

September 28, 2018

City of Toronto v Ontario* and Fixing the Problem with Section 3 of the *Charter

By: Colin Feasby

Case Commented On: *Toronto (City) v Ontario (Attorney General)*, [2018 ONCA 761](#)

Introduction

Ontario Premier Doug Ford’s recent restructuring of Toronto City Council in the midst of an election and the ensuing court battle shone a light on a significant gap in the constitutional protection of democratic rights in Canada. Elections for municipal government – arguably the most important level of government in the daily lives of Canadians – need not be conducted in accordance with the fundamental democratic norms found by the Supreme Court of Canada to reside within section 3 of the *Charter*. The Ontario Court of Appeal in *Toronto (City) v Ontario (Attorney General)*, [2018 ONCA 761](#) following numerous appellate authorities, succinctly stated the law: “Section 3 does not apply to municipal elections and has no bearing on the issues raised in this case” [citations omitted] (*City of Toronto*, at para. 12).

This blog post is predicated on what I believe are two uncontroversial normative claims. First, the Supreme Court of Canada’s *Charter* section 3 jurisprudence, though not without its critics, has made federal and provincial elections more fair and democratic. The corollary of this normative claim is that democratic processes outside the aegis of section 3 are vulnerable to those who would impose unfair or undemocratic rules. Second, democratic processes that are not protected by section 3 of the *Charter* – referenda, band council elections, municipal elections, school board elections – are important to Canadians; perhaps more important in some respects than provincial and federal elections. This blog post contends that the lack of constitutional protection for important democratic processes is an unnecessary defect in our constitutional arrangement and proposes a way that the Supreme Court of Canada can remedy this defect.

Courts as Regulators of Democratic Processes

There has been considerable debate in the academic literature as to whether democratic rights are individual rights or whether they are structural rights and what the appropriate role of courts is in light of the characterization of rights as individual or structural. This has been discussed, for example, by [Michal Pal](#) and [Yasmin Dawood](#). Democratic rights, like most other rights prescribed by the *Charter*, are held and exercised by individuals and actions brought to enforce such rights must be brought by individuals. Some legal scholars contend, however, that democratic rights are better understood to be structural rights. Structural rights are rights that are defined in significant part by the institutional context in which they exist. Democratic rights, particularly the right to vote and the right to stand for election, cannot be understood without

reference to the institutional framework of elections and the structure of our political system. Structuralists focus on the conflict of interest inherent when elected representatives are permitted to set the rules by which elected representatives are chosen. In particular, structuralists emphasize the systemic harms and distortions of the democratic process that result from what might ordinarily be considered violations of individual rights. Those who view democratic rights as structural rights contend that the court's role in adjudicating such cases is akin to that of a regulator of the democratic process. Put in the terms of *Reference re Secession of Quebec*, [1998] 2 SCR 217, courts have a role in ensuring that the democratic process functions so that the sovereign will of the electorate may be expressed without distortion.

The Supreme Court of Canada has not interpreted s. 3 as merely a formal right to cast a ballot or to stand for election. The Court has given wider life and meaning to s. 3 by articulating robust democratic principles including effective representation in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 SCR 158, and a meaningful right to participate in *Figueroa v Canada (Attorney General)*, 2003 SCC 37. Professor [Dawood](#) has explained that “[b]y diversifying the right to vote so that it includes additional democratic rights, the Court has developed a set of sophisticated jurisprudential tools with which to regulate the democratic process” (at 295).

Anti-Democratic Mischief

The “jurisprudential tools” developed by the Supreme Court to regulate the democratic process are unavailable to courts faced with democratic process questions outside the context of federal and provincial elections as a result of a narrow interpretation of section 3 of the *Charter*. Referenda, municipal elections, school board elections, and band council elections have all been found by courts not to be subject to section 3. Some of the most obvious infringements of rights in democratic processes not subject to section 3 – for example, blatant racial restrictions on voting like the disenfranchisement of citizens of Asian descent in British Columbia in the first half of the 20th century – can be addressed through section 15 of the *Charter* which limits discrimination on enumerated and analogous grounds. Other less brazen, though still insidious, infringements of democratic norms which were historically tolerated by the common law cannot be addressed by courts in the absence of section 3.

Two recent Supreme Court of Canada cases provide examples of the type of systemic harms that structuralists are concerned with and demonstrate the impotence of courts to constructively intervene as regulators of the democratic process to remedy plainly anti-democratic rules in the absence of section 3. The first example is *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, where the Court dismissed a section 15 challenge, upholding a prohibition on the right of band members with less than Grade 12 education to run for office in band council elections in the Kahkewistahaw First Nation. The Court held that educational attainment was not an enumerated or analogous ground and, as such, discrimination was not prohibited. What is remarkable is that there was evidence before the Court that the educational restriction would disqualify a large number of individuals from holding public office including the appellant who was a former Chief. Even in the absence of an effort to engineer a particular electoral outcome, educational requirements for elected office are exclusionary and have no place in a free and democratic society. Literacy tests, a form of educational requirement, were a notorious means by which African-American voters were denied the right to vote in the southern United States between the

Civil War and the 1960s. There are no educational requirements to hold any Federal or Provincial elected office in Canada and, if there were, such requirements would not survive a challenge under section 3. Despite an educational requirement for standing for election being contrary to widely accepted contemporary democratic norms, in the absence of evidence of differential impact on enumerated or analogous grounds, section 15 was of no utility.

