Figueroa v. Canada (2003) – The Right to Vote and Registered Party Status

Prior to the Supreme Court of Canada's 2003 decision in *Figueroa v. Canada*,[1] the *Canada Elections Act* required a registered federal political party to nominate candidates in at least fifty electoral districts. A party that nominated fewer than fifty candidates for a federal election would be de-registered. In losing its registration, it would lose various benefits, including reimbursement of some of its campaign expenses. The Court was split 6-3 in its reasoning, but it was unanimous in finding that the 50-candidate threshold is contrary to the full meaning of the right to vote, as protected by section 3 of the *Canadian Charter of Rights and Freedoms*.

Effective Representation

All *Charter* rights, including the right to vote, are given a broad and purposive interpretation by the courts. Section 3 protects more than "the bare right to place a ballot in a box."[2] Rather, the purpose of the right to vote is "effective representation."[3] In an earlier decision[4] the Supreme Court determined that effective representation means more than an effective representative in Parliament or a legislative assembly.[5] The Court said effective representation includes the right of every citizen "to play a meaningful role in the selection of elected representatives."[6] It is not just the composition of Parliament after an election that establishes effective representation. Effective representation also encompasses meaningful participation in the electoral process. Each vote – even for the most unpopular parties and candidates – contributes to "the free flow of diverse opinions and ideas."[7] Because casting a vote in an election gives voice to perspectives that may not be represented in Parliament, it "has intrinsic value independent of its impact upon the actual outcome of elections."[8]

50-Candidate Threshold Impedes Meaningful Participation in the Electoral Process

Justice Iacobucci, writing for the majority, disagreed with the Ontario Court of Appeal's view that a political party only achieves its "essential function" when it shows potential to participate in "governance" after an election.[9] Rather, "participation as a voter is not only about the selection of elected representatives."[10] Smaller political parties play an essential role in the democratic process. They contribute to the discourse that determines social policy.[11] They draw attention to issues and concerns overlooked by larger parties.[12] For these reasons, parties with fewer than fifty candidates contribute to the effective representation of Canadian voters. Thus, if the 50-candidate threshold harms smaller political parties, it will be contrary to a broad and purposive reading of section 3 of the *Charter*. The threshold has two distinct effects. First, there is an economic burden. Parties with fewer than fifty candidates do not have the right to issue tax receipts to donors,

nor may they retain funds that go unspent during an election campaign.[13] The effect is that smaller parties will be at a disadvantage when it comes to buying advertising space and communicating their policies to the general public.[14]As information about smaller parties is reduced, the right to meaningful participation in the electoral process is diminished. The second effect of the 50-candidate threshold is that party affiliation is not printed on the ballot papers next to the candidate's name.[15] Because many voters base their voting choices on the policies of parties, rather than individual candidates, the absence of party affiliation on the ballot paper interferes with "the right of each citizen to exercise his or her right to vote in a manner that accurately reflects his or her actual preferences."[16]

50-Candidate Threshold Not a Justifiable Limit on the Right to Vote

All *Charter* rights, including the right to vote, are subject to justifiable limits under section 1 of the*Charter*. The government identified three objectives for limiting the right to vote. Justice Iacobucci saw two of these objectives as pressing and substantial, but all three failed the *Oakes* test, the established test for reasonable limits on *Charter* rights. The first objective identified by the government was "the improvement of the electoral process through the public financing of political parties."[17] The government said it is important to provide a subsidy to encourage a broad base of donations to political parties, but that the public funds must be carefully managed.[18] Justice Iacobucci saw "no connection whatsoever" between the objective of improving the electoral process and the 50-candidate rule.[19] The second part of the objective – to promote fiscal responsibility – is not sufficiently pressing and substantial in this instance to allow for a limitation on a *Charter* right.[20] The second objective was to protect the integrity of the electoral financing regime.[21] That is, the candidate limit prevents abuse of the electoral financing regime by parties that do not have a genuine interest in participating in the electoral process.[22] Justice Iacobucci found no rational connection between the 50-candidate threshold and this pressing and substantial objective.[23] For reasons already discussed in the definition of "meaningful participation," Justice Iacobucci said "there is no merit whatsoever to the claim that the failure to satisfy the 50-candidate threshold is evidence that a party has no genuine interest in the electoral process."[24] The final objective submitted by the government was to ensure that the electoral process is able to deliver a viable outcome for our form of responsible government.[25] The suggestion here is that Canadian democracy functions best with a majority government, so an electoral system that promotes a few larger national parties over many smaller regional or interest based parties is an important objective.[26] Justice Iacobucci found this objective problematic.[27] While Canada has a long history of majority governments, he saw nothing inherently undemocratic or undesirable about minority governments or coalition governments. In fact, such governments may have benefits.[28] Justice Iacobucci concluded by holding out the possibility that some form of legislated differential treatments of political parties could be a reasonable limit on the right to vote, but the 50-candidate threshold is not one of them.[29] Thus the relevant sections in the *Elections Act* were declared unconstitutional.[30]

