called on the federal government to adopt an electoral system that would reduce the regional polarization among the parties in the House of Commons. This recommendation does not appear to have received serious consideration.

106 Details of the Democratic Reform agenda issued in early 2004 are available at www.pm.gc.ca/eng/dem_reform.asp

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Résumé

Le jugement *Figueroa* rendu en juin 2003 par la Cour suprême du Canada a éliminé le seuil des 50 candidatures que devait présenter un parti avant de pouvoir s'enregistrer en vertu de la *Loi électorale du Canada*. Le gouvernement fédéral a réagi en modifiant la loi pour permettre aux partis présentant un seul candidat de se prévaloir des avantage de cet enregistrement, y compris des reçus fiscaux et l'inscription du nom du parti sur les bulletins de vote. Cette étude examine les enjeux de ce jugement, ses répercussions sur la loi électorale et ses possibles conséquences sur la vie politique et gouvernementale.

L'auteure s'y intéresse d'abord à l'application de la Charte des droits et libertés à la loi électorale, en ce qui concerne notamment la légitimité d'une révision judiciaire du processus démocratique et les valeurs qui devraient éclairer une telle démarche. Elle soutient qu'on ne peut pas nécessairement faire confiance aux législateurs élus pour rédiger des lois électorales équitables puisque l'intérêt du parti au pouvoir (et des autres partis représentés au Parlement) est indissociable des règles du jeu politique. Elle examine également le poids relatif qu'on devrait accorder aux notions d'égalité et de liberté en contexte électoral, et plus précisément en lien avec les partis politiques. Elle passe finalement brièvement en revue la controverse régnant parmi les juges canadiens à propos de la constitutionnalité des lois préjudiciables aux nouveaux et petits partis, controverse à laquelle le jugement *Figueroa* a justement mis fin.

La section suivante décrit les modalités d'enregistrement des partis prévues à la *Loi électorale du Canada* et en retrace l'évolution de 1970 à 2003, pour confirmer que le seuil des 50 candidatures privait les petits et nouveaux partis des avantages de l'enregistrement. En 1993, on a même modifié la loi pour exiger des partis qui n'atteignaient pas ce seuil qu'ils liquident leurs actifs et se retirent définitivement de l'échiquier politique. Quand cette nouvelle disposition a été appliquée au Parti communiste du Canada par suite de l'élection de 1993, le chef de ce parti, Miguel Figueroa, a contesté en bloc la constitutionnalité du mode d'enregistrement. Sa cause a fait l'objet de trois jugements : M. Figueroa a remporté un premier succès à l'étape du procès, il a été partiellement débouté par la Cour d'appel de l'Ontario, puis a finalement obtenu gain de cause devant la Cour suprême. L'auteure résume ces trois jugements ainsi que les arguments juridiques soumis à la Cour suprême en ce qui touche notamment l'article 3 (le droit de voter et de briguer un poste électif) et l'article 1 (la clause de prescription) de la Charte. Elle analyse également le jugement majoritaire de la Cour et les raisons de la victoire de M. Figueroa.

La dernière partie du document évalue les répercussions potentielles du jugement, examine le contenu de la réponse législative du gouvernement, en l'occurrence l'avant-projet de loi C-3, et relève certaines questions clés omises dans cet avant-projet. En conclusion, l'auteure anticipe les effets positifs du jugement sur la vie politique et suggère de les renforcer par d'autres changements juridiques et institutionnels, en engageant par exemple une réforme électorale et en réservant aux députés un plus grand rôle politique.

Summary

The June 2003 *Figueroa* ruling from the Supreme Court of Canada struck down the 50-candidate threshold for party registration under the *Canada Elections Act*. In response, the federal government is amending the Act to permit parties with a single candidate to claim the benefits of registered status, including tax credits and ballot labels. This paper examines the issues at stake in the case, the case's impact on Canada's national election law, and its potential impact on our politics and government.

The paper begins with a general discussion of the Charter's application to election law, focusing on the legitimacy of judicial review in matters of democratic process and the values that should inform this review. It argues that elected legislators cannot always be trusted to write fair election laws, because the self-interest of the governing party (and the other parties represented in Parliament) is bound up with the rules of the political game. Next, the paper considers the relative weight that should be accorded to equality and freedom in the electoral context, and specifically in relation to political parties. The paper briefly discusses the controversy among Canadian judges over the constitutionality of laws that discriminate against smaller and newer parties, a controversy that was finally resolved in the *Figueroa* ruling.

The next section of the paper describes the party registration scheme in the *Canada Elections Act* and traces its development from 1970 to 2003. The 50-candidate threshold for registration effectively denied the benefits of registered status to smaller and newer parties. In 1993, the Act was amended to require parties that failed to meet the threshold to liquidate their assets and put themselves permanently out of business. When this law was applied to the Communist Party of Canada after the 1993 election, party leader Miguel Figueroa challenged the constitutionality of the entire registration scheme. The paper describes the three rulings in the case: Mr. Figueroa's victory at the trial stage, his partial defeat in the Ontario Court of Appeal, and his ultimate success in the Supreme Court. It summarizes the legal arguments before the Supreme Court, focusing on section 3 (the right to vote and run for office) and section 1 (the limitation clause) of the Charter. It then considers the court's majority ruling and the reasons Mr. Figueroa won his case.

The final section of the paper assesses the possible impact of the ruling. It sets out the content of the government's legislative response, Bill C-3, and it identifies some key issues that are not included in the Bill. The paper concludes by speculating about the positive effects of the ruling on Canadian politics and by suggesting that those effects could be magnified by other legal and institutional changes (such as electoral reform and a larger policy role for MPs).