Letter to the Editor

Keep Democracy out of Court

Sir:

Heather MacIvor raises some interesting points in her guest editorial in the autumn edition of the *Canadian Parliamentary Review*. Her main point is that electoral reform could be achieved by using s. 3 of the *Charter* to challenge some of the provisions of the *Canada Elections Act*. Unfortunately, the idea itself is plagued with problems and is based on a misunderstanding of what representation means in Canada.

First and foremost, while MacIvor makes an interesting argument on the constitutionality of Single Member Plurality (SMP) and the legislation that puts that system into practice, she fails to address the foundations of Canadian government established in the *Constitution Act, 1867*. The spirit of SMP is embodied in the preamble of the constitution which states that Canada's system of government is based on that of Britain. This was reinforced by Justice McLachlin in the Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158 reference where she suggests that the electoral system is part of the conventions we inherited from Britain. In addition, s. 40 of the *Constitution Act, 1867* contains an indirect reference to the method of election. While the determination of the size and number of electoral districts has been delegated to a commission under the *Electoral Boundaries Readjustment Act, 1985*, and the *Constitution Act, 1985 (Representation)* created new rules to be applied in the determination of these boundaries, neither touched the basic premise of one member per electoral district. The essential point here is that the constitution appears to only consider one person per riding as legitimate representation, and the Court is not likely to interpret a conflict between the *Charter* and any other part of the constitution.

This point is reinforced in prior interpretations of s. 3 of the *Charter*. In the Provincial Electoral Boundaries case, Justice McLachlin states: "As will be seen, there is little in the history or philosophy of Canadian democracy that suggests that the framers of the *Charter* in enacting s. 3 had as their ultimate goal the attainment of voter parity. That purpose would have represented a rejection of the existing system of electoral representation in this country. The circumstances leading to the adoption of the *Charter* negate any intention to reject existing democratic institutions." Justice McLachlin clearly indicates that s. 3 of the *Charter* cannot be used to reject the present electoral system. In other words, the electoral system, much like the other elements of the constitution, does not seem to conflict with the *Charter*.

In arguing her case, MacIvor's definition of fairness and representation should conform to how fairness and representation are envisioned by the electoral system and not the definition applied by MacIvor. Her definition of representation and fairness hinges on three arguments. The first is that small parties have little chance of getting elected. This is simply not true. If MacIvor suggested that small parties with little appeal have a hard time getting elected, I would agree and it should be thus. Small parties with significant appeal in constituencies do elect members. The Progressives, Social Credit, the Reform Party, and the Bloc Quebecois to name some prominent ones, all managed to do it. They were all small, nascent parties at one time, but they had appeal and so they won, which shows that small parties with wide appeal within a constituency have little problem getting elected. The reality is that big parties with little appeal within a constituency have a hard time getting elected as well. This applies to the Liberals, Conservatives, and the NDP equally. The Conservatives have problems electing members in Toronto, the Liberals in Alberta, and the NDP in Quebec. Contrary to what MacIvor thinks, this should demonstrate the fairness of the system. If candidates and political parties have appeal, they get elected. If they are not interesting, they really do not deserve to represent the constituents of a particular riding

MacIvor's second argument surrounds the issue of "relative voter parity." Her argument states that it took more than 30 times the number of PC voters to elect a PC member compared to the Liberals in 1993. This is faulty because it uses a definition of representation that is typical of proportional representation systems rather than SMP. Again, the system's representative nature should be based on the way it defines representation (i.e. plurality of

votes within an electoral district) and not the way MacIvor does. Even still, why do we continually blame the electoral system for the inability of the PC Party to win more seats? Could we not hypothesize that the reason why the PCs had problems electing more than two members in 1993 had something to do with the fact that they had a hard time recruiting good candidates, a large number of incumbent MPs choose not to run in that election, campaign workers in the ridings chose not to volunteer, voters lost their sympathy for the party, and the fact that Kim Campbell ran a horrible campaign? Surely, elements of all of these were present in 1993, yet the major thesis of the PC demise continues to be the electoral system.

Her final argument is that SMP is a deterrent to voting because a person's vote might not affect the outcome of the election. This argument, however, can be made about all electoral systems, not just SMP. One person's vote will not significantly alter the results of any federal election. Yet, the main point is that every vote in every election does count. Even though someone may have voted for another candidate, the candidate who won still represents every person in the constituency, including those who voted for somebody else or who failed to vote at all. We cannot ignore the possibility that MPs, who may have won by narrow margins or are in danger of losing their seat in the next election, are not affected by the voting results. MPs must be mindful of local concerns when they make laws in the national interest. The reality is that the MP works hard to keep those who voted for him or her happy while trying to do a decent enough job to gain the vote of those who opposed the member's candidacy during the last election. This compels the MP to be representative according to SMP, and it is the way representation would be judged in court.

It is quite clear that if the system is to be judged as being unfair or unrepresentative through the use of the *Charter*, then it should be judged based on what SMP considers fair and representative. Put another way, we cannot simply throw away the electoral system because MacIvor's definition of fair and representative is at odds with the system in place. As such, Justice McLachlin states: "Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative." This goes along with the judgement in *Dixon v. B.C. (A.G.), [1989] 4 W.W.R. 393* which suggests that the justices understand that a member of parliament has a legislative role and an ombudsman role. In essence, MPs have a role in the deliberations of government, and they have to listen to the grievances of their constituents too. Everybody has a right to vote for such a representative. So long as the vote is not unduly diluted – which is not the case with SMP, according to the judges – then everyone can participate in the deliberations of government and air any grievances one might have.

None of this has focused on the even larger question of the desirability of a court challenge. The above has focused on how the Court might consider a challenge to the electoral system. However, should the Courts be used in this manner? While a clear case of democratic rights infringement may warrant a court intervention, this response has argued that such a case has many holes. If MacIvor's desire to use the courts for electoral reform is based on the fact that she does not like the current system, then she should be making her case in the court of public opinion. After all, this is the people's system. It is the people who have the right to accept it or change it, and they are the ones that should be persuaded if we want something different.

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