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Liberty, Equality and Deference: A Comment on Colin Feasby’s “Freedom of Expression and the Law of the Democratic Process”

Christopher D. Bredt and Laura Pottie*

I. INTRODUCTION

In his paper, “Freedom of Expression and the Democratic Process,” Colin Feasby accepts the Supreme Court’s adoption of the egalitarian model of electoral regulation in *Harper v. Canada (Attorney General)*.¹ Feasby’s main arguments are two-fold. First, while the Court should generally be deferential to Parliament’s choices regarding democratic processes, Feasby asserts that this deference should not extend beyond the electoral realm. Thus, to the extent that the *Canada Elections Act* provisions at issue in *Harper* extend to non-electoral speech (*i.e.*, to “pure” issue advocacy), there should be no deference. Second, Feasby argues that courts should be highly suspicious of legislation that tends to support the *status quo*, since this can be seen as self-interested behaviour.

We agree to a large extent with Feasby’s positions, with two main provisos. First, while the egalitarian model may be appropriate in some contexts, it is inadequate to address the range of participants and the resources brought to bear in an electoral context, nor does it accurately capture the range of regulations that Parliament has enacted. In fact, regulation of the electoral regime occurs within a range of libertarian and egalitarian principles. A more comprehensive approach to understanding

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¹ [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 [hereinafter “*Harper*”].

electoral regulation that takes all of the participants and all of the resources into account is necessary.

Second, while we agree with Feasby's position that deference should not extend to non-electoral regulation of political advocacy, we believe that a healthy dose of judicial scepticism is particularly warranted in respect of regulation of advocacy *within* the electoral context. Experience has demonstrated a clear tendency for Parliament to enact legislation that preserves the *status quo* by giving preferential access to resources to incumbents and/or large established parties. This tendency should be balanced by a requirement for convincing evidence when justifying restrictions on participation in an election.

II. THE EGALITARIAN MODEL IS INADEQUATE

The egalitarian model is neither a comprehensive answer to the issues posed by electoral regulation, nor has the concept been applied consistently by Parliament or by the courts. The electoral process involves a complex interplay between a number of different participants with differing roles and access to a variety of resources. Electoral regulation and judicial review of participants and their access to these resources has seen both egalitarian and libertarian principles applied. However, both Parliament and the courts seem to address the intersections between participants and resources in isolation, without a consistent or principled approach to regulation.

There are a number of participants in the electoral process, each with differing and sometimes overlapping roles. These participants include:

- *political parties*, including large established parties with national reach, smaller issue-specific or regional parties and fringe parties;
- *candidates*, including candidates who are members of registered parties and independents;
- *third parties*, which are usually interest groups that are issue-focused, and seek to influence the views of others; and
- *voters*, who may be members of a political party, activists, or independent.

Each participant brings a variety of resources to the process. These resources include:

- *money*, which is the most highly regulated resource;²
- *ideas*, which are unregulated;
- *political capital*, such as public profile and organizational ability, which is largely unregulated; and
- *access to the media*, which has a mix of regulated and unregulated aspects.³

While money is a primary focus of electoral regulation, it is but one of a number of factors that determine whether or not any particular candidate is elected. Other resources can have an equal or even greater influence, and attempts to “equalize” one of these resources while leaving others unregulated may only serve to exacerbate inequality. Equality is an elusive if not impossible goal in this context.

For example, a candidate who is relatively unknown in a community may have access to significant financial resources, but may find these resources inadequate to challenge a long-time incumbent who is well-known and respected within the electoral district. Similarly, no amount of money will suffice to “sell” an unpopular platform to an electorate; if a candidate’s positions are out of step with the needs or desires of his or her constituency, access to financial resources may not result in the election of that candidate. Candidates with equal financial resources will often have varying levels of charisma, media coverage, community status or public profile, and intellectual capital both in the form of individual ideas and support from campaign managers and staff.

While the Supreme Court in *Harper* expressly adopted the “egalitarian” approach, its application of this approach is not consistent. Consider for example the apparent conflict between the decisions in *Sauvé v. Canada (Chief Electoral Officer)* and *Carter v. Reference re Provincial Electoral Boundaries (Sask.)*.⁴ In *Sauvé*, the Supreme Court focused on the effect of denying federal inmates the right to vote. The Court held that disenfranchisement of a discrete group of individuals threatened, among other things, the principles of equal rights and equal membership

² For example, see *Canada Elections Act*, S.C. 2000, c. 9 [hereinafter “*Elections Act*”], ss. 404, 404.1, 404.2, 404.3, 405, 405.2, 405.21, 405.3, 422, 423, 440, 441, 443.

