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Democratic *Charter* Rights and First-Past-The-Post: A Shallow Conception of Democracy at the Ontario Court of Appeal

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Case Commented On: *Fair Voting BC v Canada (Attorney General)*, [2025 ONCA 581](#)

Despite many Canadians' dissatisfaction with our current first-past-the-post ("FPTP") election system, every attempt at reform so far has failed. The failed political attempts include the [2015 Liberal Party campaign promise to reform FPTP](#) (at 27) and later [abandonment of reform efforts](#), as well as the [unsuccessful referendums in BC](#). A previous *Charter*-based challenge to the provincial system in Québec was dismissed in *Daoust v Québec (Directeur general des élections)*, [2011 QCCA 1634](#). As of last month, the *Charter* challenge brought by Fair Voting BC and Springtide Collective for Democratic Society (collectively, the "Applicants") is no exception. I will begin my commentary on *Fair Voting BC v Canada (Attorney General)*, [2025 ONCA 581](#) (*Fair Voting BC*) by providing a summary of the Applicant's claim, as well as some background on FPTP or single member plurality (SMP), compared to the proportional representation (PR) system advocated for by the Applicants. I will then review the majority decision in *Fair Voting BC*, highlighting what I believe to be a narrow and impoverished view of democratic rights under the *Charter* and the more balanced approach taken by Justice Dawe in his concurring reasons. I will conclude by emphasizing both the difficulty and the importance of judicial protection of democratic rights. Judicial restraint is commendable, and indeed essential, to protect the ideal of a free and democratic society. However, interpreting the right to vote as being limited to the mere ability to cast a ballot, as the majority does, risks abdicating the judicial responsibility to protect the foundation upon which the entire democratic system is premised.

Nature of the *Charter* Challenge

The Applicants challenged the provisions of the *Canada Elections Act*, [SC 2000, c 9](#) (*CEA*) which establish the current FPTP system, including sections 2(1), 24(1), and 313(1) on the basis that they violate both section 3 (the right to vote) and section 15 (equality rights) of the *Charter*.

The Applicants argued that the impugned provisions of the *CEA* violated both the right to effective representation and meaningful participation contained within section 3 of the *Charter*. The Applicants' position was that the right to effective representation is violated by SMP because many voters are represented by Members of Parliament (MP) that they did not vote for, the system diminishes the value of votes cast for small parties, and that it violates the principle of majority rule (at para 35). The argument for meaningful participation was that it reduces the participation

and engagement of citizens who support small parties and those in ridings where their preferred candidate has little chance of winning (at para 36).

The basis of the Applicants' section 15 claim was that SMP results in adverse effect discrimination on the basis of race, sex, and the analogous ground of political affiliation because it contributes to the underrepresentation of racial minorities, women, and small parties in Parliament (at paras 56, 59).

First-Past-The-Post Versus Proportional Representation

In order to give some context to the arguments made and the decision of the Ontario Court of Appeal, I will briefly canvas the various electoral systems under consideration in this case. Canada currently has a first-past-the-post, also called single-member plurality, electoral system both federally and in all provinces. SMP is "single member" because each electoral district elects only one MP (or member of the provincial legislature). SMP is a "plurality" because the winner in each electoral district is the candidate who received the most votes among all the candidates running in that district, regardless of the total percentage of votes.

SMP is not the only type of single-member electoral system. Other systems include approval voting, where voters can vote for as many candidates as they want and the candidate with the most votes wins, and systems which allow voters to rank candidates on their ballot, with a variety of methods to use the ranking to determine the winner. However, there is no discussion of non-SMP single member systems in either the lower court decision (*Fair Voting BC v AG Canada*, [2023 ONSC 6516](#) (ONSC Decision)) or the Ontario Court of Appeal decision. This is likely because the Applicants framed the application by arguing the *Charter* mandates proportional representation.

The version of proportional representation (PR) advanced by the Applicants allows each district to elect more than one representative, and therefore it is not a single-member system. Instead of a single winner, all candidates who receive a minimum number or percentage of votes become MPs or members of the provincial legislature (see ONSC Decision at para 22). The name arises because the composition of Parliament is proportionate to the votes received, rather than a winner-take-all system like SMP.

