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ELECTORAL RIGHTS: CHARTER OF RIGHTS AND FREEDOMS

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ELECTORAL RIGHTS: CHARTER OF RIGHTS AND FREEDOMS*

ISSUE DEFINITION

Sections 3 to 5 of the *Canadian Charter of Rights and Freedoms* guarantee basic democratic rights:

- the right to vote;
- the right to stand for office;
- the regular sitting of federal and provincial legislative bodies; and
- the requirement that elections be held every five years except in times of war or insurrection.

On the whole, the democratic rights of Canadians were considered to be relatively well protected before the Charter, and these sections have not generated the volume of cases or the attention associated with the Charter provisions on fundamental freedoms, legal rights or equality rights. Nonetheless, the decisions handed down affect the basic way in which we govern ourselves, and our conception of what a democracy should be. Moreover, unlike most of the rights conferred by the Charter, democratic rights cannot be overridden by the use of section 33, the "notwithstanding clause." More recently, section 2(b) of the Charter – freedom of expression – has been successfully used to adjudicate other electoral issues such as political activity by public service workers and access to broadcasting.

A number of electoral issues have been the subject of Charter challenges resulting in judicial decisions and legislative changes. This paper will review and summarize the main cases and issues. The paper also discusses recent legislative reforms.**

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* The original version of this Current Issue Review was published in September 1990; the paper has been regularly updated since that time.

** For general background, see James Robertson, *The Canadian Electoral System*, Background Paper BP-437, Parliamentary Research Branch, Library of Parliament, March 1997.

BACKGROUND AND ANALYSIS

A. Background

Section 3 of the *Canadian Charter of Rights and Freedoms* deals with the democratic rights of citizens:

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

Section 3 raised relatively little excitement during the debate on the *Constitution Act, 1982*. Perhaps this was because democratic rights were so accepted that the Charter appeared to be merely declaratory of existing law. Compared to such wide-ranging concepts as "fundamental freedoms," "mobility rights," "legal rights" and "equality rights," the right to vote or to be qualified for membership in a legislative body seemed established and commonplace.

Both the right to vote and the right to be qualified for membership in a legislative assembly arise from the ancient powers of Parliament as a high court with broad jurisdiction over electoral proceedings. From the start, however, there seems to have been a distinction between the right to elect and the right to be elected. According to the 1863 edition of Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*:

> On the other hand, it was objected that "there is a great difference between the right of the electors and the right of the elected: the one is a temporary right to a place in Parliament *pro hac vice*; the other is a freehold or a franchise. Who has a right to sit in the House of Commons may be properly cognizable there; but who has a right to choose, is a matter originally established, even before there is a Parliament…" (p. 55)

Some limits on these rights are obviously required, and these are usually justified under section 1 of the Charter, which states that the rights and freedoms guaranteed in it are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." If totally unqualified, section 3 would confer the right to vote and to stand for election on, for example, a two-year-old child or a citizen convicted of treasonous behaviour on behalf of another state.

Canada was generally accepted to be a democratic society – with a well-developed body of election law – prior to the passing of the Charter. Consequently, some limits on democratic

rights (such as residential or age qualifications) may well be considered "prequalified" or inherent in section 3 itself.

New qualifications or disqualifications, or old ones that are too broad and offend the tests of proportionality or minimum impairment of rights, must be justified under section 1. Nor does the "prequalification" argument seem to apply to limits that were unevenly enforced across the country, such as some provinces' particularly strict limitations on public service workers.

Finally, because section 3 of the Charter gives a right as opposed to confirming a freedom, there is also an issue of procedural or administrative disqualification as opposed to legal disqualification. There is an onus on the government to prevent unreasonable administrative bars to the exercise of democratic rights. The concept of procedural disqualification may also be extended to equality of voting power, wherein the right to vote is clear but the value of an individual vote is arguably diminished because of an inequitable distribution of seats.

It is not clear at this point whether the right "to be qualified for membership" in the House of Commons or a legislative assembly refers only to the right to be qualified to stand for membership and be elected, or extends to the right to be seated and to continue to be qualified as a member. If the latter, the Charter could potentially come into conflict with the law and custom of Parliament, under which Parliament continues to regulate its own internal affairs.

B. The Right to Vote

The general trend of Canadian electoral law has been to extend the franchise to virtually all adult Canadian citizens. At various times since Confederation, voting qualifications in various Canadian jurisdictions have included criteria such as racial origin and sex. It seems unlikely, however, that any modern Canadian court would have considered these acceptable limitations even before the Charter was passed.

Other electoral qualifications, however, were generally accepted in modern pre-Charter electoral law. In general terms, the modern limitations on voting rights, whether expressed as qualifications or disqualifications, can be broken into the following categories:

- the requirement that the elector have sufficient *nexus* with the geographic area which is electing a member (such as citizenship or residency), usually expressed as a "qualification";
- physical qualifications (such as age), expressed as either "qualifications" or "disqualifications";

- other incapacities that affect legal status (such as imprisonment), usually expressed as specific "disqualifications";

- procedural limitations related to registration and the act of voting, or administrative disenfranchisement; and

- limitations on the equality of voting power through, for example, inappropriate electoral boundaries.

Court challenges have been mounted in the majority of these areas.

1. Residency Requirements

The courts have shown a disinclination to strike down legislated standards as to the required nexus, or link, between the voter and the community, or the length of residence required to vote. In *Re Storey and Zazelenchuck* (1984), an early case on the issue, the Saskatchewan Court of Appeal declined to "fine-tune" provincial residency requirements. The Court also indicated that the conduct of other provinces was relevant, an approach that has been taken in several later cases.

In *Reference Re Yukon Election Residency Requirements*, the Yukon Minister of Justice argued that "a reasonable residency requirement is implicit in section 3 of the Charter ... in order to reflect the geographical distribution of political units within our Canadian federal system." The court found this argument "persuasive and perhaps sufficient to dispose of the appeal," especially considering the Yukon's small and particularly transient population.

In the *Haig* case, the Supreme Court of Canada upheld residency requirements in terms of eligibility to vote; although the case involved referendum legislation, it is broad enough to apply to election laws. Overall, the cases seem to indicate that a residence qualification may well be implicit in the section 3 right to vote in an election, but the reasonableness of the qualification will be subject to a section 1 test.

2. Age or Mental Disabilities

A clause in the *Canada Elections Act* disqualifying certain persons with a mental disease was successfully challenged in the 1988 federal election by the Canadian Disability Rights Council. The section in question disqualified people who either had their liberty restrained or were deprived of the management of their own property by reason of mental disease. The decision was not as sweeping as one might suppose. The case suggests, however, that legislation disqualifying

persons for mental incapacity must specifically address their mental capacity or incapacity to vote, rather than other characteristics or abilities. Such a test has not yet been approved by a higher court, but it could create some interesting results if applied to age qualifications, which have not yet been challenged. At this point, however, the *Canadian Disability Rights Council* case creates as many questions as it answers.

Bill C-114, which received Royal Assent in May 1993, removed the disqualification for persons limited as a result of mental disease; however, it was unclear to what extent the persons in question would be able to exercise their right to vote in practical terms.

3. Disqualification of Inmates

Although some "qualifications" may be implicit in section 3, one can assume that "disqualifications" have to meet the test of section 1. Imprisonment was the first such disability to attract serious challenges under the Charter, but the cases have almost invariably been complicated by procedural issues, both with respect to the remedy being sought and the voting process itself.

In 1983, the British Columbia Supreme Court concluded that the right to vote meant the right to make an informed electoral choice reached through freedom of belief, conscience, opinion, expression, association and assembly – "that is to say with complete freedom of access to the process of discussion and interplay of ideas by which public opinion is formed." Because it was administratively impossible to allow inmates those freedoms necessary for an informed and democratic choice, the denial of the vote was found to be a reasonable limit as contemplated by section 1.

A year later, the British Columbia Court of Appeal dealt with a provision in the *British Columbia Elections Act* that disqualified from voting any person convicted of an indictable offence until he or she had been pardoned or undergone the sentence imposed. While upholding the earlier decision, the Court held that denying probationers the vote was unreasonable, particularly because the primary purpose of probation is to provide for reintegration into society.

Also in 1984, however, a Federal Court Judge considered the *Canada Elections Act* and decided that the necessity of curtailing some rights of prisoners, such as freedom of association and expression, was no justification for curtailing the right to vote. The Federal Court of Appeal overruled the decision, but only on the basis that the remedy suggested was inappropriate.

Two years later, the Manitoba courts again canvassed the issue under the pressure of an impending election. The court distinguished between qualifications, which are inherent in the

section 3 right, and disqualifications, which must meet the section 1 test. Although agreeing that limitations on a convict's right to vote could serve several valid purposes, the Court concluded that a general disqualification of inmates did not meet the Charter test of rational connection, minimum impairment, and proportionality of purpose. The impugned section was declared invalid, but the trial judge refused to declare that the prisoners in question had a right to vote and instead left the future amendment of the provincial *Elections Act* to the legislature.

