



Canadian Study of Parliament Group

National Essay Competition Winner – 2012

AN EPHIPHANY FOR CANADIAN DEMOCRACY
“The effects of the Figueroa Case on Canadian Democracy”

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The Canadian Study of Parliament Group (CSPG), as part of its efforts to foster knowledge and understanding of Canadian parliamentary institutions, is sponsoring the annual National Essay Competition. College and university undergraduate and graduate students in any discipline across Canada are invited to submit essays on any subject matter broadly related to Parliament, legislatures or legislators. The winning essays are made available free of charge, in both official languages, on the CSPG Web site. The views and opinions contained in these papers are those of the authors and are not necessarily reflective of those of the CSPG.

Essay

Modern democracy remains characterized by the diversity with which its ideal procedures, structures, and goals are defined. Historically, Canadian democracy has revolved around a strong central government, a plurality electoral system, and cohesive national parties. However, these founding conceptions and institutions of Canadian democracy are increasingly conflicting with contemporary views of democracy founded in a definitive adherence to liberalism and individual rights.

In June 2003, the Supreme Court of Canada rendered a decision in the case of Figueroa versus Canada. Miguel Figueroa, leader of the Communist Party of Canada, went to court to fight clauses in Sections 24 and 28 of the Canada Elections Act that he argued were unconstitutional. These sections defined a registered party as one that nominated a minimum of fifty candidates for a federal election. The registered party label provided several benefits including government funding for election campaigns and the right for candidates to have their party affiliation printed on the ballot.ⁱ Figueroa argued that these conditions came into conflict with the democratic rights guaranteed within the Canadian Charter of Rights and Freedoms. The Supreme Court ruled in favour of Figueroa saying that the law “does great harm by discriminating against fringe parties and demeaning their contributions in the political arena.”ⁱⁱ

This decision has crucial implications for Canada’s system of political parties, election financing, definitions of representation, electoral reform and the issue of balancing parliamentary law making and judiciary review. It will bring Canadian parliament to an important impasse concerning the way parliamentary democracy functions in Canada. This impasse revolves around an increasing division between support of unity and diversity. It will be argued that Canadian political parties have evolved to support Canadian unity but the Figueroa legislation works to promote parties that support diversity of views. The legislation also relates to party financing and how campaign finance laws can be manipulated to support either large unity driven parties or small parties with a diverse set of interests but rarely both. Finally, the legislation presents important challenges between maintaining the status quo and electoral reform in the direction of proportional representation. Arguably, all of these issues pose an important challenge to Canadian Parliament as it works within this framework of opposing diversity and unity. The struggle of Parliament will be to negotiate this increasing incompatibility of unity and diversity in a way that supports traditional Canadian conceptions of democracy or introduces a series of expansive reform policies.

Political parties fulfil a significant function in a free democratic society by fostering competition. Expanding on this idea, Frank Underhill indicates that political parties create a framework in which issues are expressed allowing for the organization of voters and the development of public policy.ⁱⁱⁱ Historically, two large national parties, the Liberals and the Conservatives, have struggled for power in Canada. In the past decade, Canada's political system has been regionally fragmented among five parties. The arguments used in the Figueroa case can be distinguished through the support they provide for traditional and contemporary views of political parties.

Representatives of the Federal Government in the Figueroa case contended that the Canadian political system encourages the development of parties with a broad source of support.^{iv} These parties promote the aggregation of political will and are an important source of cohesion. This argument is made in the spirit of the brokerage theory of political parties: parties act as mediators, they attempt to integrate the socio-cultural disparities of gender, ethnicity, religion, and region that exist in Canada.^v According to Thorburn, these parties build programs to appeal to society's majority: a task that requires the building of cohesion by being accountable to various socio-cultural groups.^{vi}

Canada's two long-standing parties epitomize the importance of universal appeal as a goal of political parties. The first subsection of the Constitution of the Liberal Party describes the party's role as seeking "to achieve a common ground of understanding among the people of the different provinces and territories of Canada."^{vii} Similarly, the constitution of the Progressive Conservative Party declares that the party exists to "build a national coalition, embracing our differences and respecting our traditions."^{viii} These statements represent a brokerage system in which parties strive to enhance national unity.