Majority Decision

Justice Huscroft and Justice Trotter began their judgment with an overview which sets the tone for the remainder of the judgment. The thrust of the overview is captured by the statement that "[there is not] any role for the court in evaluating proposals for electoral reform." (at para 11)

The majority then moved on to reviewing the background of the case, including a brief summary of the impugned legislation and the operation of the current electoral system. The majority then diverted its discussion to the topic of the expert social science evidence filed in the application. While not part of the legal analysis regarding democratic rights or equality, this portion of the judgement (paras 19-22) telegraphs the mentality of the majority's reasons, which envision a very restricted role for judicial scrutiny of the merits of different electoral systems (and the views of social scientists on those relative merits). The majority started by giving a warning that "[g]reat care is required in assessing such evidence." (at para 19) They further noted that, unlike the natural

sciences, social science “is not inherently oriented to discovering the objective truth of some matter under investigation.” (at para 19) The justices were critical of the expert evidence as normative opinions rather than empirical evidence that should be entitled to deference: “[o]ften, what appears to be disinterested conceptual or empirical analysis is better understood as the marshalling of facts and arguments to create a case for a policy change favoured by the author.” (at para 20) and “[a]cademic views are not entitled, *a priori*, to priority over anyone else’s.” (at para 20)

This unfavourable view of the expert evidence also extended to the Application Judge’s description and evaluation of the evidence, and in particular to his comment that the Applicants “have shown that PR would be a fair system.” (ONSC Decision at para 152). The majority criticized this as “insufficiently attentive to these nuances [of the variation within PR systems]”, “inapt”, and “irrelevant to the questions before him” (at para 21). In the view of the majority, “[t]hese sorts of comments stray beyond the realm of legal analysis into policy analysis.” (at para 22) This criticism, and the majority’s assertion that evidence regarding PR is completely irrelevant to answering the legal question of whether SMP violates the *Charter*, suggests a very narrow view of the permissible scope of judicial scrutiny of electoral law, relegating it to the realm of policy decisions beyond the purview of a court.

Moving on to the section 3 arguments, the majority reviewed the major Supreme Court of Canada decisions interpreting section 3 and grouped them into the cases which implicated the basic right to cast a ballot and the cases which established two additional rights within section 3: the right to effective representation and the right to meaningful participation (see paras 26-33). The majority also notes that both the right to effective representation and meaningful participation were recently affirmed by the Supreme Court in *Ontario (Attorney General) v Working Families Coalition (Canada) Inc.*, [2025 SCC 5](#), a successful challenge to pre-election limits on third party spending (at para 34).

However, in its discussion of the right to vote, the majority seemed unwilling to engage substantively with these rights and espoused a narrow interpretation of section 3 that limits it to the mere ability to cast a vote. The majority commenced its discussion of the right to vote by asking: “[h]ow is it possible that a system in which citizens are free to cast ballots for the candidates and political parties of their choice could infringe the right to vote?” (at para 40) The answer according to the majority is that it cannot: “[i]n short, the right to vote is a right to vote pursuant to the electoral system in operation – whatever that system is, and regardless of the electoral outcomes that may obtain.” (at para 42)

In justifying this conclusion, the majority relied on the limits of purposive interpretation and emphasized how it must be constrained by the literal text of the right (at paras 44-46). Applied to the text of section 3 (which is: “[e]very 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 majority stressed that the inclusion of effective representation and meaningful participation as rights under section 3 does not permit unlimited expansion of the right (at para 47). The majority’s interpretation of section 3 is limited to “a right to participate in choosing a community’s representative in Parliament or a provincial legislature by casting a ballot” (at para 53). The majority emphasized the limits to a purposive interpretation of the *Charter* and found the

rights asserted by the Applicants were beyond the scope of section 3. On this basis, the majority dismissed the Applicants' challenge under section 3.

The second *Charter* violation argued by the Applicants was section 15. The Applicants argued that SMP creates adverse effect discrimination because SMP contributes to the underrepresentation of women and racial minorities in Parliament, even if the primary cause of this underrepresentation is independent of SMP (see para 59). The Applicants also alleged that the Application Judge made errors in his factual findings about the lack of causation and by rejecting evidence about New Zealand's experience with PR (see para 60). The Applicants also appealed the Application Judge's finding that political affiliation is not an analogous ground for the purpose of section 15 (see para 61).

The majority rejected the Applicants' arguments about causation, citing the Supreme Court's comments from *R v Sharma*, [2022 SCC 39](#), although they did note the relative lack of guidance in *Sharma* regarding what level of contribution is required to establish a disproportionate impact (at para 72).