The Court of Appeal of Manitoba took another look at the issue before the 1988 federal election and unanimously agreed that the trial judge had erred in ordering the Chief Electoral Officer of Canada to enumerate inmates. Aside from noting the immense difficulties involved in making the standard in Manitoba different from that in other provinces, the three members of the Court indicated in separate judgements that it would be inappropriate for the judiciary, rather than Parliament, to make an order enfranchising all prisoners. Interestingly, two of the judges queried whether the provision even violated section 3, or whether "the right to vote in section 3 should be read as reflecting that right as it had developed and was known in our country."

In 1992, the Ontario Court of Appeal, faced with two conflicting decisions, struck down the federal prohibition against inmate voting. The Court looked at three objectives that might be considered sufficiently important to infringe on the right to vote, and decided that all three objectives, even if taken collectively, could not justify the complete denial of prisoners' rights to vote (*Sauvé*). The three objectives were:

- affirming and maintaining the sanctity of the franchise in our democracy;
- preserving the integrity of the voting process; and
- sanctioning offenders.

In early 1991, the Federal Court of Canada had likewise found that denying prisoners the right to vote violated section 3 of the *Charter of Rights and Freedoms*. In February 1992, the Federal Court of Appeal upheld this judgement, on the basis that the disqualification of prisoners has more to do with the punishment of criminals than with social measures such as ensuring that only those who can fully participate in the democratic process are allowed to vote. Even if the objective of the legislation were acceptable, however, the prohibition would not be demonstrably justified as the means chosen are irrational, arbitrary and disproportionate (*Belczowski*).

As a result of the *Belczowski* and *Sauvé* decisions in the Federal and Ontario Courts of Appeal, the prohibition on inmate voting was not in effect at the time of the 1992

federal referendum on the Charlottetown Accord. Consequently, as noted in the Report of the Chief Electoral Officer on the Referendum, inmates were entitled to vote. The two Court judgements had not provided guidelines as to a voting system for inmates, so administrative mechanisms were developed by the office of the Chief Electoral Officer.

Registration took place early in the referendum period for federal institutions. However, in provincial and territorial institutions – where there are shorter sentences and high inmate turnover – registration occurred in the three days prior to voting.

The office of the Chief Electoral Officer conducted an information program to inform inmates of their right to vote and of the procedures for exercising that right. A voter's guide was distributed to each inmate along with an Application for Voting, and posters were displayed prominently in each institution. Information kits were distributed with the help of the Elizabeth Fry and John Howard societies, and representatives of these two organizations were invited to monitor activities during the voting period.

The place of ordinary residence for inmate electors was defined as either the electoral district where they had lived prior to incarceration or the residence of a spouse, parent or dependant. Where no fixed address could be ascertained in this manner, the inmate's place of ordinary residence was held to be the address of the court where he or she had been sentenced or arrested.

Inmate electors voted on 16 October 1992, ten days prior to the ordinary polling day of 26 October 1992. The envelopes containing the ballots were received, sorted and counted by scrutineers in Ottawa, under the supervision of a Special Election Administrator appointed by the Chief Electoral Officer, and in cooperation with the Special Returning Officer appointed for the Ottawa voting territory under the Special Voting Rules. Overall, 188 correctional institutions containing almost 28,000 inmates were involved in the voting process.

The apparently successful involvement of inmate electors in the Referendum meant that it would be difficult to argue that prisoner disenfranchisement can be justified on the grounds of administrative necessity, or the practical difficulties of ensuring that inmate electors can exercise an informed vote.

In May 1993, Bill C-114 became law, resulting in significant changes to the *Canada Elections Act*. Among other measures, Bill C-114 removed the disqualification for prisoners serving less than two years, who, for all practical purposes, are prisoners serving in provincial rather than federal institutions. In the same month, the Supreme Court of Canada

affirmed both the Ontario and Federal Court of Appeal decisions (*Sauvé* and *Belczowski*). The decision was extremely brief, simply stating that the federal prohibition against inmate voting was drawn too broadly and failed to meet the proportionality test, particularly the test of minimum impairment.

In December 1995, the Federal Court Trial Division found that the new provisions of Bill C-114 were unconstitutional (*Sauvé*, 1995). The Court accepted a dual purpose, or objective, for inmate disenfranchisement: the enhancement of civic responsibility and respect for the rule of law; and the imposition of an additional sanction on prisoners who had committed serious anti-social acts. The Court found that the disqualification for inmates serving two years or more failed the requirement that the measure chosen must result in a minimal impairment of Charter rights, and also the requirement that the negative effects of impairing the right be proportionate to the salutary effects.

On the minimum impairment test, the Court decided that Parliament had not considered the alternative of a case-by-case disqualification by the sentencing judge, possibly using criteria set by Parliament as a guide. This would be a significantly less intrusive, and equally effective, means of infringing a citizen's democratic right to vote. Moreover, because it would be more publicly visible than the current absolute bar for inmates serving two years or more, it would enhance the social objectives involved in inmate disenfranchisement.

As for the proportionate effect test, the Court saw little benefit flowing from the disqualification even in theory. The argument that prisoner disqualification enhances respect for civic responsibility and the rule of law was not accepted because the Court found that there was a "pervasive lack of awareness of the disqualification." Although the government argued that disenfranchisement served the retributive function of criminal justice, the Court found instead that it worked against both rehabilitation and reintegration, which are the principal goals of corrections policy.

The fact that inmate electors had voted successfully in the 1992 Referendum, as well as in a number of provincial elections, appeared to influence the Court. According to figures provided at trial, more than 55% of federal prisoners in Canada were entitled to vote in provincial elections as of 30 April 1995. The Court noted that the government could not provide evidence of any harm flowing from the exercise of inmate voting rights, or any arguments to justify the mixed message that society is receiving from the conflict between federal and provincial policies relating to prisoner voting rights.

On appeal, the Federal Court of Appeal ruled that although the denial of the right to vote to persons imprisoned for two years or more infringed section 3 of the Charter, it could be justified under section 1. The Court noted that the current provision was sufficiently different from its predecessor – which provided for a total disenfranchisement – to warrant a fresh consideration under section 1. The objectives of the provision – the enhancement of civic responsibility and respect for rule of law, and enhancement of penal sanction – are sufficiently pressing and substantial to warrant infringement of a Charter right. The Court found that the legislation met the rational connection test, and also impaired the right in an appropriately minimal way. The provision aims at disenfranchising only the most serious offenders. Its enactment followed consideration and rejection by Parliament of the alternative of discretionary judge-imposed disenfranchisement. There was no reason for the Court to declare invalid the balancing in which Parliament engaged. Basing itself on electoral policy, Parliament was entitled to add civil consequences to the criminal sanction. Finally, the legislation achieves proportionality. Even if there is widespread public ignorance of the provision, that does not nullify its proportionality, particularly when it is well known to sentencing judges and defence counsel (*Sauvé,* 1999). **This decision was appealed to the Supreme Court of Canada, which heard the case on 10 December 2001; the judgement was reserved.**

4. Administrative Disqualifications

The issue of effective procedural disqualification, or how far the state must go in positively enforcing voting rights as opposed to not impairing them, was specifically raised by the British Columbia Court of Appeal in 1985. Two absentee residents (not coincidentally attending Osgoode Hall Law School) sought an order that their constitutional right to vote was infringed because the provincial *Election Act* failed to provide for absentee ballots.

The trial judge held that it was their own conduct, in being absent from the province, that deprived them of the opportunity to vote. The Court of Appeal disagreed, finding that where an individual is deprived of the substance of the right to vote, it matters little whether it is "by commission (an express statutory limitation) or by omission (the failure of the statute to provide a mechanism to vote and thus creating a limitation on the right to vote)."

It is difficult at this point to see where the balance will settle with respect to the positive duty of the legislature to limit procedural barriers to voting. Time off for voting, for example, is well established for polling day, but not for advance or special polls. Enumeration

practices vary from province to province, placing various degrees of responsibility on the qualified elector to ensure that his or her name is properly recorded.

For example, in 1986 the British Columbia Supreme Court upheld a provision requiring voters registered in the wrong district to re-register in the new district 20 days before the election if they wished to vote there. Moreover, when dealing with the argument that the provision was discriminatory (because a voter not registered in any district could apply for registration in the district of residence on election day), the Court specifically rejected an attempt to link section 15 of the Charter (equality rights) to section 3.

In 1982, a Saskatchewan court held that remand prisoners had been effectively denied their right to vote, because no provisions had been made to allow them to do so, apparently because of security considerations.

In 1986, the British Columbia Court of Appeal was faced with the interesting question of whether the rejection, on a recount, of ballots marked with a tick rather than a cross unreasonably deprived those persons using a tick of their full right to vote. The Court declined to interfere with the electoral scheme devised by the legislature.

In 1988, an administrative provision of the *Canada Elections Act* which made it easier for rural voters than for urban voters to be added to the official list on election day was challenged. The Court did not have much difficulty in finding that section 15 did not apply. Although sympathetic to the urban residents denied a vote, the Court declined to propose a solution and called on the legislature to do so. Bill C-114, however, provided for polling day registration in both rural and urban ridings.

Bill C-114 also included a new "Schedule II – Special Voting Rules," which set out the special voting procedures for persons voting outside the area in which they are normally resident. The Schedule is lengthy and technical, but essentially covers six classes of voters:

- members of the Canadian Forces;
- members of the public service of Canada or a province who are posted abroad;
- employees of an international organization to which Canada contributes and of which it is a member;
- Canadians who have been absent from Canada for less than five consecutive years and who intend to return;
- inmates serving a sentence of less than two years; and
- any other elector who wishes to vote in accordance with the Special Voting Rules.

