THE CHANGING CONCEPTION OF THE RIGHT TO VOTE AND ITS IMPLICATIONS FOR THE ROLE OF THE CANADIAN SUPREME COURT

ABSTRACT

A key theme of *Charter*-era Canadian constitutional thought has been to emphasize the difference between Canadian and American conceptions of individual rights and, correspondingly, the different roles played by the respective Supreme Courts when hearing rights-based challenges to legislation. We argue that this distinction between the Canadian and American courts is inaccurate if not mythical, and that a convergence has occurred, especially concerning the manner in which the Supreme Courts of both nations regard scope and vision of the franchise.

Members of both courts now acknowledge that it is not possible to defer to the elected branches when dealing with voting rights claims because there is an inherent conflict of interest when elected officials write the rules by which they are returned to office. As a result, the Canadian Supreme Court now manifests an increasing awareness of the need to follow (or, at least, bear in mind) John Hart Ely's call for courts to police the process of representation and protect the integrity of the democratic process. This suggests that 25 years of judicial deference under the *Charter* is likely to be to be succeeded by an era of increased conflict between the judiciary and the legislature as the Supreme Court struggles to set forth a clear definition of the franchise and the notion of a meaningful political process.

A key theme of *Charter*-era Canadian constitutional thought has been to emphasize the difference between Canadian and American conceptions of individual rights and, correspondingly, the different roles played by the respective supreme courts when hearing rights-based challenges to legislation. Canadian scholars have emphasized that the Canadian constitutional vision of rights promotes the public interest over that of the individual.[1] Therefore, the Canadian courts have maintained a much more deferential stance towards parliament and the provincial legislatures than their American judicial counterparts.

We argue that this distinction between the Canadian and American courts is inaccurate if not mythical, and that a convergence has occurred, especially concerning the manner in which the Supreme Courts of both nations regard scope and vision of the franchise. Both courts have manifested a growing desire to protect the "meaningful" exercise of the franchise. While they have struggled thus far to define what, exactly, constitutes a meaningful vote, both have also drawn similar conclusions regarding the nature of infringements that decrease the integrity of the franchise.

This, in turn, has resulted in a confluence of thought concerning judicial deference. On the one hand, members of both courts acknowledge that they must respect the collective wisdom of the larger legislative bodies when it comes to balancing individual rights claims and those made on behalf of the public interest. On the other hand, both have also come to acknowledge that it is not possible to defer to the elected branches when dealing with voting rights claims because there is an inherent conflict of interest when elected officials write the rules by which they are returned to office. The incentive for legislators to erect barriers to entry into the political process and to buffer themselves from political competition is palpable in cases dealing with discriminatory ballot access laws and restrictions on campaign spending and speech.

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The Canadian Supreme Court now manifests an increasing awareness of the need to follow (or, at least, bear in mind) John Hart Ely's call for courts to police the process of representation and protect the integrity of the democratic process.[2] This same concern animated the early writings of Patrick Monahan[3], who also urged the judiciary to protect the meaningful exercise of the franchise, and is now evident in the opinions of Chief Justice Beverly McLachlin.

In this paper, we document this evolution of Canadian judicial thinking and discuss its implications for the relationship between the Supreme Court and the elected branches of the government. We suggest that this enhanced judicial concern for protecting the integrity of the democratic process ensures that Canadian courts will be less deferential towards the legislature when dealing with matters of electoral law. This, in turn, suggests that there will be an increasing tension between the judiciary and the other branches of the government as the courts constrain (or at least scrutinize) the substantive actions of the legislatures in order to protect the process by which they were elected to office.

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The contemporary setting: *R v. Bryan*[4]

The evolving tensions within the Supreme Court's vision of the franchise were clearly demonstrated in its most recent decision on electoral law, *R v. Bryan.* Splitting 5-4, the court dismissed a challenge to s.329 of the *Canada Elections Act,* which prohibits the transmission of electoral results in one riding to another before the closing of polls in the latter.

