

How the Charter Right to Meaningful Participation in the Electoral Process
Impacts on the Voting System

Abstract

The Canadian Charter of Rights and Freedoms, as interpreted by the Supreme Court of Canada, stipulates that the purpose of section three of the Charter is protect the right of each citizen to play a meaningful role in the electoral process. Any changes to the current voting system will be required by law to conform to that purpose. Upon analysis, neither the present voting system nor the new proposed model respect the above-mentioned right. Both systems interfere with the capacity of each citizen to introduce ideas and opinions into the open debate the electoral process engenders and the capacity of individual citizens to exercise their right to vote in a manner that accurately reflects their preference. In the absence of any sufficiently pressing and substantial objective that would warrant interfering with the right of each citizen to play a meaningful role in the electoral process, the proposed model of mixed member proportionality should be modified.

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In considering making changes to the voting system in Quebec, any changes are required by law to conform to Canadian Charter of Rights and Freedoms. In fact, section three clearly stipulates the each citizen has the right to vote and the right to become a candidate for public office. Over the years, the Supreme Court has taken a liberal and purposive manner in expanding the definition of the right to vote so that it means more than simply the right to place a ballot in a box. It is the subject of this brief to examine how this definition of the right to vote, as it has been defined by the Supreme Court, could impact on the new electoral system that is presently under review.

In the landmark Saskatchewan Electoral Boundaries Reference, the Court decided that the right to vote cannot be equated with the equality of voting power per se, but that the purpose of the right to vote enshrined in section three is the right to effective representation. Although relative parity is a prime condition of effective representation, factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. Moreover, the principles integral to a free and democratic society are to guide the Court in deciding whether or not deviations from absolute parity can be justified as contributing to the better government of the people as a whole.

More recently, the Figueroa decision expanded the definition of effective representation to move beyond the right to have a voice in the legislature and the right to bring one's concerns to the attention of an elected representative. In Figueroa, the Court stated that Section three should be understood with a reference of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government. According to the Court, each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives.

Importantly, the Court's interpretation of the values and principles integral to a free and democratic society led to the articulation of two important obligations that governments are subject to when implementing their choice of electoral process. The first, arising out of a sense of electoral fairness, is the obligation not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen's right to meaningful participation. The second obliges the government to set up an electoral system providing for democratic government in accordance with voters' choices.

Since our voting system predates the Charter, the Court also stipulated that the Charter is entirely neutral as to the type of electoral system in which the right to vote or run for office is exercised. More precisely, the purpose of Section three is not to protect the values or objectives that might be embedded in our current electoral system, but, rather, to protect the right of each citizen to play a meaningful role in the electoral process. Furthermore, inequities in the electoral

system are not acceptable merely because they have historical precedent and institutions are not constitutional because they already exist.

Moving to the particulars of the Figueroa case, what was at issue was the Federal government's legislation that extended certain benefits to certain political parties and to deny the same benefits to others based on the criteria of whether or not a political party fielded fifty candidates during a general election. Those benefits included the capacity to have a candidate's party affiliation indicated on the ballot, the capacity to issue tax receipts for donations, and the ability to keep unspent monies raised during the general election afterwards. The essential question that was to be determined is whether withholding these benefits from candidates of parties that have not met the fifty-candidate threshold undermined the right of the supporters and members of these parties to meaningful participation in the electoral process.

In a majority decision, the Court decided that the fifty-candidate threshold undermined both the capacity of individual citizens to influence policy by introducing ideas and opinions into the public discourse and debate through participation in the electoral process, and the capacity of individual citizens to exercise their right to vote in a manner that accurately reflects their preference. In each instance, the threshold requirement was judged to be inconsistent with the purpose of Section three of the Charter. In short, legislation that reduces the number of votes that a candidate nominated by a particular party might receive interferes with the capacity of the members and supporters of that party to participate in the public discourse through participation in the selection of elected representatives.

In regard to the values and principles integral to a free and democratic society, the Court decided, in no uncertain terms, that 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 these principles.