5. Limitations on the Equality of Voting Power

In the first round of Charter challenges, the courts did not go from the question of whether there was a right to cast a vote to looking at the quality of the vote cast. In 1986, however, a petitioner in British Columbia asked for a declaration that unevenly populated electoral districts violate the Charter.

The first question was whether the issue was even justiciable, because it had long been considered that the apportionment of electoral boundaries was solely within the scope of the legislatures. In particular, disparities in urban/rural representation were defended on grounds of equity, rather than equality. In April 1989, however, Madam Justice McLachlin granted an order stating that the provincial election boundaries were inconsistent with the right to vote in section 3 of the Charter.

Although section 3 does not require complete equality of voting power, the court held that population must be the dominant consideration in drawing electoral boundaries. Factors such as geography and regional interests can be taken into consideration, but the ultimate goal must be better government of the populace as a whole. Considerable leeway must be given the legislature, and the court ought not to interfere unless it appears that reasonable people governed by the appropriate principles could not have set the existing boundaries.

Judge McLachlin was not unsympathetic to the factors justifying giving a greater weight to rural votes:

- special interests of rural residents;
- difficulties in communicating with electors in large rural areas;
- a relative lack of access to the communications media;
- the wider range of problems with which rural members must deal; and
- limited availability of resources to rural members.

Judge McLachlin, however, was not swayed by the U.S. jurisprudence, which requires "near absolute equality of voting power unalloyed by other considerations." Noting that the development of Canadian democracy has different roots from those of U.S. democracy, she suggested that "while the principle of representation by population may be said to lie at the heart of electoral apportionment in Canada, it has from the beginning been tempered by other factors."

Given the degree to which the principle of relative equality of voting rights had been infringed, however, together with the lack of justification in terms of regional or geographical concerns or short-term population fluctuations, the electoral boundaries could not be saved under section 1 of the Charter.

In declaring the legislation invalid, Judge McLachlin provided for a period of temporary validity while the legislature enacted a new and better scheme. Noting that she had already set out the broad principles of law on which the legislature should act, Judge McLachlin referred in particular to the Fisher Commission, appointed in 1987 to recommend changes to electoral boundaries based on the 1986 census. The Commission reported to the legislature in March 1989 and recommended that population deviations greater than 25% above or below the norm should not be tolerated. Judge McLachlin indicated that this seemed reasonable for a province such as British Columbia.

In March 1991, the Saskatchewan Court of Appeal heard a reference on the validity of the provincial electoral boundaries set out in the Saskatchewan *Representation Act, 1989*. The Court was asked whether the variance in the number of voters per constituency or the distinction made between urban, rural and northern constituencies violated the *Charter of Rights and Freedoms*. The *Electoral Boundaries Commission Act*, which established the commission recommending the boundaries in question, had specifically required that 29 constituencies be urban, 35 be rural, and 2 be northern.

The Court of Appeal relied largely on U.S. precedents on the right to an equal vote, including quoting Daniel Webster as saying that the right to vote for a representative "is every man's portion of sovereign power." Although the Court agreed that absolute equality was a practical impossibility, given the limitations inherent in a representative parliamentary democracy, it decided that electoral systems must "strive to make each citizen's portion of sovereign power equal." The difference in population between Saskatchewan ridings was sufficiently large for the Court to find that the existing boundaries effectively violated the section 3 right to vote, which included the right to an equal vote.

The Court declined to fix *de minimis* population deviations, or indicate the allowable population difference between ridings. It noted that the electoral boundaries commission for the Province of Saskatchewan, set up under the federal *Electoral Boundaries Readjustment Act*, had managed to design all federal constituencies within plus or minus 5% of the province's mean

population. This indicated that no formula for acceptable deviancy was necessary where an electoral boundaries commission made substantial voter equality its prime consideration.

Unlike Judge McLachlin in the B.C. case, the Saskatchewan Court of Appeal rejected the distinction between urban and rural ridings as a justification for population differences between various ridings. Therefore, it concluded that the statutory requirement of 35 rural and 29 urban ridings placed unreasonable control in the hands of non-urban voters which could not be justified under section 1 of the Charter. Although the larger size and different structure of rural ridings can impose additional time demands or communications constraints on elected representatives, these should be dealt with by methods – such as additional staff or travel allowances – that do not infringe on the principle of voting equality.

There was general agreement between the parties and the Court that the extraordinary circumstances of the northern region justified some deviation from the concept of equality of voting power with respect to the two northern constituencies.

Because Saskatchewan was to hold an election by November 1991, the Court of Appeal decision raised some practical concerns. The Supreme Court of Canada heard an expedited appeal at the end of April 1991, and handed down its decision in the Saskatchewan appeal on 6 June 1991. In a 6-3 decision, the Court found that the existing electoral boundaries did not violate the right to vote enshrined in section 3 of the Charter. The majority opinion was written by Madam Justice McLachlin.

The Saskatchewan Court of Appeal had decided that section 3 guaranteed the equality of voting rights *per se*, where practically achievable. Considerations such as geography, historical boundaries and community interest could be considered as reasonable limitations under section 1, but the government would have to establish that such deviations were demonstrably justified.

The Supreme Court disagreed, concluding that section 3 guaranteed a right to "effective representation," not voter parity. Although relative parity of voting power remains the first consideration in effective representation, it is not the only one. The Supreme Court noted, for example, that Sir John A. Macdonald had recognized this fundamental fact as early as 1872: in introducing the *Act to re-adjust the Representation in the House of Commons*, S.C. 1872, c.13, he said:

> ... it will be found that ... while the principle of population was considered to a very great extent, other considerations were also held to have weight; so that different interests, classes and localities should be fairly represented, that the principle of number should not be the only one.

The framers of the Charter had two distinct electoral models before them: the "one-person one-vote" U.S. model and "the less radical, more pragmatic approach" that had developed in this country and in England through the centuries. Madam Justice McLachlin quoted from her earlier decision in *Dixon (No. 2)* on the difference between the two, and the manner in which Canada has tended to adopt the British model: "Pragmatism, rather than conformity to a philosophical ideal, has been its watchword."

In short, the Court decided that absolute voter parity may be practically impossible and, even where it is possible, may actually detract from the primary goal of effective representation when geography, community history, community interests or minority needs are a factor. Elected representatives function in two roles, as legislators and as "ombudsmen" for their constituents. In a country of vast, sparsely populated territories and varied distinct interests, deviations from voter parity may be necessary to ensure effective representation for all.

The non-northern seats in Saskatchewan all fell within plus or minus 25% of the provincial quotient or norm. Given this, the Court found that the evidence supplied by the province was sufficient to justify the existing electoral boundaries, including the two northern ridings, and that no violation of section 3 of the Charter had been established. Accordingly, section 1 did not need to be taken into consideration.

The decision of the Supreme Court of Canada suggests that the courts should be reluctant to second-guess legislators on the appropriateness of electoral redistribution. Where variations from the population norm are within plus or minus 25%, the government probably need only establish that there are geographic factors or distinct community interests, including rural/urban differences, that could justify the variation in the interests of effective representation. In such cases, no section 3 violation occurs, and it is not necessary to prove that the variations are demonstrably justified in a free and democratic society.

The test appears to be close to Madam Justice McLachlin's suggestion that "the courts ought not to interfere with the legislature's electoral map under section 3 of the Charter unless it appears that reasonable persons applying the appropriate principles ... could not have set

the electoral boundaries as they exist." Given this broad test, however, it also appears that electoral boundaries that cannot meet the test will be extremely hard to justify under section 1. This is perhaps appropriate because, of all Charter rights, violations of democratic rights should be the most difficult to be demonstrably justified in a free and democratic society.

In February 1993, the Prince Edward Island Supreme Court handed down a decision expanding on the principles outlined by Madam Justice McLachlin. Historically, Prince Edward Island is divided into three counties and the *Election Act* mandates that representation in the legislative assembly shall be apportioned by county, regardless of population. Two of the counties have five districts, and the third has six districts. Largely because of rural-urban population shifts over the years, there is a very significant disparity in the number of enumerated voters in the electoral districts. Of the 16 electoral districts, eight have disparities in excess of 40% under the provincial average and four have disparities in excess of 40% above the provincial average. At the extremes, the district of Fifth Queens is 115% above the provincial average and the district of Fifth Kings is 63% below the provincial average. In the 1989 election, Fifth Queens had 5,982 voters per elected member and Fifth Kings had 1,021 voters per elected member (Prince Edward Island has dual-member ridings).

The Court commented at length on the concept of "effective representation" as set out by the Supreme Court of Canada, and concluded that the ideal of fair and effective representation embodies a balance between absolute voter parity and non-population factors such as community history, community of interest, rate of growth, special geographic features and the like. Accepting that an appropriate urban/rural and regional balance in political representation was a valid legislative objective, the Court doubted that the means adopted in Prince Edward Island were either proportional or appropriate.

