The Right to Vote

Until 1982, there was no constitutionally protected right to vote in Canada. Instead, the right to vote was provided by ordinary legislation which, at times, excluded parts of the population. What began as a right conferred only on white male landowning citizens, slowly evolved to extend to women, Indigenous Peoples, ethnic minorities, and all economic classes of people.

Chief Justice McLachlin of the Supreme Court of Canada, reflecting on the history of Canadian democracy, referred to it as a "history of progressive enfranchisement."[1] She called it a "steady march to universal suffrage [which] culminated in 1982, with our adoption of a constitutional guarantee of the right of all citizens to vote in s. 3 of the *Charter*."[2]

Section 3 of the *Canadian Charter of Rights and Freedoms* reads:

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.

The right to vote is unlike other constitutional rights and freedoms, such as equality rights, freedom of religion and conscience, and the right to life, liberty and security of the person. The legislature may override these rights and freedoms by invoking section 33 of the *Charter*, but the right to vote is beyond the reach of Parliament and the provincial legislative assemblies. While Canadian lawmakers have the power to pass legislation "notwithstanding" the fact that a court may find it contravenes certain sections of the *Charter*, the right to vote cannot be overridden. Thus, it may be regarded as a belonging to a higher order of rights that, in the words of Supreme Court Justice Bastarache, are clearly placed "at the heart of our constitutional democracy."[3]

A Literal Reading or Broad Reading

On its face, section 3 provides for an unequivocal right to vote in provincial and federal elections. Other than citizenship, it provides no explicit restrictions on the right to vote. In interpreting the content of section 3, courts have had to determine whether it should be read literally or purposively. That is, should the court adhere to a plain reading of section 3 or should it read in implicit restrictions and democratic ideals?

As for the types of votes to which the right to vote pertains, the Supreme Court of Canada has adhered to a plain and literal reading. Justice L'Heureux-Dubé, writing for the Court's majority, said, "Section 3 of the *Charter* is clear and unambiguous as is its purpose."[4] It specifically limits the right to vote to elections of provincial and federal representatives. By implication, there is no constitutional right to vote in municipal elections, nor in referenda.

Justice Cory, in dissenting reasons, would have extended the right to vote beyond the two sorts of elections explicitly referred to in section 3. He said, "[In] the interpretation of all

enfranchising statutes the provisions granting the right to vote should be given a broad and liberal interpretation. Every effort should be made to interpret the statute to enfranchise the voter."[5]

In the early days of the *Charter*, some Canadian courts saw internal limitations to the right to vote. That is, reasonable limitations (such as age and residency) were regarded as implicit in section 3. A Manitoba trial court recognized certain "rational dimensions" of the right to vote. Just as there are basic conditions on citizenship that are not expansively described in the *Charter*, there are also inherent attributes of the voter that are not expressed in section 3.[6]

The Supreme Court of Canada ultimately rejected the approach of recognizing inherent limitations in section 3, preferring to justify limits on voter enfranchisement through section 1 of the *Charter*.[7] Section 1 provides that all *Charter* rights are "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Thus the only inherent limitation contained in section 3 is citizenship.

Federal Court Justice Strayer described the proper approach to section 3:

It is quite clear in section 3 who are the holders of the right ("every citizen of Canada") and what they are thereby entitled to do ("to vote in an election of the members of the House of Commons..."). I am not deterred in this finding by the argument of the defendant that the section cannot be applied literally because there are some, such as infants, who clearly should not have the right to vote. I do not need to define here who may properly be denied the vote; that issue must be determined in each case under section 1 of the *Charter*.[8]

Age: a Reasonable Limit on the Right to Vote

The requirement that Canadian voters reach the age of 18 by election day is, on its face, an infringement of the right to vote guaranteed to every citizen in section 3. Therefore, it must be asked how laws which deny the vote to mature 16 or 17 year-olds can be justified. The simple answer is that section 1 of the *Charter* "allows Parliament to make such choices as long as they are rational and reasonable limitations which are justified in a free and democratic society."[9]

A judgment of the Alberta Court of Queen's Bench articulates the reasoning behind age restrictions on voting. The objective of an age requirement is obvious: without one, even infants would be qualified to vote. It is a pressing objective to ensure, as much as possible, that the electorate is mature enough for rational and informed decision making. Thus, the legislature's decision on where the line should be drawn deserves deference as long as it falls within a reasonable range of choices.[10]

The court recognized that people mature at different rates and there may be some well-informed and mature 16 and 17 year-olds who are excluded from voting. Nonetheless, a line must be drawn somewhere.[11] The decision of Canadian lawmakers to draw the line at age

18 seems reasonable when we consider that, in our society, 18 is the age at which most students have finished high school and have begun to make decisions about their future and their place in society. The life experience and burgeoning responsibility that most Canadians have by age 18 make it a reasonable legislative choice for minimum voting age.[12]

Unconstitutional Limits: Mental Disease, Judgeship, Incarceration

Aside from the minimum voting age, Canadian courts have struck down all legislated restrictions on the right of Canadian citizens to vote in elections.