As well, the Court held that participation in the electoral process has an intrinsic value independent of its impact on the outcome of elections. Although the electoral process is the means by which elected representatives are selected and governments formed, it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. As a result, the right of each citizen to play a meaningful role in the electoral process is not to be balanced against countervailing values, such as the collective interest in the aggregation of political preferences in the formation of majority governments.

Indeed, the ability of a political party to make a valuable contribution to the electoral process is not dependent upon its capacity to offer the electorate a genuine "government option". All political parties, whether large or small, are capable of acting as a vehicle for the participation of individual citizens and it is better that an individual citizen have his or her ideas and concerns introduced into the open debate of the electoral process by a political party with a limited geographical base of support than not to have his or her ideas and concerns introduced into that debate by any political party.

For Parliament to interfere with the right of each citizen to play a meaningful role in the electoral process, it must be able to point to a pressing and substantial objective that it wishes to advance. However, no evidence was advanced that minority governments are less democratic than majority governments or that they provided less effective governance than majority governments. Consequently, the Court decided that in the absence of compelling reason to assert that a particular outcome (the formation of a majority government) will result in better governance, there was no basis on which to conclude that legislation that seeks to obtain that outcome advances an objective that is sufficiently pressing and substantial to warrant interfering with the right of each citizen to play a meaningful role in the electoral process.

The same observation can easily be made of our first-past-the-post voting system, which has been recently been brought to the Quebec Superior Court to have its constitutionality verified. The strict plurality requirement for the aggregation of political preferences to be found in this voting method does not have an objective that is sufficiently pressing and substantial to warrant the violation of a Charter right. Moreover, the plurality requirement, without which no effective representation is possible, is discordant with the integral principles of a free and democratic society.

Essentially, the first-past-the-post method only aggregates the political preferences that establish a plurality within an electoral district. All other votes, whether they are cast for other candidates or are over and above what is necessary to establish the plurality are not aggregated. As a result, significant distortions of the popular vote are engendered: false majorities are created, geographically dispersed communities are chronically under-represented, smaller parties are denied representation, and occasionally a party that has not amassed the greatest number of votes goes onto form a majority government. Clearly, these are deleterious effects of which overriding salutary benefits have yet to be identified. Worse yet, the application of this method interferes with each citizen's capacity to play a meaningful role in the electoral process.

Indeed, the scale of the interference brought about by the failure of the voting system to aggregate all political preferences in regard to the capacity of each citizen to play a meaningful role in the electoral process is much larger than what is engendered by the fifty-candidate threshold. Moreover, since the voting method unquestionably favors the capacity of the supporters and members of large, geographically dispersed political parties over the capacity of the supporters and members of smaller more regionally based political parties, it contravenes the equal opportunity principle integral to the values of a free and democratic society.

For example, the right to meaningful participation includes the right to each citizen to vote in a manner that accurately reflects his or her preferences. Considering the presence of strong institutional incentives for citizens to engage in strategic voting within a first-past-the-post electoral system, it cannot be said that this method respects this right. On the contrary, this voting method is specifically designed to aggregate, in a disproportional fashion, the political

preferences of those voters who support political parties that offer the electorate a government option.

In short, given the option of voting one's sincere preference and risking not having one's political preference aggregated or voting strategically by supporting a candidate who has a chance of winning a plurality or by taking action against a disfavored candidate by voting for his or her leading rival, many voters opt for the strategic choice, a fact not lost on our politicians who frequently promote strategic voting choices within their electoral platform. Inevitably, the institutionalization of strategic voting reduces the number of votes candidates nominated by smaller political parties might receive, and, as the Court stated in *Figueroa*, this type of legislation interferes with the capacity of the members and supporters of such parties to participate in the public discourse through participation in the selection of elected representatives.