The Court noted the reference to a deviation of plus or minus 25% in both the British Columbia and Supreme Court of Canada judgements, but questioned that a province as small as Prince Edward Island could justify such a degree of deviation: "Based on the evidence presented during this hearing, I consider that a variance of plus or minus 10%, as in Manitoba south of the 53rd parallel, might well be more appropriate." The Court declared the relevant provisions of the Prince Edward Island *Election Act* to be contrary to the Charter, but left the legislation in place for a reasonable period of time to avoid a crisis.

In October 1994, the Alberta Court of Appeal was invited, by means of a reference, to comment on whether the *Electoral Divisions Statutes Amendment Act*, *1993* was in compliance with the Charter. This followed a series of events that demonstrated a troubling split between the

size and nature of urban and rural ridings. The Court, as in an earlier 1991 reference, "decided to withhold any Charter condemnation," citing the need for judicial restraint.

Following the most recent federal redistribution, a case was launched by the Société des Acadiens et Acadiennes du Nouveau-Brunswick regarding the weight given to the linguistic composition of the population in drawing electoral boundaries.

C. The Right to be Qualified for Membership in a Legislative Assembly

As with the right to vote, the right to be a candidate seems now to be governed almost entirely by federal or provincial statute. This right is far less restricted than in the 19th century when, for example, aspiring candidates had to meet property qualifications. In most cases, the qualifications to be a candidate today coincide with the qualifications needed to be a voter. Thus it is the disqualifications, whether traditional or new, that tend to result in legal challenges.

It seems reasonable to assume that the courts will follow the same general approach with respect to candidate disqualification as is emerging with respect to voting rights. They will:

- look to existing practice in other jurisdictions and tend to adopt the most liberal;
- tend to strike down sweeping disqualifications that do not meet the *Oakes* test of minimal impairment and proportionality; and
- allow room for the legislatures to make the necessary amendments, while looking with disfavour on "administrative disqualifications."

A 1986 Nova Scotia case is a good example. A public service worker, together with the government employees' union, argued that the Nova Scotia *Civil Service Act* prevented him from becoming a political candidate. The union did not suggest that a public service worker should continue as a public service worker while being a candidate for political office. The argument was rather that the sections of the Act prohibiting partisan work and the payment of party membership dues, together with the non-existence of leave-of-absence provisions, had the effect of disqualification. The issue was closer to "administrative disqualification" than to strict legal disqualification.

The judge canvassed other provincial jurisdictions, and even included in his judgement a five-page table of comparisons decisively indicating that the Nova Scotian provisions

were unusually restrictive. He then found that the restrictions did not meet the tests of minimum impairment, or of proportionality between the end to be obtained and the means used. The objective of a politically neutral public service could be obtained, he decided, by the lesser means of providing for a leave of absence rather than dismissal.

An Ontario case has since confirmed that requiring a candidate or person elected to a provincial or federal office to take an unpaid leave from public employment does not violate section 3 rights. A 1992 Ontario Court of Appeal decision has also affirmed that section 3 rights do not apply to municipal councils.

There is also the question of how far section 3 extends. It clearly covers the right to stand for election, to be elected, and to be termed a member, but it is not so clear that it covers the right to be or to remain seated in the House or a legislative assembly. The disqualification or expulsion of a sitting member has traditionally been a privilege of the House as a whole. In *MacLean*, one of the major cases on the relationship between the Charter and the right to be qualified for membership, the trial judge noted that "section 3 deals with the right to vote and the right to be elected and that is different from setting standards for sitting members."

The *MacLean* case revolved around the validity of express disqualification against potential membership in the House. There has been a long-standing common law disqualification of persons found guilty of corrupt electoral practices, the original purpose of which appears to have been to preserve the integrity of the electoral process. The basis of the law seems to be the theory that someone who has engaged in corrupt electoral practices once may well do so again, bringing the process into disrepute. In 1986, the Nova Scotia House of Assembly went considerably farther, and passed an Act to expel William MacLean, a former Minister of the government who had pleaded guilty to falsifying his expense claims.

Mr. MacLean's financial affairs, about which rumours had been circulating for a number of years, had become an embarrassment to the government. Presumably wishing to settle the issue once and for all, the government included in the Act a section to disqualify persons convicted of certain criminal offences from being nominated as a candidate or standing for election to the legislature for a period of five years. With an obvious eye to the Charter, the Act was entitled *An Act Respecting Reasonable Limits for Membership in the House of Assembly*.

Mr. MacLean, who had announced his intention to re-offer himself as an independent candidate but would have been disqualified by the section, promptly decided that his fundamental rights under the Charter were being violated by the Act. Also at issue were the rights

of the voters of his native Port Hawkesbury. Could they continue to cast a vote for Mr. MacLean, or could the House of Assembly legislatively prevent them from doing so?

In early 1987, the Chief Justice of the Trial Division of Nova Scotia decided that Mr. MacLean did have the right to be qualified to run for office and the people of Port Hawkesbury had the right to vote for him. The elected could not legislatively impede the rights of the electors. In the event, Mr. MacLean was re-elected and reseated, but defeated in the following election.

In discussing whether the Charter applies to the amendment of provincial constitutions, an issue which also came up in the British Columbia case on electoral distribution, the Chief Justice noted that "if it were otherwise, a province could, for example, amend its constitution by passing a law that only blue-eyed, brown-haired persons could qualify for membership in the legislative assembly."

The new statutory disqualifications on the right to run for office were found to be penal and not demonstrably justified in a free and democratic society. Historically, it seems clear that Parliament could expel members for breach of privilege, including conduct bringing the House into disrepute, but could not prevent their re-election. Thus the House, by its own law and customs, has control over internal House matters, including membership, but less over the qualifications of those standing for election to it.

The fine line remaining was between exclusion and expulsion. Could the House refuse to seat an elected Member or effectively exclude him/her if his/her conduct had been offensive to House traditions? Or must they first seat the member, and then wait for him/her to commit some fresh contempt of the legislature that would justify expulsion?

In 1996, the Supreme Court of Canada upheld a provision of the New Brunswick *Elections Act,* which stated that any person convicted of a corrupt or illegal practice under that Act was disqualified for five years from being elected to or sitting in the Legislative Assembly (*Harvey*). Mr. Harvey had induced a 16-year-old female to vote, knowing that she was ineligible.

The majority of the Court noted that the English version of section 3, providing for a "right to be qualified" for membership in a legislative assembly, is somewhat ambiguous, but that the French version clearly indicates that the right is to be a candidate and to sit as a member: "est éligible aux élections." The disqualification from sitting in the legislative assembly infringes section 3 rights, but the infringement is justified in order to preserve the integrity of the election process. The five-year disqualification ensures that the person convicted of a corrupt or illegal

election practice is ineligible to run in the next general election; it is a minimal and proportional impairment of section 3 rights.

Two of the judges found that the disqualification from office should be immune from judicial review because it falls within the legislature's historical privilege, which enjoys constitutional status and is not subject to the Charter. Such disqualifications can be reviewed by the courts to ensure that they do not fall outside the rules of Parliament, as any based on such features as race or gender would do; however, once a court has decided that an Act falls within the domain of parliamentary privilege, it should not proceed with Charter review. The Chief Justice, on the other hand, specifically found that legislation with respect to parliamentary privilege was subject to the Charter. The majority decision did not deal with the issue of privilege, on the grounds that it was raised by an intervenor rather than the parties themselves, and was not seriously argued.

D. Conclusions on Section 3 Rights

Overall, the courts have split on whether there are limitations on voting rights, particularly with respect to residency and age, which are inherent in section 3, or whether all restrictions have to be demonstrably justified as reasonable under section 1. Many of the existing cases took place under the pressure of an upcoming election, and the courts have preferred to leave to the legislatures a wholesale rewriting of voting laws, even when they are over-restrictive.

There is often a tendency to canvass the situation in other Canadian electoral jurisdictions. If the challenged provision is within the norm, it is likely to stand. If it is notably more restrictive than the Canadian average, the court is naturally inclined to view it more critically.

As for the right to be qualified for membership in a legislative body, it would seem the only safe statutory limitations on membership are:

- *structural or administrative reasons*, such as: membership in, or nomination for, another legislative body or the holding of a government office for reward; or section 750 of the *Criminal Code*, which states that anyone convicted of an indictable offence and sentenced to more than two years' imprisonment is incapable of being elected, sitting or voting as a member of Parliament or of a legislature until the sentence is served;

- *corrupt election practices* which bring the election process itself into disrepute; and

- *conviction for offences* which by their very nature offend against the dignity of the House, or which so clearly involve breaches of the public trust that conviction under any circumstance justifies automatic exclusion.

In general, section 3 of the Charter has clearly entrenched and speeded up a move towards more universal suffrage and procedural consistency. It has given the courts a lever to enforce changes in the various procedural limitations remaining in the various *Election Acts* and it has caused some narrowing in specific disqualifications. How much more it will do remains to be seen.

Overall, in dealing with both limitations of voting and limitations on membership qualifications, the courts are not likely to favour new classes of restrictions. As far as pre-existing restrictions are concerned, there is the argument that they are *prima facie* reasonable in a democratic society unless overbroad or unreasonable in their application. Limitations based on administrative convenience are likely to be frowned upon, especially where other jurisdictions have managed to apply a less restrictive approach.