³ For example, access to the print media and the Internet are unregulated, while access to the broadcast media is highly regulated. See *Elections Act* ss. 319-362.

⁴ *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 [hereinafter “*Sauvé*”]; *Carter v. Reference re Provincial Electoral Boundaries (Sask.)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158 [hereinafter “*Saskatchewan Boundaries*”].

embodied in the *Charter of Rights and Freedoms* (“Charter”).⁵ This right to equal membership, however, apparently does not include the right to have one’s vote counted equally. In *Saskatchewan Boundaries*, the Supreme Court was willing to accept deviations in voter parity of up to 25 per cent as acceptable under section 3. The Court expressly disclaimed an equality-based approach in that case, stating:

Respect for individual dignity and social equality mandate that citizen’s votes not be unduly debased or diluted. But the need to recognize cultural and group identity and to enhance the participation of individuals in the electoral process and society requires that other concerns also be accommodated.⁶

The most striking example of the inconsistency with which the egalitarian approach is applied and the inequality this creates is apparent when the Supreme Court’s decision in *Harper* is considered against *Figueroa v. Canada (Attorney General)*.⁷ There the Court applied section 3 of the Charter to *Election Act* provisions restricting access to certain benefits to political parties flowing from registered party status. In order to obtain registered party status (and thus the benefits), the party was required to have nominated candidates in at least 50 electoral districts. The benefits included the issuance of tax receipts for donations received outside the election period, the right to transfer unspent election funds to the party, and the right to list party affiliation on the ballot.

Justice Iacobucci writing for the majority in *Figueroa*, emphasized that the right to vote under section 3 included more than simply the right to place a ballot in a box. Justice Iacobucci cited and concurred with McLachlin J.’s (as she then was) analysis in *Haig v. Canada*:

The purpose of s. 3 of the *Charter* is, then, to grant every citizen of this country the right to *play a meaningful role in the selection of elected representatives* who, in turn, will be responsible for making

⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11. See *Sauvé*, *supra*, note 4, at 545-46, para. 35.

⁶ *Saskatchewan Boundaries*, *supra*, note 4, at 188, para. 62. See also the Alberta Court of Appeal’s rejection of an egalitarian approach to the allocation of free and discounted broadcast time during an election in *Reform Party of Canada v. Canada (Attorney General)*, [1995] A.J. No. 212, 123 D.L.R. (4th) 366 (C.A.), which is arguably inconsistent with the Supreme Court’s analysis in *Figueroa*, discussed *infra*.

⁷ [2003] S.C.J. No. 37, [2003] 1 S.C.R. 912 [hereinafter “*Figueroa*”].

decisions embodied in legislation for which they will be accountable to their electorate.⁸ (Emphasis added)

According to the majority in *Figueroa*, therefore, the right to vote includes the right to play a meaningful role in the electoral process. This is a participatory right, and one that is of fundamental importance in a free and democratic state. The right to participate in the electoral process is not necessarily related to the composition of Parliament subsequent to an election, nor is the value of such participation related to its impact on the actual outcome of an election. As stated by Iacobucci J:

It follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, *but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy*. The right to run for office provides each citizen with the opportunity ... to express support for the ideas and opinions that a particular candidate endorses. In each instance, *the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process.*⁹ (Emphasis added)

On this understanding of section 3, the Court set a two-part test to determine whether a restriction interferes with the capacity of individual citizens to play a meaningful role in the electoral process:

- (a) does the organization in question (in that case, members and supporters of political parties that nominate fewer than fifty candidates) play a meaningful role in the electoral process, and
- (b) do the restrictions interfere with their capacity to do so?¹⁰

In *Harper*, Bastarache J. ostensibly adopted and applied the *Figueroa* analysis, but the result is inconsistent. Justice Bastarache

⁸ *Haig v. Canada (Attorney General)*, [1993] S.C.J. No. 84, at para. 63, [1993] 2 S.C.R. 995, at 183, cited in *Figueroa*, *supra*, note 7, at 933, para. 21.

⁹ *Figueroa*, *supra*, note 7, at 935-36.