In contrast, the lawyers for Figueroa argued that all political parties, especially marginal and regional ones, are capable of introducing unique interests and concerns into political discourse.^{ix} Here, marginal parties can refer to political parties that do not constitute a serious chance of obtaining government. More specifically, this can relate to the parties effected by the registered party status examined in the Figueroa case. This creates an arena of competing political ideas. Although the ideas advocated by marginal parties are rarely adopted by mainstream parties, they can emphasize a specific issue or goal, such as the Green Party's attempts to enhance the prominence of the Global Green movement, or lie in the fringes of the political spectrum like such as the Leninist vision of Marxism promoted by Figueroa's

Communist Party.^x Clearly, marginal parties can add unique perspectives to the political process. In the arena of marginal parties, political parties developed along linguistic, regional, ethnic, and class divisions would represent Canadian socio-cultural diversity. Aggregating political will would be replaced by the representation of specific socio-cultural interests.

These opposing conceptions of Canadian political parties are incompatible especially in the context of bilingualism, regionalism and multiculturalism. Brokerage parties promote cohesion, and although not historically perfect, the system has maintained national unity in the face of Canada's increasing diversity. However, as will be seen, promoting national parties punishes marginal ones. Conversely, events such as the Figueroa decision increase marginal party power at the expense of national parties. Most Canadians belong to a minority in some regard and enhancing marginal party power provides the conditions for representation on a regional, ethnic or linguistic and not a national basis. Thus, concerns for unity are replaced by concerns for the representation of diverse ideas. It appears that these two values, unity and diversity, are incompatible due to the types of political parties required to promote them and the procedures required to promote those political parties.

In this age of political contributions by corporations and expensive media centred campaigns, electoral financing is critical. The registered party status judged unconstitutional in the Figueroa case provided financial benefits including the right to issue tax receipts for donations and the right to transfer unused government election funds into the party purse.^{xi} The federal Attorney General argued that the fifty candidate threshold ensures the integrity of electoral financing by preventing the abuse of the system by parties that have no intention or ability to form a government.^{xii} This argument relies on defining elections as primarily the process of selecting governments. In this view, the public purse should not fund parties that are primarily focused on the promotion of narrowly defined interests. This prevents the use of public funds for the promotion of ideas that may only represent a tiny majority of the population. In this way, financial accountability is ensured.

Figueroa's representatives underscored the importance of elections as based on the competition of ideas. They argued that the benefits given to registered parties at public expense enhanced the electoral success of some parties and created an uneven playing field. Figueroa argued that governments should fund elections as stages for the competition of ideals and not only for selecting a government from a set of limited choices.^{xiii} Reducing the minimum requirements for government funding could open the door to parties spending the

public monies to promote special interests while showering large parties with government financing works to eliminate smaller parties in the expensive realm of electoral campaigning. It becomes apparent that public financing can be structured to favour either large parties who are able to form governments or marginal parties representing diverse perspectives but not both due to limited economic flexibility and contradictory views of the government's role in election financing.

The definition of representation is a feature of all modern democracies and it is a critical issue in Canada. In the Figueroa case it was highlighted by sharply differing conceptions. Representation is closely tied to the idea of meaningful participation in the democratic process: the right protected in Section Three of the Charter of Rights and Freedoms. As outlined in the Figueroa decision, meaningful participation results from the effective representation of individuals.

On the government side of the case, effective representation referred to the ability of an individual voter to be actively involved in the selection of a government.^{xiv} A vote for a party that has no intention of forming a government is thus not considered an example of effective representation in the electoral system. This relates to the notion of individual representation in which voters are represented by a single individual whom they deem qualified to be involved in a strong majority government.

Conversely, Figueroa's representatives and the Supreme Court viewed effective representation as the right for each citizen to be represented in democracy on an individual basis.^{xv} This does not involve conferring political support onto those deemed qualified to govern but instead closely correlates to direct participation in democracy through representatives with interests and values common to those who voted for them. Such an argument revolves around agency or mirror views of representation in which government representatives are selected to represent the ideas, values and even socio-cultural backgrounds of the voters who supported them. These conceptions of representation come into conflict in two senses. First, they promote a radical differences in the socio-cultural complexions of political life but more importantly they are incompatible because of the electoral system required to achieve each type of representation.

The importance of an electoral system that supports a functioning democracy can not be overstated. Munroe Eagles suggests that elections "are the most frequent point of contact with the political system" for Canada's citizens. They provide the stage for selecting governments,

influencing policy, and punishing poor legislative performance.^{xvi} Electoral systems fall into two general categories: single member plurality and proportional representation which were advocated by opposing sides in the Figueroa case.