E. Other Charter Issues

Increasingly, election issues other than the right to vote or stand for office are being treated as "freedom of expression" concerns. In 1991, in *Osborne*, the Supreme Court of Canada dealt with the section of the federal *Public Service Employment Act* that prohibited public service workers from working for or against a candidate or political party. The Court agreed that the provision implemented the constitutional convention of public service neutrality, but found that this did not protect it from Charter scrutiny. Although protecting the neutrality of the public service was an important objective, the provision did not constitute a "reasonable limit" because it was unnecessarily broad. The court was not prepared to "read down" the legislation, or interpret it in a restrictive manner, stating that it was for Parliament itself to decide on the appropriate limitations.

The provisions of the *Canada Elections Act* dealing with election expenses have generated a number of cases.

The Supreme Court of Canada has upheld both the use of compulsory union dues for political purposes (*Lavigne*, 1991), and the use of public funds to support serious electoral candidates (*MacKay*, 1989).

1. Allocation of Broadcasting Time

In November 1992, an Alberta court decided a Reform Party of Canada challenge to the allocation of broadcasting time during an election under the *Canada Elections Act*. The Act

requires broadcasters to make available a total of six and one-half hours to registered political parties for the purposes of paid political advertising. Both parties agreed that at certain times of the year (particularly October, November, April and May), "prime time" advertising may be sold out in advance. In the past, broadcasters have pre-empted previously sold advertising time in order to comply with the requirements of the *Canada Elections Act*. It could, therefore, prove impossible for political parties to purchase prime time advertising other than that allocated to them under the Act. Additionally, after listening to considerable expert testimony, the Court found that "political advertising by way of the television broadcast media is in all probability the most effective means of reaching voters."

The Court found that the purpose of the legislation, i.e., ensuring an adequate supply and equitable allocation of prime broadcasting time during federal election campaigns for use by registered political parties, was appropriate. The effect of the allocation, however, was to discriminate against new and emerging political groups, such as the Reform Party, and thereby limit their ability to express themselves freely.

Turning to a section 1 analysis, the Court decided that the purpose of the legislation was sufficiently pressing and substantial to justify a possible infringement of freedom of expression. Moreover, the reservation of broadcast time was proportionate to the purpose and constitutionally valid.

The Court had reservations, however, about the allocation of broadcast time. The allocation formula is based on a party's percentage of seats in the House of Commons, the percentage of the popular vote it obtained in the last election, and the number of its candidates in the previous election. Although all these factors can be considered a reliable indicator of public interest, they are also all retrospective in nature. Taken alone, the Court found that they tend to limit the broadcast time available to new or emerging national parties.

The Court noted that the Reform Party had indicated that it expected to run 220 candidates in the following federal election. Under the allocation of advertising time in force at the time of the hearing, however, it would be entitled to only 10 of the 390 minutes set aside for broadcast advertising. The Progressive Conservative Party would be entitled to 173 minutes (roughly 17 times as much) and the two other national parties to 110 and 71 minutes.

Consequently, the Court found that the retrospective nature of the allocation formula was discriminatory in effect, and neither proportionate nor appropriate to the purpose of ensuring adequate air time to parties with the greatest national appeal. The allocation formula was declared

unconstitutional, although the Court did suggest that the discriminatory effect might be alleviated by the addition of such factors as the number of candidates for the current election named by a specified date. Although a separate provision of the *Canada Elections Act* gave a wide discretion to the Elections Canada Broadcasting Arbitrator to modify the results if the allocation formula appeared unfair, the Court found that, once the formula was struck down, this provision was too vague.

The decision was appealed, and in March 1995 the Alberta Court of Appeal handed down a narrow 3-2 decision allowing both the appeal of the Attorney General of Canada on the main point, and a cross-appeal on certain other sections.

The majority of the Court of Appeal agreed with a large part of the trial decision on the broadcast allocation formula, but considered that the judge had erred in not fully considering the broad discretion of the Broadcast Arbitrator to relieve any unfairness or discriminatory effects that would arise from a strict application of the broadcast allocation formula. The allocation formula must be considered in its entirety, and the discretion of the Broadcast Arbitrator provides an internal mechanism by which any such discriminatory effects or unfairness can be corrected. Thus, these sections do not have the effect of restricting the freedom of expression of any political party; they merely reserve time that might not otherwise be available and provide for the allocation of such time.

The Reform Party had, however, cross-appealed with respect to the trial judge's findings upholding certain other sections of the *Elections Act* dealing with the regulation of broadcast time during elections. Two of these sections had the effect of preventing a registered party from purchasing additional broadcast time. Broadcasters selling additional time to one party were required to offer proportional additional time to other parties at no charge. The Attorney General justified these provisions by arguing that they preserved the integrity of the allocation formula and helped to control election expenses. The Court found that total election expenses were already effectively controlled by other provisions of the Act. Once all parties have some access to general broadcast time as a result of the allocation provisions, there is no need to impinge upon the freedom of parties to decide how they can best use their limited allowable expenditures. The minority decision would have found for the Reform party on all counts, and would have effectively struck down the allocation scheme.

2. Third-party Spending Limitations

In 1984, the National Citizens' Coalition mounted a court challenge against a 1983 prohibition of third-party expenditures. The government argued that the limitation was necessary as part of a legislative framework regulating expenditures by candidates and parties and to prevent an unfair benefit to candidates with wealthy supporters. The Court found that such fears alone were not a sufficient reason for limiting Charter rights, and that the government had not adequately established that such provisions were necessary. The decision, which was handed down just months before the 1984 election, was not appealed.

Bill C-114, which amended the *Canada Elections Act* in the spring of 1993, re-introduced a limit of $1,000 with respect to direct advertising by third parties, either individually or jointly. On 25 June 1993, a judge of the Alberta Court of Queen's Bench, the same Court that had heard the 1984 challenge, again struck down third-party spending limitations.

In 1996, the Alberta Court of Appeal upheld the decision of the lower court (*Somerville*). The Court found that the provision violated three different Charter rights: section 2(b), freedom of expression; section 2(d), freedom of association; and section 3, the right to vote. It was common ground that the provision impaired freedom of expression, and the argument was confined to whether this could be justified under section 1 of the Charter. Freedom of association was affected in that the section prevented third parties from pooling their resources to inform voters; an important aspect of association is the ability to combine resources to pursue common goals, influence others, exchange ideas, and effect change.

As for the section 3 "right to vote," the Court of Appeal described it as being "at the core of our constitutionally enshrined democracy," and concluded that "justifying its breach will be onerous indeed." The Court also concluded that it is well accepted in Canada that the section 3 right to vote includes a "right to sufficient information" component, although the breadth of that right remains unclear. The result of disallowing third-party advertising, according to the Court, is that "a so-called 'informed vote' amounts to little more than a choice from amongst various candidates, where citizens are only as 'informed' (or not) as the news media, the parties and the candidates themselves want the citizens to be."

The Court concluded that third-party spending limits are primarily aimed at:

- preserving an electoral system that gives a privileged voice to political parties and official candidates within those parties; and

- ensuring that other interest groups cannot be heard in any effective way.

There was no appeal from the 1996 decision of the Alberta Court of Appeal. In a 1997 decision on Quebec's referendum legislation, however, the Supreme Court of Canada clearly indicated that restrictions on third parties can be justified under the *Charter of Rights and Freedoms*, and explicitly stated that it disagreed with the reasoning of the Alberta Court of Appeal.

The *Somerville* decision also struck down provisions that prohibited advertising in the first 18 days of an election campaign, or on the day before voting day or on voting day. The Court found that these violated freedom of expression, with no clear evidence of an objective that would justify such a violation.

In a 1998 ruling on Quebec's referendum legislation (*Libman*), however, the Supreme Court of Canada found that restrictions on third-party spending could be constitutionally justified, and cast doubt on the 1996 *Somerville* decision.

3. Third-party Advertising

The issue of third-party advertising was addressed in the new *Canada Elections Act*, which came into force on 1 September 2000. The spending limit for third parties was set at $150,000 in relation to a general election, including no more than $3,000 in an individual constituency. The third party is required to identify itself in any election advertising. Provision is made to prevent attempts to circumvent the limits by splitting into two or more groups or acting in collusion. Also, third parties have registration requirements: immediately after incurring election advertising expenses totalling $500 and after the issue of the writ, the third party is required to send an application for registration to the Chief Electoral Officer. Upon receipt of the application, the Chief Electoral Officer registers the third party if the requirements in the Act are met. Registration is valid only for the election for which an application is made. Requirements include the appointment of an auditor, recording of contributions, and authorization of all election advertising expenses incurred on behalf of the third party. Following the election, third parties are required to submit reports containing: a list of election advertising expenses; the time and place of the broadcast or publication of the advertisements; details of contributions received in the period beginning six months before the issue of the writ

and ending on polling day; and the names and addresses of persons contributing more than $200. The details that must be reported by third parties are similar to those required of political parties.