For their assessment of the section 15 claim, the majority agreed with the Application Judge that the evidence was insufficient to establish discrimination; however, they “part company with him where his analysis strays into the political and policy realm.” (at para 87) In making this criticism, the majority drew a wide arena for the impermissible “political and policy realm”, including within that range being supportive of gender parity in Parliament (at para 88) and endorsing evidence that Canadian society is systematically sexist and racist (at para 88).

Indeed, for the majority, the very concept of “underrepresentation” contains impermissible normative assessments and an implication that “that the composition of Parliament may be more or less legitimate depending on its demographic diversity.” (at para 89) By assigning responsibility for any over- or underrepresentation to the freedom of voters to vote for whomever they choose (at para 91), the majority forcefully rejected any responsibility for a court to ensure that the mechanism through which voters exercise their vote is *Charter*-compliant.

The final aspect of the Applicants' argument that the majority rejected is that political affiliation is an analogous ground under section 15. The justices upheld both the Application Judge's conclusion and his reasoning on this point (at paras 92-95).

Comment on Deference to Trial Judges

Somewhat tangentially to its discussion of the merits of the appeal, but worthy of commentary given its departure from established law, is the critical comments made by the majority about appellate deference to trial judges. When addressing the factual grounds of appeal on the section 15 issue, the majority took the opportunity to criticize the principle that appellate courts must show deference to trial-level courts' findings of fact on *Charter* claims. For the majority, “[i]t is difficult to accept that a conclusion that the federal electoral system is discriminatory should depend on the social science findings of a single judge.” (at para 78) The problem, for the majority, was not only the frailties of social science evidence previously mentioned, but “that those findings may essentially determine the alleged *Charter* infringement.” (at para 79)

While the majority did ultimately uphold the decision of the Application Judge, they expressed significant dissatisfaction that, if the Application Judge had come to different findings of fact (that causation had been established or that Canada would have similar outcomes to New Zealand if it adopted PR), the appeal court would be required to show deference (at paras 76-78 and 80-81).

In support of this rather significant departure from viewing appeal courts as error-correcting courts, the majority cited two Ontario Court of Appeal decisions which have interpreted the comments from the administrative law case of *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, [2024 SCC 13](#) as applying to the standard of review between trial-level courts and appeal courts (paras 82 to 83). The majority did note that two other Ontario Court of Appeal decisions have not made this change and ultimately left the issue unresolved by stating that the law requires clarification (at para 85).

Concurring Decision

Justice Dawe wrote concurring reasons, agreeing with the disposition of the appeal but clarifying his disagreement with some of the comments made by the majority. Justice Dawe parts company with the majority on the basis that “such a narrow conception of the scope of s. 3, and of the role of the courts in enforcing its guarantees, is at odds with the Supreme Court of Canada’s interpretation of s. 3 in the *Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158” (at para 101). In Justice Dawe’s view, the recognition of the right to effective representation puts some constraints on what are constitutionally-permissible electoral systems and how far they can deviate from voter parity or the ideal of a “free and democratic society” (at para 102).

While recognizing this role for the courts, Justice Dawe ultimately rejected the Applicant’s claim that the right to effective representation under section 3 requires that all voters have their votes contribute to the election of a representative (at para 103).

Justice Dawe referred to the majority’s comments about the appropriate standard of review as “thought-provoking” but makes no further comment on this issue except to agree that the Applicants did not establish a palpable or overriding error in the factual findings of the applications judge (at para 104).

Conclusion

Courts will always have to navigate the delicate balance between doing enough to protect constitutional rights and infringing too much upon elected governments. This is a particularly difficult exercise when it comes to electoral rights, which determine the legitimacy of the political power exercised by those very governments.

When faced with striking this balance, Justices Huscroft and Trotter took a position firmly on the side of non-interference and limited the role of the judiciary to ensuring voters are able to cast ballots within whatever system elected governments choose to establish. Justice Dawe took a more moderate approach but was unwilling to extend the scope of section 3 to mandate proportional

representation, as sought by the Applicants. However, these three justices of the Ontario Court of Appeal may not have the final say on this matter. The Applicants are currently preparing an application for leave to appeal to the Supreme Court (see <https://www.charterchallenge.ca/>).

If leave is granted, our highest court will get to weigh in on where to draw the line of legitimate judicial scrutiny when it comes to electoral reform. It is my hope that the justices will not let warranted caution about overstepping the proper role of the courts to obscure the important role courts have in ensuring that citizens are able to access democratic power. Otherwise, our judicial system will have abdicated the task of oversight of the political system to political actors, whom citizens - by the very nature of the problem - cannot effectively access.

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