The second example is *Baier v Alberta*, [2007 SCC 31](#), where limits on school board employees to run for school board elections were considered. Traditionally, Alberta prohibited individuals from being both a board trustee and an employee of the same school board – this was called the “same school board rule” and was ostensibly intended to prevent conflicts of interest. The Provincial government amended the law in 2002 to apply to employees of all school boards, charter schools, and private schools, effectively removing all teachers and other school board employees from any form of school governance in the Province. The conflict of interest rationale did not support the extension of the rule and critics claimed that the restriction was intended to punish teachers whose unions had been vocal critics of the government. Although the applicant in *Baier* proceeded under section 2(b) of the *Charter*, Justice Rothstein writing for the majority reiterated the Court’s position on section 3 stating “it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so” (*Baier*, at para 39). The Court was unable to accept a claim for participation in a democratic process under the guise of section 2(b). Justice Fish, in dissent, decried what he considered the “...systematic exclusion of otherwise qualified persons from participation in an important institution of local governance...” (*Baier*, at para 95). Again, a blatant exclusion from a democratic process survived Supreme Court of Canada scrutiny because the jurisprudential tools of section 3 were considered to be unavailable.

(Re)interpreting the *Charter* to give Section 3 its Proper Scope

Justice Belobaba in *City of Toronto v Ontario (Attorney General)*, [2018 ONSC 5151](#), struck down the restructuring of Toronto City Council on the basis of two violations of *Charter* section 2(b), one of which was a violation of the principle of effective representation which he borrowed from section 3 jurisprudence. Belobaba J. seized upon the Supreme Court of Canada’s prescription in *Haig v Canada (Chief Electoral Officer)*, [\[1993\] 2 SCR 995](#), that, “where a government chooses to provide [a platform for expression], it must do so in a fashion that is consistent with the Constitution” (*City of Toronto*, at para 48; *Haig*, at para 84). Iacobucci J., dissenting in *Haig*, explained “the federal government is not legally obligated to hold referenda” but “if the government chooses to conduct a referendum, it must do so in compliance with the *Charter*” (*Haig*, at para 1065). Justice Belobaba interpreted *Haig* as authorizing the importation of the principle of effective representation into his section 2(b) analysis (*City of Toronto ONSC*, at para 51). Belobaba J.’s intuition was that when the Federal or a Provincial government creates a democratic process it must conform to the requirements of *Charter* jurisprudence including the democratic principles articulated in the context of section 3. The problem with *Haig* as an authority is that the result of the case stands in contrast to the words cited by Belobaba J.; the majority proceeded to find that there was no right to vote in the referendum. While this might be explained away based on the peculiar circumstances in *Haig* where there were concurrent referenda – one in Quebec and one in the rest of the country – the Supreme Court of Canada’s subsequent decision in *Baier* made it clear that section 2(b) does not protect democratic rights. *Baier* provides that any claim for exclusion must be considered using the factors set out in

Dunmore v Ontario (Attorney General), [2001 SCC 94](#), the first of which requires that any claim for inclusion in a statutory regime must be rooted in a fundamental freedom (*ie.* not section 3) (*Baier*, at para. 27). As such, *Baier* limits the broad language in *Haig*.

The fundamental problem in *Haig* and *Baier* was that the Court was asked to apply democratic norms developed in the context of section 3 under the rubric of section 2(b). In doing so, the Court was reluctant to deviate from the established structure of the section 2(b) analysis. A different approach is required. The Constitution empowers but does not require the Federal or Provincial governments to create other orders of elected government and hold referenda. Given the contingent nature of other orders of government and referenda, it makes sense that section 3 of the *Charter* does not make an explicit reference to such things. What is left unanswered by the text of section 3 is what happens if the Federal government or a Provincial government delegates part of its legislative role to another elected body. Faced with this question, the Supreme Court of Canada chose to narrowly interpret section 3, limiting its scope tightly to its text. The Court's narrow textual reading of section 3 of the *Charter* is at odds with the Court's usual purposive and often generous approach to interpreting *Charter* rights.

A better approach than trying to force the square peg of section 3 democratic norms into the round hole of section 2(b) would have been to simply ask the Court to impose a rule as follows:

Where a government, Federal or Provincial, delegates a legislative role to a democratically chosen body or where a government, Federal or Provincial, effectively delegates a decision to the electorate in a referendum, section 3 of the Charter applies.