Shortly after the Act received Royal Assent, Stephen Harper, then the president of the National Citizens' Coalition, sued the Attorney General of Canada. He sought a declaration that the provisions affecting third-party advertising should be declared of no force and effect, as they breached his constitutional rights to freedom of speech and association and the right to vote. The matter moved expeditiously to trial, and a nine-day trial concluded on 13 October; judgement was reserved. No decision had been rendered when the federal general election was called on 22 October 2000. Mr. Harper, therefore, applied for an interlocutory injunction restraining the Chief Electoral Officer from enforcing the provisions of the Act that restrict and control third-party advertising. The judge granted part of the relief sought, i.e., suspending the spending limits, but allowed other provisions, such as the registration and disclosure of contributions, the advertising blackout on election day, and pooling contributions. This decision was appealed to the Alberta Court of Appeal, which, on 23 October 2000, upheld the injunction. On 10 November 2000, however, the Supreme Court of Canada, in an 8-1 decision, suspended the injunction on the basis of the balance of convenience. As a result, the third-party spending limits remain in force, although they were not to be applied to advertising between 22 October 2000 and 10 November 2000.

On 29 June 2001, the Alberta Court of Queen's Bench ruled that the *Canada Elections Act*'s limits on third-party election advertising expenses violated section 2(b) of the *Charter of Rights and Freedoms* (*Harper* v. *Canada (A.G.)*). The federal government had argued that the limits were reasonable and equitable, but Justice Robert Cairns found that the rules could not be saved by section 1 of the Charter. He also found that the section that prohibits third parties from combining or splitting in order to circumvent the spending limits violated section 2(d) and was not saved by section 1.

The judge, however, did agree with the government's position that the ban on election advertising in the 20 hours before polls closed on election day was reasonable and could, indeed, be saved under section 1. He also found that the rest of the Act's contested sections were not in violation of the Charter. This includes those that call for third parties to identify themselves in their election advertising and for them to register with the Chief Electoral Officer if they spend more than $500. Therefore, the Justice Cairns did not overturn the regulatory controls on reporting costs and details of third-party advertising.

Shortly after the ruling, Mr. Harper indicated that he might launch an appeal regarding the contested sections of the *Canada Elections Act* that were not struck down by Justice Cairns. He subsequently stepped down as President of the National Citizens' Coalition in order to run for the leadership of the Canadian Alliance Party, which he won, and was elected as a Member of the House of Commons. To date, no appeal has been made by Mr. Harper or on his behalf. In October 2001, the federal government announced that it was appealing Justice Cairns' rulings on limitations for third-party advertising expenses. The case is now before the Alberta Court of Appeal.

On 29 November 2001, Elections Canada confirmed that the National Citizens' Coalition (NCC) in Toronto was being charged with violating the *Canada Elections Act* during the 2000 federal election campaign. The organization was charged with breaching the Act for failing to register its third-party election advertising costs of $500. Gerry Nicholls, a vice-president of the NCC, stated that the advertisement in question was not an election commercial, but rather "the ad simply asked Canadians to support the NCC's legal challenge to the gag law."

4. Last-minute Reporting of Polls

In May 1995, the Ontario Court of Justice handed down a decision on the constitutionality of prohibiting the publication of polls during the weekend before an election (*Thomson Newspapers*). Somers J., in a lengthy and reasoned judgement, made a number of useful observations on the way to his final decision. For example, he noted that the legislation must reasonably be read as applying only to new polls, and not to references to polls that had previously been publicly discussed.

It was agreed by all parties that the provision violated the Charter guarantee of freedom of expression. More difficult to resolve was whether it also violated the right to vote guaranteed by section 3 of the Charter. Although agreeing that the right to vote must be "read broadly to encompass the right to vote in a free genuine multi-candidate election," Somers J. concluded that, in the overall context of the election campaign, the prohibition against the last-minute reporting of polls was not contrary to the section 3 right to vote.

Somers J. then went on to a section 1 analysis of whether the prohibition could be demonstrably justified in a free and democratic society. The first test is whether the objective of the legislation relates to concerns that are pressing and substantial in such a society. The Court found

that the level of public concern about the effect of polling on the electoral process was evidence that the legislation's objective was valid.

The next test is whether there is a rational link between the legislative measures and the harm to be remedied. The Court found that there was a rational connection, in that last-minute polls could influence the public, but could not be responded to or critiqued. As for the question of minimal impairment, or whether the objective could have been achieved without impairing Charter rights to the same degree, the Court found that other suggested measures, such as a ban on false polls or the mandatory publication of methodological information, would not have been effective.

Finally, the Court noted that Parliament had had the difficult task of evaluating unclear social science studies while balancing the different interests of several groups:

- the *public's interest* in getting as much electoral information as possible, being protected from misleading information, and having the information received tested by debate;
- the *media's interest* in being free to cover the election as they see fit and being able to offer their audience an interesting and saleable product; and
- the *parties' and candidates' interest* in having sufficient time to respond to potentially misleading information.

Somers J., in upholding the constitutionality of the blackout provision on polls, concluded by quoting the Supreme Court of Canada in a case involving a similar balancing of issues: "If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another."

In 1996, the Ontario Court of Appeal rejected an appeal of this decision, largely adopting the logic of Somers J. Although there was no empirical evidence as to the extent or nature of the influence of opinion polls, the Court of Appeal found that there was a real concern about their potential for being deceptive when not accompanied by methodological information or when there is insufficient time for response. Although the right to vote includes the right to have the necessary information in order to vote in a rational and informed manner, the court decided that "the right to an informed ballot does not, in our view, elevate the provision of a snapshot of the mood of the electorate at a particular time to the level of a constitutional entitlement during the last three days of an election campaign."

The Court of Appeal also extended the judgement of Somers J. by finding that the prohibition included "hamburger polls," or polls based on the belief that sales of certain goods (such as hamburgers) can indicate the opinions of voters, and polls already published prior to the last three days of the campaign. The Court of Appeal noted the decision of the Alberta Court of Appeal in *Somerville*. Because that case had dealt largely with direct communications with the electorate, however, the Court felt that the prohibitions involved were much more intrusive than those limiting the right to receive information as to the opinion of others.

The case was further appealed to the Supreme Court of Canada, which in May 1998 struck down the prohibition on the publication of opinion polls during the last 72 hours of an election campaign (*Thomson Newspapers*). In a 5-3 decision, the Court ruled that the ban was a very serious invasion of Canadians' freedom of expression under the Charter. Mr. Justice Michel Bastarache said that the blackout amounted to a complete ban on political information at a crucial time in the electoral process, and interfered with both the rights of voters to have the most up-to-date information and the rights of the media and pollsters to provide it. He also found the notion that voters would be unable to assess the weight to be given polls to be patronizing; although inaccurate polls are possible, voters must be presumed to have a certain degree of maturity and intelligence. Less intrusive measures could be instituted, such as a requirement that the methodology of the poll be disclosed. He also argued that the blackout affected voters' perception of the freeness and validity of their vote. There was no reasonable apprehension that significant harm might ensue to Canadian voters in the absence of a blackout, nor were they a vulnerable group in danger of being manipulated by pollsters or the media. The three dissenting judges – all from Quebec – argued, however, that the ban was a modest measure of protection for voters against factual misinformation, and lamented the influence exerted by polls in modern electoral campaigns.

In the new *Canada Elections Act*, which came into force on 1 September 2000, section 328 prohibits the transmission to the public of the results of new election surveys during polling day. Originally, the bill would have imposed a 48-hour blackout on election advertising and new opinion polls, but this was reduced, on a motion of amendment from the government during consideration of the bill in the House of Commons, to a prohibition on advertising and new opinion polls until the close of voting on election day itself. This occasioned considerable criticism from the media and others. The new provision is also designed to prohibit exit and entrance polls on election day.

5. Registration of Political Parties

Another issue that has come before the courts in recent years involves the registration of political parties under the *Canada Elections Act*. To be eligible for registration, various requirements must be met. In addition, there are various ongoing requirements. Benefits flow from registration, including the ability to:

- issue tax receipts for contributions;
- receive reimbursement of certain election expenses;
- have candidates identified as belonging to the party on ballots; and
- receive airtime on radio and television.

Amendments to the Act in 1993 resulted in several political parties being de-registered. These provisions were challenged in court by Miguel Figueroa, the leader of the Communist Party of Canada, one of the parties that had been de-registered. He sought a declaration that several provisions of the Act infringed the Charter and therefore were of no force and effect.

In March 1999, Madam Justice Molloy of the Ontario Court held that the requirement that a party must nominate at least 50 candidates in order to be a registered political party in federal elections violated section 3 of the Charter, and could not be saved by section 1. She ordered that the relevant provisions be amended by changing the word "fifty" to the word "two." In light of this determination, it was not necessary to address the issue of party affiliation of candidates on ballots, although the judge did so. The prohibition against identifying on the ballot the party affiliation of candidates who were not endorsed by registered parties was held to infringe section 3 and could not be justified under section 1. The consequences of de-registration of a party – liquidate all assets, pay debts, and remit any balance to the government – was held to infringe sections 2 and 3 of the Charter.

Molloy J. also ruled unconstitutional the section requiring candidates to post a $1,000 deposit – $500 of which is refundable if the candidate complies with the reporting requirements following the election, and $500 of which is refundable if the candidate receives at least 15% of the votes cast – as a limitation on the right to stand for election. The Court decided that the provision could not be justified, and decided that the appropriate remedy would be to leave the deposit requirement in place, but to read in a requirement that the entire amount would be refundable upon compliance with the reporting requirement. This aspect of the decision was not appealed, and was in fact incorporated into the new *Canada Elections Act*.