The majority, led by Justice Bastarache, deferred to the government's desire that all voters go to the polls with essentially the same type, quality and amount of information. Accordingly, the infringement on free speech imposed by the broadcast restriction was acceptable in light of the government's desire to protect the integrity of the electoral process and to maintain public confidence in the fairness of the rules by which elections are conducted. The dissents, led by Justice Abella, asserted that the government had not provided enough evidence to justify s.329's infringement on free speech.

During the 2000 parliamentary election, Paul Charles Bryan had posted election results from Atlantic Canada on a website. He thereby made them available across Canada despite the fact that polling stations were still open in the western provinces. He was fined $1,000 for violating s.329. In sustaining the fine and dismissing Bryan's challenge, the Supreme Court relied principally on its decision in *Harper v. Canada*[5], where it sustained several restrictions on campaign spending and third party advertising.

We regard *Harper* as a seminal, if not pivotal decision in the evolution of Canadian judicial thought.[6] There, for the first time in nine *Charter* decisions concerning electoral law, Justice McLachlin dissented. Her dissent was especially intriguing because the majority opinion was grounded in several opinions that she had written. We discuss the importance of McLachlin's defection from the court majority below. For now, we focus on the manner in which *Harper* informed *Bryan* and what it indicates regarding the Supreme Court's approach to electoral rights.

Writing for the majority, Justice Bastarache summarized the key points from *Harper* that bore upon *Bryan*. *Harper*, said Bastarache, contained two important principles.

> First, it establishes that courts ought to take a natural attitude of deference toward Parliament when dealing with election laws: "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" (*Harper*, at para. 87).
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> Second, it reaffirms that, in determining the nature and sufficiency of evidence required for the Attorney General to establish that a violation of s.2(b) is saved by s.1, the impugned provision must be viewed in its context…. This context can be best established by reference to the four factors which this Court set out in

Thomson Newspapers and Harper: (i) the nature of the harm and the inability to measure it, (ii) the vulnerability of the group protected, (iii) subjective fears and apprehension of harm, and (iv) the nature of the infringed activity.[7]

In *Bryan*, the Court concluded that the context surrounding s.329 was sufficient to justify the infringement it placed on the right to speak. Bastarache and the rest of the court majority accepted the government's justification that s.329 was designed to promote "informational equality" among voters by ensuring that voters in the western provinces went to the polls with the same information as those in the east. The broadcast of election results from east to west would enable western voters to condition their electoral choices on the basis of their knowledge of eastern election results. Insofar as eastern voters would not have access to such information (due, simply to the difference in time zones), the Attorney General argued that s.329 was designed to prevent the broadcast of electoral information that, while clearly pertinent, gave western voters an unfair advantage in casting their votes. This, in turn, informed the government's second justification for s.329. Insofar as information inequality could undermine public confidence in the electoral system, the government asserted that s.329 was necessary to preserve the public's perception of the integrity of the electoral process.

The dissents rejected the government's evidence and, accordingly, would have supported Bryan's challenge to s.329. Speaking for the dissenters, Justice Abella first acknowledged that ensuring "that electors in different parts of the country have access to the same information before they go to the polls" is a "pressing and substantial" governmental objective.[8] Nonetheless, the dissenters challenged the majority's conclusion that the publication ban was necessary to the achievement of this goal and that it resulted in a "minimal" impairment of the right to speak. The right at issue, said Abella, is "the right of the media and others to publish election results in a timely fashion and the right of all Canadians to receive it."[9] Insofar as communicating and receiving elections results is a core democratic right that is an "essential" part of the democratic process, "clear and convincing evidence is required" to justify limiting the availability of political information.[10]

According to the dissent, the government provided no conclusive evidence to demonstrate that the information imbalance had a palpable effect on the outcome of the election or that the public had indeed lost faith in the fairness of the electoral process. As well, the dissent also noted that publication bans such as s.329 were rendered increasingly moot due to advances in technology. Accordingly, Justice Abella asserted that s.329's ban on the dissemination of election results was tantamount to a ban on speech. The harm to the *Charter*, she argued, was "demonstrable." Yet, the "benefits of the ban are not."[11] S.329 therefore failed not only the rational basis test but also any test of proportionality.