Compounding the problem is that in Quebec each political party, which garnered more than two percent of the popular vote, receives a financial subsidy based on the total number of votes cast for the party within the province. In other words, all of the votes from across the province are aggregated to determine the level of funding to be received from the state, but no such method is employed to determine the level of representation. Consequently, the institutionalization of strategic voting, which is brought about by the failure of the voting method to aggregate all political preferences, gives additional capacity to groups supporting political parties that offer a government option at the expense of those groups that do not. Without question, such legislative practice is inconsistent with Section three of the Charter which imposes on governments an obligation not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen's parallel right to meaningful participation.

Finally, given that the practice of aggregating all political preferences already exists in regard to financing, how could the Quebec government point to a pressing and substantial objective that would justify the failure to aggregate all political preferences in regard to representation? Clearly, the principle of electoral fairness is a fundamental value of a free and democratic society and to embrace electoral fairness in one electoral practice but not to apply the principle in another, especially one that is at the core of democratic rule, is inconsistent with the values of a free and democratic society.

Moving to the new model that the government has proposed to replace our current voting method, the most salient feature is that it abandons the strict plurality requirement for the aggregation of political preferences. In this mixed model, all voting preferences are aggregated within an electoral district and representation is determined by adjusting the results of the popular vote cast in the single member ridings by adding compensatory seats that correct for the distortions brought about by the first-past-the-post method.

At first glance, this method would reduce the level of interference that the present voting system presents in regard to the right of each citizen to play a meaningful role in the electoral process. However, although the level of

interference is reduced, it still exists and, as a result, would be inconsistent with the purpose of Section three of the Charter.

The most significant problem is the size of the electoral districts in which the aggregation takes place does not allow for a sufficient number of compensatory seats that would give representation to a significant expression of political preferences. Although the strict plurality requirement does not apply to the distribution of the compensatory seats, the limited size of the electoral districts establishes an unacceptably high threshold that must be attained in order for the benefit of representation to be granted. With electoral districts that make available only five seats, the threshold is approximately fifteen percent. Consequently, a political party that obtained less than fifteen percent would not receive any representation in the district and, if it were unfortunate enough to have a similar distribution of votes across the province, it would be denied representation altogether in the National Assembly.

From the perspective of the right of each citizen to play a meaningful role in the electoral process, the partial aggregation of votes still decreases the capacity of members and supporters of the disadvantaged parties to introduce ideas and opinions into the open dialogue and debate that the electoral process engenders. As a result, the new model would also be inconsistent with Section three of the Charter.

Furthermore, the problem of strategic voting has not been sufficiently addressed in order to allow for each citizen to vote his or her sincere preferences. The problem is twofold. First, the size of the electoral districts only reduces the level of support required for representation from the percentage of the vote needed to establish a plurality (35% to 50%) in a single member riding to approximately 15% for the entire electoral district. Supporters of smaller parties would still face the sincere preference/strategic vote dilemma. Second, since there is only a single vote on the ballot for a candidate running in a riding where the first-past-the-post method is in play, the aggregation is performed through the filter of the strict plurality requirement. In other words, the institutional constraints to be found in our present voting system would still be in force, although to a lesser degree, to reduce the number of votes for the smaller parties. Again, the new method would be inconsistent with Section three of the Charter.

Fortunately, the new model can be easily be modified so that it would conform to the requirements and obligations set out by the Charter. To avoid the problem of discriminatory practice in regard to the aggregation of political preferences, a province-wide aggregation would give representation to parties with as little as two percent of the popular vote and would align the practice of awarding representation with the practice of providing financial aid to political parties. As far as the obligation of respecting the right of each citizen to vote his or her preference, this can easily be done by conforming to the norm of mixed member proportional systems and having two votes on the ballot: one for the candidate in a single member riding and one for party preference, that way the right to meaningful participation is still respected while giving significant geographic representation to the population.

In conclusion, if this commission decides not to recommend modifications to the proposed model that would bring into conformity with purpose of Section three of the Charter, it would do well to identify precisely what is the pressing and substantial objective that is being advanced that would justify an infringement of the right of each citizen to participate meaningfully in the electoral process. At the very least, the members of this commission should communicate openly and honestly to the public what are the values of our society that would allow for a deviation from the equitable distribution of the right to vote.