The Attorney General appealed the findings regarding the number of candidates and the identification of candidates. Justice Doherty, writing for the unanimous Court, held that the purpose underlying the right to stand for election in section 3 of the Charter was effective representation. Political parties enhance effective representation by: structuring voter choice; providing a vehicle for public participation in politics; and giving the voter an opportunity to be involved in the process of choosing the government of the country. Those roles require a significant level of involvement in the electoral process. Some meaningful level of participation is, therefore, properly a condition precedent to eligibility for the benefits available to registered political parties, and the number of candidates is a legitimate means of measuring that participation. Reasonable people may differ on the specific measure or number, but the 50-candidate requirement is within the bounds of reasonableness. The Court also rejected Mr. Figueroa's argument that the 50-candidate requirement infringed sections 15 and 2(d) of the Charter.

6. Listing of Party Affiliation on the Ballot

The Court (in *Figueroa*) also held that the sections of the Act providing that only registered parties may have party affiliation listed on the ballot violate the right to vote in section 3 and are not justifiable limits to that right under section 1. The right to vote contains an informational component, and the listing of party affiliation on the ballot is an important piece of information for voters. The provisions in the Act seek to avoid voters being confused or misled, but it did not follow that because a political party nominates 49 or fewer candidates that the listing of the party affiliation on the ballot will mislead or confuse voters. In fact, for smaller parties, it may provide the only information that the voter has about that particular candidate. These provisions were therefore declared invalid, but the declaration was suspended for six months to allow Parliament a reasonable opportunity to amend the legislation.

In response to this judgement, the government introduced Bill C-9, An Act to amend the Canada Elections Act and the Electoral Boundaries Readjustment Act, on 15 February 2001. It received Royal Assent on 14 June 2001. The basic objective of the bill was to address the decision of the Ontario Court of Appeal regarding the identification of the political affiliation of candidates on election ballots.

Pursuant to the judgement of the Ontario Court of Appeal, Bill C-9 set out a regime for the political affiliation of candidates who do not belong to registered parties to be indicated on the ballot. It introduced a new concept of a "political party," to describe a

grouping or entity that nominates at least 12 candidates; it is to be distinguished from a "registered party," an "eligible party," and a "suspended party." The Act continued to make registration as a party the key to being eligible for the other benefits accruing to parties. The bill allows "political parties" to have the affiliation of their endorsed candidates shown on the ballots. In other words, a political grouping or party can run candidates in an election, and have them identified as such, provided it runs candidates in at least 12 electoral districts. In the case of a by-election, only those parties that had nominated at least 12 candidates in the preceding general election are entitled to have their candidates identified on the ballot. The number 12 was chosen because it is the number used for recognition of parties in the House of Commons.

F. Section 4 and Section 5

Sections 4 and 5 of the *Charter* read as follows:

> 4.(1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.
>
> (2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.
>
> 5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Section 50 of the original *Constitution Act, 1867* contained a similar provision with respect to the federal Parliament. These sections have not been controversial. Some questions have arisen as to how long a government might be able to continue to operate after the five-year life of the Parliament had expired; however, these questions have been only theoretical.

PARLIAMENTARY ACTION

In November 1989, the Royal Commission on Electoral Reform and Party Financing was established. On 13 February 1992, the Commission tabled its four-volume report, *Reforming*

Electoral Democracy, which included specific legislative proposals. The Commission concluded that the electoral system should be governed by six major objectives:

- securing the democratic rights of voters;
- enhancing access to elected office;
- promoting the equality and efficacy of the vote;
- strengthening political parties as primary political organizations;
- promoting fairness in the electoral process; and
- enhancing public confidence in the integrity of the electoral process.

On 14 February 1992, the House of Commons appointed a special eight-member committee to undertake a comprehensive review of the Royal Commission report, and to recommend changes in the *Canada Elections Act*. Because of the magnitude of this task, the Special Committee on Electoral Reform decided to divide its work into phases.

The *first phase* was to deal with those changes, mainly administrative, for whose implementation the Chief Electoral Officer needed as much lead time as possible before the next election. On 11 December 1992, the Committee tabled its report on this phase, including draft legislation to implement its recommendation. Subsequently, the government introduced Bill C-114 (based on this report) which received Royal Assent on 6 May 1993. It dealt primarily with:

- the activities undertaken by Elections Canada prior to and on election day;
- changes to make it easier for Canadians to have their names put on the list of electors; and
- changes to make voting itself more accessible.

In the *second phase* of its work, the Committee concentrated on other matters that it considered should also be in force before the next election, and which the Chief Electoral Officer could implement quickly. They included the areas of broadcasting, disclosure of information in public opinion polls, third-party advertising, decriminalization of certain election offences, and election financing. The second phase also examined methods for facilitating the candidature of disabled persons and those caring for young children. Although the Committee tabled its second phase report, Parliament prorogued before further action could be taken.

In the *third phase* of its study, the Committee had intended to deal with all other matters in the Report of the Royal Commission on Electoral Reform and Party Financing, including:

- the assignment of seats to provinces;

- the drawing of constituency boundaries;
- measures to increase the number of female candidates;
- the establishment of Aboriginal constituencies; and
- the question of establishing a Canada Elections Commission appointed by the House of Commons, or a comparable mechanism.

In March 1994, the government introduced Bill C-18, an Act to suspend the operation of the Electoral Boundaries Readjustment Act, which would have abolished the 11 electoral boundaries commissions that were in the process of adjusting the redistribution and boundaries of seats based on the 1991 federal census. Although the government argued that its intent was to provide an improved redistribution system, various opposition members in both the House of Commons and the Senate argued that the bill was an unprecedented and unwarranted interference in the decennial electoral redistribution process guaranteed by section 51 of the *Constitution Act, 1867*. Of particular concern was the possibility that, as a result of Bill C-18, the next election might be held on a distribution based on the 1981 census; in this case, the faster-growing provinces would be deprived of the additional seats to which they would otherwise be entitled.

Various amendments to the bill were proposed by the Senate and resulted in a compromise whereby the existing electoral boundaries commissions were suspended until 22 June 1995, rather than being abolished. Bill C-18 (as amended) was given Royal Assent on 15 June 1994. In the meantime, on 19 April 1994, the House of Commons instructed the Standing Committee on Procedure and House Affairs to prepare a bill dealing with the electoral redistribution and readjustment process.

The Committee was asked to include four specific issues in its deliberations:

- the capping or reducing of the number of seats in the House of Commons;
- the adequacy of the existing method of selecting members for the various electoral boundaries commissions;
- the procedures and premises governing the work of electoral boundaries commissions; and
- the involvement of the public and the House of Commons in the work of the commissions.

The Committee reported on 25 November 1994, and included in its report both a draft bill and the dissenting opinion on certain issues expressed by the Reform Party members of the Committee. The Committee reluctantly concluded that it was not feasible to cap or reduce the size of the House of Commons at that time. The Committee recommended, however, that a

parliamentary committee be charged with devising a new formula to reduce or limit the size of the House in the readjustment to be based on the 2001 decennial census. This committee could deal with such complexities as the need for possible constitutional amendments, as well as the extensive political implications.

In mid-February 1995, the government introduced Bill C-69, which was based on the Committee's draft legislation. Bill C-69 contained a significant number of proposed reforms to the redistribution process.

- The Chair of each electoral boundaries commission would continue to be appointed by the Chief Justice of the province and the other two members by the Speaker of the House of Commons. However, the Speaker would publicize the impending appointments, solicit applications, and consult widely, allowing for a more transparent process. The Speaker's two appointments could be vetoed by the House of Commons.

- To minimize the effects of population shifts, a redistribution of seats *within* provinces would take place after each quinquennial (five-yearly) census. This redistribution would not affect the constitutional provisions respecting the redistribution of seats *between* provinces every ten years (2001, 2011, etc.), and would take place only in provinces where population shifts had caused more than 10% of the province's constituencies to vary more than 25% from the provincial quotient. At the other end of the spectrum, even decennial redistributions would not be necessary in provinces where the overall number of federal ridings had not changed, and where all the existing ridings had a population within 25% of the provincial quotient.

- Commissions would be required to provide more information to the public about the redistribution process, and at an earlier stage. To assist public intervenors, each commission would produce three sets of plans and maps showing different redistribution schemes and indicating and justifying its preferred option.

- Bill C-69 sets out proposals for more detailed criteria to be used by the commissions in drawing electoral maps, including community of interest (which is more clearly defined), manageable geographic size, and the probability of future population growth.

- All ridings would have to be within 25% of the provincial quotient except in "extraordinary" circumstances, as is now the case. However, such constituencies would have to be geographically isolated from the rest of the province, or not readily accessible, and the commission would have to provide written reasons for creating them.

- If a commission amended its proposal after the public hearing so as to affect more than one-quarter of the total population, a second public hearing would be required.

- Finally, the current provision that each commission's proposals be tabled in the House of Commons for debate and study by a committee would be eliminated on the basis that Members of Parliament should participate in the public hearings like other Canadians.