Democratic rights and the changing role of the Canadian Supreme Court

At first, one might regard the debate in *Bryan* as an unremarkable dispute among judges concerning the justifiability of a legislative infringement of a right. In this respect, the case embodies the principal tension in any constitutional democracy between the right of a majority to govern and the right of an individual to use constitutionally-guaranteed rights to constrain that governing power. Accordingly, *Bryan* boils down essentially to a debate about the justifiability of a particular law's infringement on a particular right.

More important, however, is the manner in which the debate among the justices manifests the evolving conception of the court's role and the disposition of particular members to defer to claims by the legislature that it manifests or embodies the public interest. In short, the assumption underlying the claim that courts ought to defer to the legislature (stated early on in the *Charter* era by scholars such as Patrick Monahan[12]) was grounded on the a priori assumption that the legislature embodies the public interest and acts as the agent for the collective will of the polity. After a quarter century of *Charter* litigation, the Supreme Court manifests an increasing tendency to question this assumption. As a result, the court has taken a much less deferential attitude towards the Parliament and provincial legislatures.

The most intriguing aspect of this evolution is that it has been driven principally by changes in the thinking of the Chief Justice. Throughout the court's election law cases, different Justices have referred to McLachlin's opinion in *Ref. Re: Saskatchewan Electoral Boundaries*[13] (the "*Saskatchewan Reference*") as the talismanic statement of the Canadian Supreme Court's view of voting rights and the manner in which it would

defer to governmental attempts to balance the protection of individual rights with the promotion of the collective right to cast a meaningful ballot.

The meaningful ballot is a core aspect of the Canadian conception of the franchise. As Justice Bastarache noted in *Bryan*: "If Canadians lack confidence in the electoral system, they will be discouraged from participating in a meaningful way in the electoral process. More importantly, they will lack faith in their elected representatives. Confidence in the electoral process is, therefore, a pressing and substantial objective." [14]

Throughout its prior election law decisions, the Supreme Court has collectively or individually cited McLachlin's *Saskatchewan Reference* opinion as the seminal statement of how the *Charter* embodies a collective, flexible and non-individualistic vision of the franchise and the role the judiciary would play in interpreting and protecting it. In that case, McLachlin rejected the American adherence to the rigid one-person, one vote principle of electoral equality and redistribution in favor of a "less radical, more pragmatic approach" developed in England and Canada[15] that allowed Parliament and the provincial legislatures the leeway necessary to protect and promote minority representational opportunities even if it required deviating from "rep by pop" and thereby resulted in the infringement of individual voting equality.

While parity of individual voting power was an important aspect of the democratic process, McLachlin noted that other factors mattered as well:

> (…) it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.[16]

Thus, this vision of the franchise suggested that the judiciary would defer to legislative attempts to balance individual and collective rights claims in order to promote a fairer democratic process and a collective right to cast a meaningful ballot.

The evolution of the Chief Justice's vision and the erosion of judicial deference to the legislature

The deference to the legislature manifested in McLachlin's *Saskatchewan Reference* opinion acknowledges that the larger, more diverse legislature may in fact be able to bring more wisdom to bear on the difficult task of balancing rights claims than the correspondingly smaller, more insulated judiciary.[17] Nonetheless, as her dissent in Harper indicates, the McLachlin's deference was not unconditional.

Harper v. Canada entailed a challenge to section 350(1) of the act which stated that no more than $3,000 per constituency and $150,000 nationally could be spent to promote the election or defeat of a particular candidate or candidates. Stephen Harper contended that the spending limits were too low and therefore violated the rights to speak and vote set forth in sections two and three of the *Charter*.