In 1988, the Federal Court of Canada struck down legislation that denies the right to vote to citizens diagnosed with a "mental disease."[13] The court ruled that this category included people with afflictions that in no way impact the ability to vote. Furthermore, it could also be argued that the law is too narrow because it does not affect people who may have mental diseases but are not confined to a mental hospital.[14] Because this limitation was arbitrary, it could not be justified as a reasonable limit prescribed by law.

Also in 1988, the Federal Court struck down legislation that restricted judges from voting.[15] The court rejected the government's reasoning behind the law: that judges must not only be politically neutral, but also perceived by the public as such.[16]

Since the Supreme Court of Canada's 2002 ruling in *Sauve v. Canada*,[17] the only Canadian citizens restricted from voting in federal and provincial elections are those under the age of 18 and the Chief Electoral Officer. The *Sauve* decision rendered the last category of disenfranchisement – penitentiary inmates serving sentences of two years or more – an unconstitutional limit on the right to vote.

The government argued that taking the right to vote from prisoners served two objectives: to enhance civic responsibility and respect for the rule of law, and to provide additional punishment. The Court rejected these objectives as vague, symbolic and rhetorical.[18] The Court also failed to find a pressing and substantial purpose that might reasonably justify such a restriction.[19]

The Court went on to say that taking away the right to vote sends a message that is contrary to the values of Canada's democracy. These values include that democracy is more important than criminal punitive measures,[20] and universal enfranchisement means that "moral unworthiness" is not a legitimate reason for taking away the right to vote.[21]

Absentee Voting

In 1983, British Columbia was one of three Canadian provinces that did not have legislation to allow temporarily absent residents to cast ballots.[22] This state of affairs resulted in a constitutional challenge from a British Columbian who was away at university in Ontario when a provincial election was called. The British Columbia Court of Appeal agreed that elections are often unpredictable in our Westminster system of governance, so it is impractical to expect all residents to plan to be in the province for elections.[23] Also, given

the relatively inexpensive means of providing for absentee voting, the lack of any such provision cannot be justified as a reasonable limitation of the right to vote.[24]

Regulation of Elections

While the question of who has the right to vote has been read narrowly and literally, the Supreme Court has been more willing to interpret what section 3 implies about how the electoral process should operate. Section 3 tells us that every Canadian citizen has the right to cast a ballot in federal and provincial elections, but in the words of Chief Justice McLachlin, "more is intended [in the right to vote] than the bare right to place a ballot in a box."[25] The Court has used the concepts of "effective representation" and "meaningful participation" in judgments that flesh out the requirements and constraints that the right to vote puts on electoral and political processes. The rules surrounding the regulation of political parties and the administration of elections impact on the full meaning of the right to vote.

Electoral Boundaries and "Effective Representation"

The principle of "one person, one vote" is of fundamental importance to mature democracies. Accordingly, the populations of each electoral district should be as similar as is practical. However, the Supreme Court of Canada has ruled that achieving absolute parity amongst electoral districts is not the preeminent goal of Canadian democracy. Rather, the meaning of the right to vote is "not equality of voting power *per se*, but the right to 'effective representation.'"[26]

The principle of "effective representation" recognizes the distinctive and divergent interests of Canada's regions. Northern and rural voters often have political concerns that differ from those of southern and urban voters. "Factors like geography, community history, community interest and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic."[27]

Just how far the quest for "effective representation" will be permitted to detract from strict voter parity has not been made explicit by the Court. Much deference is given to government in crafting effective electoral boundaries, but "respect for individual dignity and social equality mandate that citizens' votes not be unduly debased or diluted."[28] What exactly would amount to an undue dilution seems to be left for determination on case-by-case basis. In the Saskatchewan Electoral Boundaries case, the Court recognized a 25% deviation from parity as acceptable means of recognizing the political interests of voters in northern and rural districts.

At the federal level, section 37 of the *Constitution Act, 1867*, provides for the number of members of Parliament for each province. Population patterns have changed significantly since 1867, with populations growing vastly in some provinces while shrinking or remaining stable in others. Although the number and allocation of seats in Parliament is, to some degree, subject to constitutional amendment, this means that there may be great disparity in the ratio of population to representation from province to province. Nonetheless, this

situation is one that is prescribed by the Constitution, and since one part of the Constitution may not conflict with another part, section 3 of the *Charter* may not be applied to rectify this sort of disparity.