Government representatives argued that the electoral system should be geared to producing a viable outcome for a system of responsible government.^{xvii} A system that involves the election of a government with support on a national basis. This reflects the ideals of stable and efficient government, which closely relate to the results produced by a traditional first past-the-post plurality system. Stable government has been a hallmark of Canadian democracy. As alluded to by Massicotte, Canadians have elected six straight majority governments, and only seven governments have held power in the past thirty years. This shows a historical connection between stable, long standing Canadian governments and the first past the post system used to elect them. Plurality systems emphasize stability and efficiency by over rewarding the most popular party in elections.^{xviii} Thus, decreasing the chances of minority governments, political fragmentation and deadlock. Historically speaking, Forsey suggests Canadians perceive minority government as weak and variant.^{xix} More recently, Massicotte and Eagles argue that calls for electoral reform arise mostly from political observers and academics but that the general populace has little interest in.^{xx} Therefore, valuing stable government reflects an underlying societal attraction to political inertia. This underlying value, the government argued, should be represented in electoral institutions and no electoral system is promotes stable government more than single member plurality.

The obvious alternative to this traditional system is to introduce aspects of proportional representation. The strengthening of marginal parties through the Figueroa decision can be regarded as an important first step in this direction. Proportional representation is closely associated with increased individual based representation. In a recent essay, Massicotte outlined some of the possible impacts of proportional representation on Canadian democracy^{xxi}. On a party level, he claimed that proportional representation would directly reflect the popular vote, benefiting parties with diffuse support such as the Progressive Conservatives and New Democrats and fringe parties such as the Green Party which would have a much greater chance of gaining seats in Parliament. Representation would also improve on an individual basis with an increased number of women and visible minorities elected to Parliament. However, this increased representation cannot be separated from another consequence of proportional

representation: the prominence of minority and coalition governments, less durable cabinets, and less powerful Prime ministers. If proportional representation had been employed in the 1988, 1993 or 1997 federal elections, no party would have captured a majority of the seats requiring the forming of coalitions among several parties to maintain government confidence.^{xxii} Proponents of proportional representation argue that the co operation and compromises that coalition governments require is at the heart of democracy.^{Xxiii}

Both plurality and proportional representation systems offer important benefits and have crucial detractions. By attempting to strengthen marginal parties, the Figueroa case makes an important step towards electoral reform because strengthened parties will inevitably make calls for greater political involvement and parliamentary representation. This is where the impact of the Figueroa case on Canadian democracy is apparent. Single member plurality is a system that produces stability while sacrificing the most inclusive representation possible. Proportional representation values more direct representation, which detracts from intrinsic stability. Thus, it is apparent that stability and representation, although both important goals, are antithetical. The Figueroa case suggests Canada is at an important impasse: the nation must decide to fully support electoral reform for greater representation or to assert government stability as the utmost goal and thus defend the status quo.

The road to electoral reform initiated by the Figueroa case is a dangerous one. It lies at the heart of the issue of balancing parliamentary supremacy with judicial review especially after the changed political landscape produced by the Charter of Rights and Freedoms. Section three of the Charter, which was deemed to have been violated in the Figueroa decision, provides a very flexible definition of democratic rights, saying that “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.”^{xxiv}

From these words, the Court constructed a contextual definition of this right and passed judgement on legislation passed in Parliament. Despite deeming the registered party law unconstitutional, several Supreme Court Justices voiced concern that “the court risked unduly expanding the scope of judicial review of the design of the electoral system by the suggestion that the motive behind the legislation may be itself illegitimate.”^{xxv} Thus, the issue of parliamentary supremacy versus judicial review becomes imposed on the electoral reform process.

Traditionally, Canadian democracy has operated on the Westminster system of Parliament that emphasizes a strong executive and parliamentary supremacy in the forming of legislation. Parliamentary supremacy relates to the idea of state centric analysis originally proposed by Cains which argues that state institutions such as the actions of the executive provide the foundation for legislation.^{xxvi} In this spirit, government's attention to the will and basic rights of the population at large was regulated by the principles of responsible government and regular scheduled elections in which the populace could evaluate the performance of the government. However, the introduction of the Canadian Charter of Rights and Freedoms in 1982 has created a shift in this regulation.