¹⁰ *Id.*, at 939-40, paras. 36-40.

viewed the third-party advertising restrictions as implicating the informational component of the right to vote. In other words:

The right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner. For a voter to be well informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party. The citizen must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist. *In short, the voter has a right to be "reasonably informed of all the possible choices": Libman*, at para. 47.¹¹

(Emphasis added)

On this analysis, spending limits are necessary in order to protect citizens' right to electoral information. Voters are entitled to hear all points of view, and the affluent or individuals who combine resources cannot be permitted to dominate political discourse. An unequal dissemination of points of view would undermine voters' ability to be adequately informed of all views, and thus spending limits are necessary and subject only to the restriction that they not be overly low so as to undermine the right to information in the context of an election.¹² In holding that the spending restrictions did not violate section 3, Bastarache J. stated as follows:

Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome. In fact, such an understanding of "meaningful participation" would leave little room in the political discourse for the individual citizen and would be inimical to the right to vote. Accordingly, there is no infringement of s. 3 in this case and no conflict between the right to vote and freedom of expression.¹³

In our view, the majority approach in *Harper* misunderstands the nature of third parties and their role during an election. This misunderstanding provides the basis for what is a very unequal approach to electoral regulation. While individuals are undoubtedly entitled to information during an election and third parties can be a source of this

¹¹ *Harper*, *supra*, note 1, at 872, para. 71.

¹² *Id.*

¹³ *Id.*, at 873-74, para. 74.

information, third parties are also an important vehicle through which individuals exercise their right to meaningfully participate in the democratic process. The majority in *Harper* appeared to view arguments with respect to third parties' participatory role as a conflation of the right to vote with that of freedom of expression, and rejected the idea that the right to vote contained a right to electoral debate or expression.¹⁴ Respectfully, this is too narrow a view of the role of third parties, particularly in light of the Supreme Court's analysis in *Figueroa*.

In *Figueroa*, Iacobucci J. reviewed the meaningful role that small political parties play in the democratic process. The importance of the role of small parties was expressly not correlated to the question of whether or not they would actually participate in governance, as small parties are both a vehicle and an outlet for meaningful individual participation. Political parties ensure that ideas and opinions are effectively represented in the open debate of an election, and are presented to the electorate. According to the Court, smaller parties play a special role since they tend to dissent from mainstream thinking and therefore bring forward a variety of issues and concerns, and provide individuals with an opportunity to express opinions on governmental policy.¹⁵

The Court's analysis in *Figueroa* applies equally to third parties during an election campaign. Meaningful participation in an election is not solely related to a potential role in actual governance. As acknowledged by the minority in *Harper* and by Feasby, third parties perform many of the same functions as small parties and are uniquely positioned to do so with a greater level of fidelity to political ideas, and as such are a valuable and indeed essential part of the democratic process. As individuals or groups who are not seeking election, third parties are not subject to the need to cater their views to appeal to a broad audience. Third parties can and do both challenge positions taken by parties and candidates, and bring forward new issues that parties are unable or unwilling to address.¹⁶ Third parties, like small parties, are both a vehicle and an outlet for individual participation, and thus play a meaningful role in the electoral process.

Given the above, following *Figueroa* the proper question for the Court in *Harper* was whether the spending restrictions interfere with

¹⁴ *Id.*, at 870, paras. 67-69.

¹⁵ *Figueroa*, *supra*, note 7, at 940-43, paras. 38-48.

¹⁶ *Harper*, *supra*, note 1, at 840-41.

third parties' capacity to play a meaningful role in an election. Further, according to Iacobucci J. in *Figueroa*, "legislation that exacerbates a pre-existing disparity in the capacity of the various political parties to communicate their positions to the general public is inconsistent with s. 3."¹⁷ Had the majority in *Harper* asked the proper questions, the answer could only have been in the affirmative. The spending restrictions create a significant barrier to third party participation, not the least of which is to exacerbate the significant disparity that already existed between the ability of parties and candidates to communicate their positions, and that of third parties. This disparity is anything but egalitarian.

Political parties and candidates are provided with significant support and access to resources both during and after election campaigns. Under the *Elections Act*, registered political parties are provided with access to information regarding voters, which can be used both for communicating positions and for soliciting contributions.¹⁸ During elections, parties receive both free and discounted access to prime-time broadcasting and partial reimbursement for election expenses.¹⁹ Registered parties who obtain a minimum level of electoral support also receive an annual allowance based on the number of votes received by the party in the previous general election.²⁰ Further, donations to political parties or candidates are eligible for tax deductions under the *Income Tax Act*.²¹

In contrast, third parties receive no such support. Donations to third-party interest groups are not tax deductible. Broadcasters are not required to provide time to third parties during an election campaign, and no third party expenses are reimbursable by the federal government. Third parties are thus already at a significant disadvantage *vis-à-vis* political parties in terms of their ability to participate in an election campaign. To further restrict these groups to spending only \$150,000 nationally on advertising during an election is to create such a disparity as to effectively prevent third parties from participating meaningfully in an election campaign. In *Harper*, Bastarache J. relied on a perceived danger of third parties drowning out the voices of candidates; in fact the

¹⁷ *Figueroa*, *supra*, note 7, at 946, para. 54.