The essential concept is that a body elected in processes governed by section 3 cannot delegate its power to an elected body chosen by electors with lesser constitutional protections. Although not required, support for adopting such a rule can be drawn from *Reference re Secession of Quebec*, which former [Chief Justice McLachlin](#) has described as “an instructive example of how courts may draw unwritten constitutional principles from the written provisions of the constitution.” The unwritten principle of democracy described in *Reference re Secession of Quebec* surely is not limited to Federal and Provincial elections and would support the application of the democratic norms developed in the context of section 3 jurisprudence to the expression of sovereign will of the people through municipal elections and other democratic processes.

Such a rule does no harm to existing jurisprudence because it is confined to section 3 and, if anything, relieves pressure on courts to use contortions to resolve democratic process issues using section 2(b). The rule is consistent with the intuition of Justice Belobaba in *City of Toronto ONSC*, the majority and minority in *Haig*, and Justice Fish's dissent in *Baier*. (*Baier*, at para 110) What is more, such a rule is consistent with Canada's obligations under Article 25 of the [International Covenant on Civil and Political Rights](#), which echoes section 3 of the *Charter* but includes no limitation concerning the level of government. The rule proposed here might also go some way to reinforcing and justifying the Supreme Court of Canada's deference in the context of administrative law to municipalities acting in a legislative role. Justice McLachlin explained in *Catalyst Paper Corp. v North Cowichan (District)*, [2012 SCC 2](#), that, when dealing with a municipality acting in a legislative role, “reasonableness means that courts must respect the

responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable”(Catalyst, at para 19).

Objections to Giving s. 3 its Proper Scope

Critics of the proposed reinterpretation of section 3 of the *Charter* will bemoan the constitutionalization of referenda and other orders of government. Some critics may suggest that the broader reading of section 3 will prevent Provincial legislatures from restructuring municipal arrangements, such as the amalgamation of cities to create the current City of Toronto considered in *East York (Borough) v Ontario*, [\(1997\) 36 O.R. \(3D\) 733 \(C.A.\)](#) or even the reduction in the number of council members in issue in *City of Toronto ONSC* (see, for example, *Baier*, at para 38). The answer to this is simple. Restructuring of municipalities, municipal boundaries, and the number of representatives would all be permitted – just as Federal and Provincial electoral boundaries are redrawn and the number of representatives are periodically changed – so long as those changes are consistent with the principles that animate section 3 of the *Charter*. In other words, if section 3 applies, then changes to municipal democracy must provide for effective representation and meaningful participation. This is not a harsh or unreasonable standard.

Another criticism can be found in the Federal Court of Appeal decision in *Taypotat v Taypotat*, [2013 FCA 192](#). Justice Mainville, writing for the Court, warned that “the logical result” of section 3 of the *Charter* applying to band council elections would be that “non-aboriginal Canadian citizens would be entitled to participate in such elections” (*Taypotat FCA*, at para 29). A similar argument might be advanced in respect of municipalities or school boards. There is nothing logical about such arguments. First, there is no reason why section 3 should be interpreted to give non-aboriginal Canadian citizens a right to vote in a First Nation’s band council election any more than section 3 gives Canadian citizens resident in Alberta the right to vote in Provincial elections in Quebec. Second, any mischief of this sort is easily remedied through the application of section 1 of the *Charter* which allows for the imposition of reasonable limits that are demonstrably justified in a free and democratic society. An example of a reasonable limit might be limiting democratic rights in a band council election to members of that particular First Nation. Similarly, a reasonable limit in a municipal election might be to restrict the right to vote to individuals ordinarily resident in the relevant municipality.

Conclusion

Canadian lawyers and judges often proudly say that our Constitution is a “living tree” and that our Courts have taken a purposive and generous approach to interpreting the *Charter*. Paradoxically Canadian courts have adopted a narrow textual approach to limit the scope of what is arguably the most important right in the *Charter* – section 3 which sets out the right to vote and the right to stand for election. This blog post has proposed a simple rule to remedy this constitutional defect: where a government, Federal or Provincial, delegates a legislative role to a democratically chosen body or where a government, Federal or Provincial, effectively delegates a decision to the electorate in a referendum, section 3 of the *Charter* applies. This rule fixes a significant constitutional defect, is easily implemented, does no damage to *Charter* doctrine outside of section 3, is consistent with Canada’s international commitments, and pushes us closer to realizing the aspiration embedded in the *Charter* to be a truly free and democratic society.

I am grateful to Alice Woolley, Brynne Harding, and Michael Pal for their comments on an earlier draft of this post.

This post may be cited as: Colin Feasby, “*City of Toronto v Ontario* and Fixing the Problem with Section 3 of the *Charter*” (September 28, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/09/Blog_CF_Toronto_Section_3_Sept2018.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