As exemplified by the Figueroa case and expressed by Hiebert, the Charter of Rights and Freedoms and the idea of entrenched rights has given courts the power to review executive and legislative decisions in the context of rights.^{xxvii} This reflects a society-centric argument in which the institutions of Parliament are replaced by independent courts which operate through the initiatives of interest groups and individuals who view their rights as violated.^{xxviii} Figueroa, as leader of the Communist Party, represents such an individual. The purpose of judicial review, to ensure legislation remains consistent with enumerated rights, is undoubtedly important considering the immense universal popularity of the Charter in Canada.

One of the most prominent denunciations of the legalization of politics through the replacement of parliamentary supremacy with judicial power is Michael Mandel. Mandel argues that the non elected and thus non-representative nature of judges along with the fundamental importance of majority rule in democracy make judicial review and consequently the Charter, undemocratic.^{xxix} Conversely, it is argued that procedures of judicial review are in place to support minority rights in the wake of majority rule. A condition that can not necessarily be guaranteed within a strong majority dominated Parliament.

Hiebert argues that Parliament and the courts may both have distinctive purposes in mind but that their co-operation is possible in balancing the review of legislation. She contends that the notwithstanding clause is an example the ability of Parliament to override court decisions. However, she also alludes to a stigmatisation in the general population that is easily associated with a government decision to override judicial findings.^{xxx} Therefore, unlike Hiebert argues, the ability of Parliament and the courts to work together may not be so apparent. Instead, Parliament is increasingly restricted by the power of the courts to interpret the rights outlined in the Charter and to base judgements on the validity of government legislation and, in the case of

Figueroa, the validity of the ideals behind the legislation. In Figueroa, the court decided that assuring stable governments with a broad basis of support was not a pressing objective that justified violating individual rights. The Figueroa case moves closer to a monumental shift in Canadian democracy in which the operations of responsible government are undermined by judicial review of legislation. This legislation signals a changing system in which the power of Parliament is no longer held accountable through the elected members of the House through responsible government but by the non-elected power of judges instead. It appears that parliamentary action and judicial review are incompatible in the context of their core ideals: a concern for strong, stable government and the protection of expansive individual freedom.

The Figueroa case represents a new day for democracy in Canada. It demonstrated a widening gap between traditional and contemporary values and the institutions that correlate to them including political parties, party financing, concepts of representation, electoral system, and the review of legislation. The traditional Canadian values of a strong and stable central government are being replaced by the most liberal conception of democracy promoting individual rights. Democracy remains a concept that is difficult to define perfectly but the Figueroa case shows that Canadian democracy has reached the impasse of two competing ideals and presents a situation in which only one set of ideals and institutions can reign supreme.

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- i Supreme Court of Canada, 2003, paragraph 2.
- ii Makin, 2003, A5.
- iii Underhill, 1993, p. 255
- iv Supreme Court of Canada, 2003, paragraph 16.
- v Dyck, 2004, 301.
- vi Thornburn, 1996, 118.
- vii Liberal Party of Canada, 2003.
- viii Progressive Conservative Party of Canada, 2003.
- ix Supreme Court of Canada, 2003, section 39 and 40.
- x Green Party of Canada, 2003 and Whitehorn, 1996, 365.
- xi Supreme Court of Canada, 2003, paragraph 2. xii
Supreme Court of Canada, 2003, section 61. xiii
Supreme Court of Canada, 2003, section 49. xiv
Supreme Court of Canada, 2003, section 14.
- xv Supreme Court of Canada, 2003, paragraph 13.
- xvi Eagles, 2000, p.335.
- xvii Supreme Court of Canada, 2003, paragraph 11.
- xviii Massicotte, 2000, 165.
- xix Fosey, 1993, 376.
- xx Massicotte, 2001, p. 6 and Eagles, 2000 p. 359.
- xxi Massicotte, 2001 10-12.
- xxii Tanguay, 2001, p. 338.
- xxiii Fair Vote Canada, 2003
- xxiv Government of Canada, 1982, section 3.
- xxv Makin, 2003, A5.

xxvi Dobrowolsky, 1997, p. 305.

xxvii Hiebert, 2000, 185.

xxviii Dobrowolsky, 1997, p. 312.

xxix Mandel 1994, 51, 69.

xxx Hiebert, 2000, 199,201

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