Justice LeBel's Concurring Judgment

Justice LeBel was joined by Justices Gonthier and Deschamps in a detailed set of concurring reasons. They agreed with most of Justice Iacobucci's analysis. However, they expressed "reservations about the methodology" used by Justice Iacobucci to identify an infringement on the right to vote.[31] Justice LeBel was concerned that the majority decision could establish in effect that *any* restriction on " the capacity of a citizen to participate in the electoral process" is a violation of the right to vote.[32] In his opinion, legislation aimed at enhancing "meaningful participation" could possibly "compromise individual participation to a certain extent" without infringing the right to vote.[33] Ultimately, LeBel did not find this to be the case with the 50-candidate threshold rule, but he undertook a thorough analysis of the definition of "meaningful participation." Justice LeBel stressed that there are many different competing values inherent in the section 3 right to vote. Reconciling these values is no easy task.[34] For instance, "favourable treatment of more broadly based parties does further an aspect of effective representation that can be validly weighed in the balance against the value of individual participation."[35] The Canadian political system has – for valid reasons – tended to favour"centrist, accommodative parties that are particularly well suited to representing a regionally, linguistically and culturally diverse country."[36] Thus, there is a "laudable objective" behind the 50-candidate threshold.[37] However, while the legislation may be aimed at a legitimate purpose, it interferes with other valuable objectives. It is particularly unfair to provinces other than Ontario and Quebec, which would never be able to put forward a distinctly regional party.[38] So, in the final balancing of effects, Justice LeBel found that the 50-candidate threshold conflicts with the values of the section 3 right to vote. Jim Young (June 25, 2010)

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[1] 2003 SCC 37. [2] *Ibid.* at para. 19. [3] *Ibid.* at para. 21. [4]*Reference re Prov. Electoral Boundaries (Sask.),* [1991] 2 S.C.R. 158. [5] *Supra* note 1 at para. 25. [6] *Ibid.* at para. 25, quoting *Haig v. Canada* [1993] 2 S.C.R. 995 at 1031. [7] *Ibid.* at para. 28. [8] *Ibid.* at para. 29. [9] *Ibid.* at para. 39. [10] *Ibid.* at para. 44. [11] *Ibid.* at para. 41. [12] *Ibid.* at para. 42. [13] *Ibid.* at para. 48. [14] *Ibid.* at para. 52. [15] *Ibid.* at para. 55. [16] *Ibid.* at para. 57. [17] *Ibid.* at para. 62. [18] *Ibid.* at para. 63. [19] *Ibid.* at para. 64. [20] *Ibid.* at para. 65. [21] *Ibid.* at para. 71. [22] *Ibid.* [23] *Ibid.* at para. 73. [24] *Ibid.* at para. 75. [25] *Ibid.* at para. 79. [26] *Ibid.* [27] *Ibid.* at para. 80. [28] *Ibid.* at paras. 81-82. [29] *Ibid.* at para. 91. [30] *Ibid.* at para. 93. [31] *Ibid.* at para. 95. [32] *Ibid.* at para. 96. [33] *Ibid.* at para. 99. [34] *Ibid.* at para. 132. [35] *Ibid.* at para. 136. [36] *Ibid.* at para. 156. [37] *Ibid.* at para. 172. [38] *Ibid.* at para. 176.