Guest Editorial

Democracy in the 21st Century: A Charter Challenge to Force Electoral Reform

Despite their intrinsically political nature, election laws which infringe the *Charter* are as susceptible to court review and remedy as any other type of statute. Recent events in several provinces and in Ottawa indicate that the executive and legislative branches of government are reluctant to proceed with meaningful electoral reform. The time has come for advocates of change to take their chances with the judicial branch.

The most effective attack on the Single Member Plurality (SMP) system would be to challenge sections 68(1) and 313(1) of the *Canada Election Act.* Section 68(1) enshrines the single-member aspect of our electoral system, which is reinforced by the requirement in s.313(1) that only one candidate can be elected in a given constituency. The latter section also prescribes the plurality formula for determining the winner. Because these are the two defining characteristics of SMP, those sections are the logical targets of a *Charter* challenge.

The strongest legal argument is that SMP infringes the guarantee of democratic rights in s.3 of the *Charter*. The Supreme Court of Canada has identified two purposes of the right to vote: (a) the right of each citizen to "effective representation" in the legislature, and (b) "the right of each citizen to play a meaningful role in the electoral process".

The guarantee of "effective representation" means the right to have "a voice in the deliberations of government" and "the right to bring one's grievances and concerns to the attention of one's government representative" – in other words, to have an elected "ombudsman" responsible for assisting constituents in their dealings with the federal government.

"Effective representation" entails "relative parity of voting power": "A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted." Where the unequal weighting of votes is not required to ensure better government, "dilution of one citizen's vote as compared with another's should not be countenanced."

The guarantee of "a meaningful role in the selection of elected representatives" benefits both the individual citizen and the electorate as a whole. The process of collectively choosing the legislature "enhance[s] the quality of democracy in this country" and ensures that public policy "is sensitive to the needs and interests of a broad range of citizens." This purpose also animates the second right guaranteed by s.3: "The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses."

The contextual approach explains why the guarantees in s.3, which refer only to individual voters and candidates, have also been applied to political parties. Parties provide the context within which most Canadians exercise their rights to vote and to run for public office. Consequently, a successful *Charter* challenge to SMP must go beyond the infringement of individual rights, and target the ways in which our electoral system benefits some political parties while harming others.

We know that SMP benefits larger and more regionally-concentrated parties at the expense of smaller parties and those with regionally-dispersed support. In so doing, it infringes the rights of individual voters in three ways:

- It violates the guarantee of "effective representation" by denying the supporters of some parties "a voice in the deliberations of government".
- It violates the requirement of "relative voter parity". For example, "In the 1993 election, it took 34.36 times as many PC voters as Liberal voters to elect a candidate."
- It deters some voters from casting ballots for their preferred party or candidate, because they know that their vote will not affect the outcome of the election.

The infringements of s.3 caused by SMP are not confined to individual voters and candidates. A law which tilts the playing field in favour of some political parties at the expense of others – deliberately or other-

wise - will also be found to infringe s.3. The majority ruling in *Figueroa* established that political parties, regardless of their size or vote share, "act as both a vehicle and outlet for the meaningful participation of individual citizens in the electoral process."

It follows that a law which penalizes smaller parties violates s.3, because "it undermines both the capacity of individual citizens to influence policy by introducing ideas and opinions into the public discourse and debate through participation in the electoral process, and the capacity of individual citizens to exercise their right to vote in a manner that accurately reflects their preferences."

A challenge under s.15(1) – the guarantee of equality rights – is also possible. The jurisprudence on equality rights, and the test for proving an infringement, are too lengthy and complex to be captured in a brief summary. There are, however, two main points:

First, it is possible to demonstrate, on a balance of probabilities, that SMP makes it more difficult for female candidates and would-be candidates (relative to their male counterparts) to secure election to the House of Commons. Therefore, it is possible to argue that women suffer from systemic discrimination under SMP. Moreover, the Supreme Court has ruled that the interpretation of the *Charter* must be consistent with Canada's international human rights obligations. The Convention on the Elimination of All Forms of Discrimination Against Women, require member states to abolish all legal barriers to women's political participation on equal terms with men.