¹⁸ *Canada Elections Act*, S.C. 2000, c. 9, ss. 45, 110.

¹⁹ *Id.*, ss. 335, 339, 435.

²⁰ *Id.*, s. 435.01.

²¹ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 127(3).

opposite is the case. Third parties' voices are now effectively excluded from electoral discourse.

To say that the egalitarian approach requires that third parties be equally restricted in their advertising spending also ignores the fact that finances are not allocated equally between parties themselves, nor is access to the media, as discussed above. It is difficult to see why, when resources and restrictions are not equally allocated between candidates and parties, third-party spending need be restricted on an "across-the-board" basis in order to ensure fairness in the democratic process.

Thus notwithstanding the Court's adoption of the egalitarian model, the reality is that regulation of democratic processes occurs on a spectrum between egalitarian and libertarian principles, with any given set of rules landing at different points on that spectrum depending on the point of comparison. Attempts to equalize one resource (*i.e.*, money), while adopting a libertarian approach to other resources (*i.e.*, access to the media) can exacerbate existing inequalities rather than remedy them. The third-party spending rules are a good example. In one sense, the rules create a form of restrictive equality between third parties since no one group can spend more than the prescribed limit. In another sense, however, the rules increase the already significant inequality between third parties and political parties.

III. DEFERENCE TO PARLIAMENT'S CHOICE IN ELECTORAL REGULATION IS INAPPROPRIATE

In *Harper*, the majority of the Court articulated a deferential approach, as expressed by Bastarache J.:

Under the egalitarian model of elections, Parliament must balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters Given the right of Parliament to choose Canada's electoral model and the nuances inherent in implementing this model, the Court must approach the justification analysis with deference In the end, *the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement of expenses, reflects a*

*political choice, the details of which are better left to Parliament.*²²
(Emphasis added)

Feasby's paper recognizes that regulation of democratic processes is vulnerable to abuse, given the potential for self-interested behaviour on the part of Parliament. Feasby suggests that the Court must be cautious to confine its deference to the electoral realm, and argues that there should be less deference outside of that context. To that end, Feasby distinguishes between "sham" issue advocacy and "pure" issue advocacy.

In our view, deference both within *and* outside of the electoral realm is unwarranted and potentially dangerous, for two main reasons. As noted in *Harper* by McLachlin C.J.C. and Major J., there is literally no evidence to support a claim that third-party advertising has a determinative effect on an election.²³ The concern with third-party expenditures and with money in general is motivated by the American congressional experience, which in our view is not an appropriate comparator. Secondly, and perhaps more importantly, a review of electoral regulation demonstrates Parliament's clear tendency to legislate in its own self-interest.

Much of the concern in Canada with the influence of money and third-party expenditures during elections is influenced by the American experience. However, little thought or analysis is given to the differences between the Canadian and American political systems. The nature of the American congressional system of government is that party discipline is weak, elected representatives routinely cross party lines on particular issues, and there is thus fertile ground for influence by well-funded issue-oriented lobby groups. Canada's parliamentary democracy, however, is dominated by the political parties. Party discipline is strong, and adherence to party lines can bring political rewards such as a sought after cabinet position. Canadian politicians are much less able to pursue their own personal agendas once in office, and third parties have less influence on the legislative behaviour of members of Parliament. Further, recent experience belies any argument that third-party spending is a significant problem in the Canadian parliamentary system. In fact, the

²² *Harper*, *supra*, note 1, at 878-79, para. 87. Note that deference in this context is inconsistent with the approach previously adopted by the Supreme Court in this context. See, for instance, *Sauvé*, *supra*, note 4, at 535, and *Figueroa*, *supra*, note 7, at 949.

²³ *Harper*, *supra*, note 1, at 847-48.

evidence points to the opposite conclusion; in Canada, money does not guarantee electoral success or even significant influence.

Consider, for example, the result in the 1988 federal election. This election turned largely on the issue of the Canada-U.S. Free Trade Agreement (“FTA”). A large number of Canadians opposed the FTA, as did the Liberal Party, the NDP, and numerous labour unions. The ruling Conservatives advanced a pro-FTA position, and were supported by a majority of the corporate sector, including the Business Council on National Issues which funnelled unprecedented sums into campaigning. The pro-free trade lobby spent close to 77 cents for every dollar spent by the Conservatives on campaign advertisements; in contrast, the anti-free trade lobby spent only 13 cents on the dollar as compared to the Liberal and NDP budgets. While the Conservatives won a majority in the House of Commons, the Liberals and the NDP obtained a majority of the popular vote. Despite the unparalleled sums spent by the incumbents and its wealthy supporters, the anti-free trade movement prevailed in terms of votes cast.²⁴

The 1992 referendum over the Charlottetown Accord presents another example. The referendum campaign polarized Canadians between the “yes” and the “no” sides. Those campaigning for the “no” side consisted of a small set of groups with limited resources. By contrast, the “yes” side was supported by the major political parties, virtually all of the English media, and the business community at large. Notwithstanding an overwhelming advantage in money and resources, the “no” side prevailed when a majority of Canadians voted against ratification of the Charlottetown Accord.