Asserting that "the overarching objective of the third party election advertising limits is electoral fairness,"[18] they rejected the challenge to s.350. Anticipating the tone of Abella's dissent in *Bryan*, McLachlin asserted that the government had not provided enough evidence to justify the infringement on political speech posed by the campaign spending restrictions.

> The dangers posited are wholly hypothetical. The Attorney General presented no evidence that wealthier Canadians – alone or in concert – will dominate political debate during the electoral period absent limits. It offered only the hypothetical possibility that, without limits on citizen spending, problems could arise. If, as urged by the Attorney General, wealthy Canadians are poised to hijack this country's election process, an expectation of some evidence to that effect is reasonable. Yet none was presented. This minimizes the Attorney General's assertions of necessity and lends credence to the argument that the legislation is an overreaction to a non-existent problem.[19]

McLachlin noted that the restrictions did pose a palpable threat to democracy by essentially limiting the capacity of the electorate to amass the financial resources necessary to challenge incumbents or hold them accountable.[20] Furthermore, insofar as the restrictions diminished the amount of information available to voters, they posed a

threat to the integrity and meaning of the franchise similar that posed by the broadcast restrictions that McLachlin would have struck down in *Bryan*.

Perspective

McLachlin was joined by two dissenters in *Harper* and three in *Bryan*. This suggests that McLachlin's concerns about the integrity of the democratic process and the meaning of the franchise have gained adherents. They have, at least precipitated a debate among the justices concerning the extent to which the court and justify its deference to the government when dealing with legislation that concerns the process by which the elected officials are returned to office.

We do not mean to suggest that this evolution in judicial thinking will exacerbate the tension that naturally exists between courts and legislatures. Nonetheless, insofar as Canadian constitutional development can be said to proceed as a "dialogue" among scholars, judges and legislators,[21] we maintain that the evolution of Justice McLachlin's thinking indicates that the dialogue about the scope of the franchise may become more heated to the extent that it clearly will alter the nature of the deference with which the Supreme Court regards the government.

Notes

[1] See, e.g., Weiler, Paul C. 1984. "Rights and Judges in a Democracy: A New Canadian Version." 18 U. *Mich. J. L. Reform* 51-92; McLachlin, Beverly. 2004. "Protecting Constitutional Rights: A Comparative View of the United States and Canada. Plattsburg State University, 5 April 2004. http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/ComparativeView_e.asp; Glendon, Mary Ann. 1991. *Rights Talk: The Impoverishment of Political Discourse.* (New York. The Free Press), 167.

[2] Ely, John Hart. 1980. *Democracy and Distrust.* Cambridge: Harvard University press.

[3] Monahan, Patrick. *Politics and the Constitution.* Toronto: Carswell.

[4] 2007 SCC 12.

[5] [2004] 1 S.C.R. 827

[6] We discuss this at length in our forthcoming article, "Electoral Jurisprudence in the Canadian and US Supreme Courts: Evolution and Convergence," forthcoming, *McGill Law Journal.*

[7] Bryan, at paras. 9-10, citing *Harper* at para. 87. Internal citations omitted.

[8] Ibid., at para. 104, citing *Harper* at para. 132.

[9] Ibid., para. 110.

[10] Ibid.

[11] Ibid., para. 131.

[12] Monahan, supra note 2.

[13] [1991] 2 S. C. R. 158

[14] *Bryan*, para. 37, citing *Harper*, para. 103.

[15] *Saskatchewan Ref.*, 185

[16] Ibid, 184

[17] Manfredi, Christopher. 2001. *Judicial Power and the Charter, 2d ed.* Toronto: Oxford, 151-63. See also Horowitz, Donald. 1977. *The Courts and Social Policy.* Washington: Brookings Institution.

[18] *Harper*, para 91.

[19] Ibid. para 34.

[20] Ibid, para. 80-81.

[21] See, e.g., Hogg, Peter W. and Allison Bushell. "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All." *Osgoode Hall Law Journal* 35: (1997) 75-124.