The Regulation of Parties and "Meaningful Participation"

In 1999, the leader of the Communist Party of Canada challenged legislation that provided certain economic benefits to political parties only if they fielded candidates in at least 50 electoral districts.[29] The rationale for such a system was to promote parties that have potential to form a majority in Parliament, and thus to avoid a highly fractured parliament.

The Supreme Court of Canada rejected this reasoning and struck down the 50-candidate rule. The Court ruled that the purpose of voting is more than merely the outcome of the election. The right to vote involves the right to "meaningful participation"; it recognizes the intrinsic value of voting regardless of the results of an election. Thus, the right to vote is infringed if laws impede the ability of smaller parties to promote themselves.

Limits on Financial Contributions to Political Parties

The *Canada Elections Act* sets limits on the amount of money that individuals or groups may contribute to a political party's campaign fund. In 2000 this law was subjected to a constitutional challenge, which included the claim that it violated the right to vote. The Supreme Court of Canada ruled that the opposite was the case: legislated limits on donations to political parties do not infringe the right to vote, but rather enhance the right to vote.

The Court focused on the "informational component of an individual's right to meaningfully participate in the electoral process."[30] That is, to exercise the right to vote in meaningful manner, a citizen must "reasonably be informed of all party choices."[31]

Without spending limits, the political discourse would be dominated by the wealthy segments of society. The voices of the less affluent segments of society and the political parties that represent their views would be "drowned out"; the political discourse would be "monopolized" by parties which appeal to wealthy voters.[32] "This unequal dissemination of points of view undermines the voter's ability to be adequately informed of all views."[33]

Further Reading

Jim Young, "Reference re Provincial Electoral Boundaries (1991) – Electoral District Boundaries and the Right to Vote" *Centre for Constitutional Studies* (14 June 2010).

Jim Young, "Sauvé v. Canada (1993) – Voting Rights for Prisoners" *Centre for Constitutional Studies*(26 May 2010).

Jim Young, "Harvey v. New Brunswick (1996) – The Right to be Qualified for Membership in the House of Commons or a Legislative Assembly" *Centre for Constitutional Studies* (29 June 2010).

Jim Young, "Sauvé v. Canada (2002) – Limits on Voting Rights for Prisoners" *Centre for Constitutional Studies* (26 May 2010).

Jim Young, "Figueroa v. Canada (2003) – and Registered Party Status" *Centre for Constitutional Studies* (25 June 2010).

"Major Court Cases Related to Federal Elections Legislation" *Elections Canada*.

"Voting in Canada: How a Privilege Became a Right" *CBC Digital Archives*.

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[1]*Sauvé v. Canada (Chief Electoral Officer)*, [2002] SCC 68 at para.33.

[2] *Ibid*.

[3] *Thomson Newspapers Co. v. Canada (Attorney General),* [1998] 1 S.C.R. 877 at para.79.

[4]*Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 at 47-48.

[5] *Ibid*. at 76.

[6] *Badger* v. *A.-G. Manitoba*(1986), 30 D.L.R. (4th) 108 (Man. Q.B.) at 112.

[7] *Harvey* v. *New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876 at para.30.

[8] *Belczowski* v. *Canada,* [1991] 3 F.C. 151 (T.D.) at 159.

[9] *Supra* note 1 at para. 89.

[10]*Fitzgerald v. Alberta*, 2002 ABQB 1086 at para.56.

[11] *Ibid*. at para. 69.

[12] *Ibid*. at para. 70.

[13] *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622 at 624.

[14] *Ibid*. at 625.

[15] *Muldoon v. Canada,* [1988] 3 F.C.R. 628 (T.D.).

[16] *Ibid*. at 632.

[17] *Supra* note 1.

[18] *Ibid*. at para. 24.

[19] *Ibid*. at para. 26.

[20] *Ibid*. at para. 40.

[21] *Ibid.* at para. 44.

[22] *Hoogbruin v. A.G.B.C.,* 1985 CanLII 335 (BC C.A.) at para. 8.

[23] *Ibid*. at para. 12.

[24] *Ibid*. at para. 13.

[25]*Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37 at para. 19.

[26]*Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at 183.

[27] *Ibid.* at 184.

[28] *Ibid.* at 188.

[29] *Supra* note 25.

[30]*Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33 at para. 71.

[31] *Ibid.*

[32] *Ibid.* at para. 72.

[33] *Ibid.*