A second and more fundamental reason for rejecting deference in the electoral realm is Parliament’s self-interest in regulating democratic processes. In our view, this self-interest poses a far greater threat to the integrity of our democratic system and public confidence in it than any third-party election advertising. Much of the current electoral regime is clearly designed to protect and promote established parties and/or incumbents.

For instance, the *Elections Act* provides substantial funding for successful political parties and candidates. Candidates who receive at least

²⁴ Canada: Royal Commission on Electoral Reform and Party Finance, *Reforming Electoral Democracy: Final Report* (Ottawa: Communication Group Publishing, 1991), vol. 1 at 337-38.

10 per cent of the popular vote in their riding are entitled to reimbursement of 15 per cent of their campaign expenditures.²⁵ Further, political parties that receive at least 2 per cent of the popular vote generally or 5 per cent of the popular vote in the electoral districts in which the party runs a candidate are entitled to reimbursement of 50 per cent of campaign expenditures and a quarterly allowance based on a multiple of the number of votes cast in the district and the percentage of votes the party received.²⁶ This funding is provided in addition to the incentives for donations to political parties in the form of tax credits under the *Income Tax Act*.

Similarly, the rules relating to the allocation of broadcasting time during an election clearly favour incumbents. Under the *Elections Act*, at the beginning of an election period Canadian broadcasters are required to set aside 6 ½ hours of prime-time broadcasting for discounted purchase by parties and candidates, and a further amount of time to be distributed to parties and candidates for free. A Broadcasting Arbitrator appointed by the Chief Electoral Officer allocates the distribution of this free and discounted broadcasting time according to a formula guided by the *Elections Act*. The *Elections Act* requires the Broadcasting Arbitrator to give equal weight to the percentage of seats in the House of Commons by each of the registered parties, and the percentage of the popular vote received in the previous general election. The Broadcasting Arbitrator must also give weight to the number of candidates endorsed by each party during the previous election.²⁷ In other words, the more successful the party during the previous election, the greater the allocation of broadcasting time available.

Finally, as discussed above the restrictions at issue in *Harper* represent the effective shielding of parties and candidates from any significant challenge by third parties. We should not underestimate the cumulative effect of these regulations on third-party participants and smaller or emerging political parties. The Canadian electoral scheme is clearly designed to enhance and favour incumbents and established political parties. Deference to Parliament's choices is not appropriate in this context.

²⁵ *Elections Act*, *supra*, note 18, s. 464.

²⁶ *Id.*, ss. 435, 435.a.

²⁷ *Id.*, ss. 319-62.

IV. CONCLUSIONS

Feasby's paper and his previous scholarship on this topic make a significant and valuable contribution to our understanding of judicial review of the democratic process.²⁸ It is, however, important to put the regulation at issue in *Harper* in context and recognize that the egalitarian model cannot fully address the variety of participants and resources at play. Further, we believe that judicial deference is unwarranted and indeed hazardous in this context.

Experience has shown that a high level of third-party campaign spending does not trigger the hypothetical evils associated with independent expenditures, nor is its outcome determinative. On the other hand, there is a clear need to keep Parliament's tendency towards self-interested regulation in check, particularly when that tendency is actualized in the form of restrictions to participation in democratic processes. This need is most acute in the context of electoral regulation. An election is the point at which the voter is most in need of information from *all* sources, and thus this is the most important time for political participation by all, including third parties. Government measures that restrict that participation should, in our view, be strictly scrutinized.

²⁸ Colin Feasby, "Issue advocacy and third parties in the United Kingdom and Canada" (2002) 48 McGill L.J. 11; Colin Feasby, "Libman v. Quebec (A.G.) and the administration of democracy under the Charter: the emerging egalitarian model" (April 1999) 44 McGill L.J. 5; Colin Feasby, "Public opinion poll restrictions, elections, and the Charter. (The Charter of Rights and Freedoms: The First Fifteen Years) (Canada)" (1997) 55 U.T.L. Rev. 55, at 241.