(More detailed information on Bill C-69 can be found in Legislative Summary LS-216E, *Bill C-69: Electoral Boundaries Readjustment Act*, prepared by the Parliamentary Research Branch, Library of Parliament.)

The Senate, following the recommendations of the Standing Committee on Legal and Constitutional Affairs, made seven amendments to Bill C-69, the most significant of which would lower from 25% to 15% the maximum deviation from the provincial quotient allowed to any riding. This is consistent with the recommendations of the Lortie Commission and with the position of the Reform Party in the House of Commons, even though the Supreme Court of Canada has specifically stated that the 25% maximum deviation is constitutional.

On 20 June 1995, the House of Commons accepted one relatively minor and technical amendment by the Senate, but rejected the other amendments. On 22 June 1995, the suspension of the existing readjustment process expired, and the Chief Electoral Officer transmitted copies of the reports of the electoral boundaries commissions for the ten provinces and the Northwest Territories to the Speaker, who tabled them in the House of Commons. On 8 January 1996, the Governor General, pursuant to an Order in Council, proclaimed the draft representation order outlining the new electoral boundaries to be in force on the first dissolution of Parliament at least one year after the proclamation. Bill C-69 died, however, when Parliament prorogued on 2 February 1996.

In October 1996, Parliament enacted Bill C-243, a Private Member's bill, which increased the requirements that must be met for registered political parties to be reimbursed a certain percentage of their election expenses: under the bill, in order to be eligible for reimbursement, a party would have to obtain either 2% of the votes cast in an election or 5% of the votes cast in those ridings where the party had endorsed candidates (see Legislative Summary LS-242E, *Bill C-243: An Act to Amend the Canada Elections Act (Reimbursement of Election Expenses)*, prepared by the Parliamentary Research Branch, Library of Parliament).

Bill C-63 was passed by Parliament in December 1996. It amended the *Canada Elections Act* to provide for the establishment of a permanent automated register or list of voters for federal elections, by-elections and referendums, thereby eliminating the need for door-to-door enumeration. This change makes it possible to reduce the minimum election period from 47 to 36 days. In addition, the bill changed the hours of voting across the country in an effort to ensure that all results would be available at roughly the same time: under the amendments, the hours of voting in the six different time zones across Canada will be staggered (see Legislative

Summary LS-275E, *Bill C-63: An Act to Amend the Canada Elections Act, the Parliament of Canada Act and the Referendum Act (Permanent Voters' Register)*, prepared by the Parliamentary Research Branch, Library of Parliament).

At the beginning of the 36th Parliament, the House of Commons Standing Committee on Procedure and House Affairs undertook a comprehensive review of the Canadian electoral system and the *Canada Elections Act*. The Committee's report, tabled in the House in June 1998, was intended to form the basis of future legislative amendments to be brought in by the government. In its report, the Committee reviewed most of the recommendations made by:

- the Royal Commission on Electoral Reform and Party Financing in its 1989 report;
- the 1992-1993 House of Commons Special Committee on Electoral Reform;
- the Chief Electoral Officer in his 1996 and 1997 reports to Parliament; and
- various political parties, Members of Parliament and other witnesses.

On 7 June 1999, the government introduced Bill C-83, which would replace the *Canada Elections Act*. This was reintroduced as Bill C-2 at the beginning of the second session of the 36th Parliament, on 14 October 1999 (see Legislative Summary LS-343E, *Bill C-2: The Canada Elections Act*, prepared by the Parliamentary Research Branch, Library of Parliament). The bill was intended to modernize the Act and to address administrative problems that had arisen since it was introduced almost 30 years previously. The bill also responded to court decisions on third-party spending and blackouts. It received Royal Assent on 31 May 2000, and came into force on 1 September 2000.

On 15 February 2001, the government introduced Bill C-9, An Act to amend the Canada Elections Act and the Electoral Boundaries Readjustment Act. The bill was designed to respond to the decision of the Ontario Court of Appeal in *Figueroa* v. *Canada (Attorney General)* regarding the identification of the political affiliation of candidates on election ballots. It also set out a number of technical and administrative changes and corrected certain drafting errors in the new *Canada Elections Act*, which had been passed in 2000. The bill received Royal Assent on 14 June 2001.

CHRONOLOGY

February 1981 -	The House of Commons Special Committee on the Disabled and Handicapped made several recommendations with respect to disabled voters.
17 April 1982 -	The *Canadian Charter of Rights and Freedoms* came into effect.
17 August 1983 -	The British Columbia Supreme Court held that casting a ballot under prison conditions did not deny the right to vote and was demonstrably justified in a democracy (*Jolivet*).
25 May 1984 -	The British Columbia Court of Appeal held that a person on probation should not be denied the right to vote (*Reynolds*).
31 August 1984 -	The Federal Court of Appeal stated that a full trial was necessary to decide whether denying prisoners the right to vote was demonstrably justified, and refused to grant an interlocutory mandatory injunction allowing the applicant prisoner to vote.
4 September 1984 -	First federal election after section 3 came into effect.
October 1985 -	The Sub-Committee on Equality Rights of the Standing Committee on Justice and Legal Affairs recommended in its report, *Equality for All*, that mentally disabled people have the same right to be enumerated and to vote as all other Canadians.
10 June 1986 -	The Nova Scotia Supreme Court found that the *Nova Scotia Civil Service Act* unnecessarily denied a public service worker the right to stand as a candidate (*Fraser*).
5 January 1987 -	The Nova Scotia Supreme Court found that the legislature could not unreasonably limit the right of individuals to stand for membership (*MacLean*).
7 November 1988 -	An Ontario High Court judge stated that disqualifying an inmate from voting in a federal election is justified under section 1, in light of the history and effect of the right to vote, and the practice in other free and democratic societies (*Sauvé*).
18 November 1988 -	The Manitoba Court of Appeal held that the disqualification of inmates from voting in a federal election is justified under section 1 (*Badger*).
28 November 1988 -	Second federal election affected by the Charter.

1988 - An Ontario High Court judge stated that disqualifying inmates from voting in a provincial election cannot be justified, in part because of voting's rehabilitative potential (*Grondin*).

1988 - A Federal Court judge held that the provisions disqualifying persons from voting because of mental disease are too broad to be justified by section 1 (*Canadian Disability Rights Council*).

18 April 1989 - The British Columbia Supreme Court held that relatively equal voting power is fundamental to the right to vote, and electoral boundaries must reflect this fact (*Dixon*).

15 November 1989 - The government appointed a five-person Royal Commission on Electoral Reform and Party Financing, chaired by Pierre Lortie.

6 March 1991 - The Saskatchewan Court of Appeal ruled that the discrepancies in the size of voter populations in various constituencies infringed section 3 of the Charter, as did the distinction between urban and rural constituencies in the *Electoral Boundaries Commission Act*.

6 June 1991 - The Supreme Court of Canada reversed the ruling of the Saskatchewan Court of Appeal, and found the Saskatchewan constituency boundaries to be valid.

1991 - The Supreme Court of Canada struck down the legislative provision barring all political activity by public service workers (*Osborne*).

13 February 1992 - The Royal Commission on Electoral Reform and Party Financing tabled its report in the House of Commons.

14 February 1992 - The House of Commons appointed a special eight-member committee to undertake a comprehensive review of the Royal Commission's report.

11 December 1992 - The Special Committee on Electoral Reform tabled its "phase one" report.

6 May 1993 - Bill C-114, which made amendments to the *Canada Elections Act*, received Royal Assent.

19 April 1994 - The House of Commons adopted a motion directing the Standing Committee on Procedure and House Affairs to study and bring in a bill regarding electoral boundaries readjustment. The Committee's Fifty-first Report, containing draft legislation, was concurred in by the House on 14 February 1995.

16 February 1995 - Bill C-69, the Electoral Boundaries Readjustment Act, was tabled and received first reading in the House of Commons. It was essentially the same as the bill that had been proposed by the Standing Committee on Procedure and House Affairs in its report. The bill was passed by the House, but the Senate proposed amendments, most of which the House was not prepared to accept. The bill died on the *Order Paper* when Parliament was prorogued on 2 February 1996.

2 February 1996 - Bill C-69 died on the *Order Paper* when Parliament was prorogued.

October 1996 - Parliament enacted Bill C-243.

18 December 1996 - Bill C-63, which provided for the establishment of a permanent Registry of Electors and revised hours of voting, received Royal Assent.

June 1998 - Bill C-411, which made a number of technical amendments to the *Canada Elections Act*, received Royal Assent.

1998 - The House of Commons Standing Committee on Procedure and House Affairs tabled its Thirty-fifth Report containing recommendations for legislative changes to the *Canada Elections Act*.

7 June 1999 - Bill C-83, a new Canada Elections Act, was introduced and received first reading in the House of Commons. This bill died on the *Order Paper* when the first session of the 36th Parliament was prorogued.

14 October 1999 - Bill C-2, a new Canada Elections Act, was introduced and received first reading in the House of Commons. It was virtually identical to Bill C-83 in the previous session.

31 May 2000 - Bill C-2 received Royal Assent.

1 September 2000 - The new *Canada Elections Act* (Bill C-2) is proclaimed in force by the Chief Electoral Officer.

14 June 2001 - Bill C-9 received Royal Assent. This bill responds, in part, to the *Figueroa* decision.

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