Secondly, it is more difficult, but still possible, to prove that supporters of smaller parties (e.g. the Greens) and regionally-dispersed parties suffer discrimination relative to supporters of larger parties (e.g. the Liberals) and regionally-concentrated parties (e.g. the BQ).

When a government seeks to justify a *Charter* infringement, it must identify one or more "pressing and substantial" objectives which are served by the impugned law. This requirement has proved tricky in previous challenges. Identifying the objective of SMP will be especially problematic for the federal Department of Justice (DOJ), because our electoral system appears to have been inherited from Britain without any formal debate – and hence, without a clear statement of its intended purpose.

A recent study by the Institute for Democratic Education and Assistance (IDEA) lists nine benefits which are commonly attributed to SMP. All but two are empirically unfounded, at least in Canada. The exceptions are "promoting a link between constituents and their representatives", and being "simple to use and understand". Only the former is likely to qualify as "pressing and substantial" since most MPs perceive constituency "casework" as the most important part of their job.

The central question at this stage of a challenge to SMP can be formulated as follows: do the harmful effects of SMP – including but not limited to the *Charter* infringements – outweigh its beneficial effects on Canadian politics and government? If the answer is yes, the challenge succeeds and a remedy must be imposed.

In assessing the "objectives" attributed to SMP most of the "beneficial effects" often associated with that system have little if any empirical basis. At this stage, the Government is likely to refer to one particular passage from the majority ruling in the Saskatchewan Boundaries case: "only those deviations [from relative voter parity] should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed." The claim that the denial of "effective representation" is justified by the provision of "better government" can be rebutted in any number of ways, depending on the interpretation of the latter phrase.

If "better government" is taken to mean more stable and long-lasting Cabinets, one could compare the average longevity and stability of coalition governments in Germany, Sweden, and other PR countries to the average longevity of majority and minority governments in Canada (both national and provincial).

If "better government" means that the Cabinet is held directly accountable to the voters, the New Zealand experience suggests that MMP performs just about as well on this score as SMP – once allowances are made for the necessary political adjustments to a new system.

If "better government" means the creation of public policy which reflects the priorities and preferences of a majority of electors, PR – more precisely, the coalition governments which it often requires – outperforms SMP.

If a court finds that an impugned law infringes the *Charter*, and the infringements cannot be justified under s.1, it will impose a remedy.

In a case involving election law, the most likely remedy is a suspended nullification. The court would declare the impugned provisions to be unconstitutional, and set a date on which that declaration would take effect (likely between twelve and twenty-four months from the date of the ruling). If Parliament did not remedy the infringement before the deadline, the provisions would lapse.

A blueprint for electoral reform already exists. The Law Commission of Canada has completed an extensive report on electoral systems, which makes any further investigation (e.g. a Royal Commission) unnecessary. In June 2005, the House of Commons Standing Committee on Procedure and House Affairs advised the former Liberal Government to establish a two-track procedure for achieving electoral reform: a Special Committee of the House of Commons combined with a "citizens' consultation group". The October 2005 "Government Response" endorsed the substance of the recommendations, although it rejected the Committee's demand that the two tracks be completed by early 2006. (In the event, of course, the process would have been disrupted by the general election earlier this year.) In the same document, the Liberal Government claimed to have taken steps to establish "a deliberative citizen consultation process". I am unaware of any evidence to substantiate that claim.

In its recent Throne Speech, the new Conservative Government promised to "build on" the Committee's report. If a *Charter* challenge to SMP were to succeed to any degree, even in a lower court, that would almost certainly provide the impetus needed to force the government to honour the Throne Speech promise. In the absence of such an impetus, electoral reform is unlikely at best.

Heather MacIvor is Professor of Political Science at the University of Windsor.