Supreme Court of Canada Releases its Decision on the Right to Vote of Canadians Living Abroad

January 16, 2019

In a landmark decision released last week, the Supreme Court of Canada has removed the restriction on voting for Canadian citizens living abroad. In *Frank v. Canada (Attorney General)*, 2019 SCC 1, plaintiffs Gillian Frank and Jamie Duong challenged the constitutionality of ss. 11(d) and 222 of the *Canada Elections Act* ("CEA") on the grounds that they infringe the right to vote protected by s. 3 of the *Canadian Charter of Rights and Freedoms*. Before the decision, the CEA did not allow Canadian citizens to vote in federal elections if they had been out of the country for five consecutive years or more, with some special exemptions. The Supreme Court not only extended this timeframe, but struck it down altogether; Canadian electors, that is, citizens otherwise eligible to vote, will henceforth retain their voting rights despite residing outside the country for any length of time, as long as they have lived in Canada at some point.

Chief Justice Wagner for the majority reasoned that, due to the importance of voting rights, any limits to them must be carefully scrutinized by the Court. The Attorney General of Canada conceded during argument that s. 3 of the *Charter* was breached by the relevant provisions of the CEA, so the Court's analysis turned on a s. 1 test to determine whether the breach was justified.

On the first branch of the test, the Court found that the objective of the limiting provisions was indeed pressing and substantial, as they sought to protect the integrity of the voting system in Canada, however, the residential limits on voting did not stand up to a proportionality analysis.

The Court found that there had been no evidence presented of a rational connection between residence-related limitations on voting and the integrity of the electoral system. It noted that the Attorney General had failed to produce any records of complaints, studies, or other evidence indicative of any harmful effects of allowing out-of-country citizens to vote. In fact, there had instead been four government studies on voting rights that advocated for the removal of residence-based limits. Wagner C.J. also noted Canada's position on the world stage as a leader in progressive enfranchisement, for example, it is one of only a handful of democracies that allows voting rights to those with mental disabilities. It therefore rejected evidence in the form of similar residential voting restrictions in other countries, deeming them unhelpful comparisons.

The voting restrictions further failed the minimal impairment step of the s. 1 test. The Court could find no justification for the five year limit, and saw no correlation between a citizen's commitment to Canada and the length of time that person lives abroad. The Attorney General of Canada argued that non-resident electors should not be allowed to vote in Canadian elections because they are not affected by Canadian legislation and policy. The Court also rejected this argument. It found that many laws, such as taxation, criminal law, and citizenship legislation would indeed affect a Canadian living abroad. Thus, the restriction was deemed to be over-inclusive, as citizens who remained connected to and affected by Canadian politics despite non-residency would be barred from contributing to the democratic process.

On the balancing step of the s. 1 test, the majority found that there were no demonstrable or conceptual benefits to the impugned legislation, but the deleterious effects of depriving Canadian citizens their voting rights were significant. Not only did the Court deem the right itself crucial to our political system, but it noted the importance of its effect on a dedicated citizen's dignity and self-worth. For these reasons, the infringement on s. 3 of the *Charter* could not be justified under s. 1, and the offending sections of the CEA – ss. 222(1)(b) and (c), 223(1)(f), and 226(f) – were struck down. The wording of ss. 11(d), 220, 222(1) and 223(1)(e) was also modified to reflect the Court's decision.

In concurring reasons, Rowe J. agreed that the limit on s. 3 voting rights could not be justified under s. 1 of the *Charter*. However, he made a point of noting that residence requirements were an important part of Canada's political system, and in another context, could be justifiable limits on *Charter* rights. He further clarified that the decision did not extend to the provincial or territorial level; residence requirements; those elections would engage different considerations under s. 1 and a different conclusion might be reached. The validity of such requirements for provincial and territorial elections has been upheld in courts in Saskatchewan, Yukon, and Nunavut, as was also noted in Chief Justice Wagner's reasons.

Justices Côté and Brown, on the other hand, in dissent, found that the restrictions on voting rights for non-residents were reasonable limits on s. 3. The Canadian electoral system, they argued, was founded on geographical representation and community, and was not well-served by allowing physically removed 'community members' to influence federal politics. Interestingly, the basis of their disagreement with the majority was not only substantive, but based on the interpretation and application of the s. 1 analysis. The dissenting judges objected to the majority's process, highlighting that the appropriate measure was not what the Court prefers, but whether the limit on a *Charter* right is reasonably imposed. They found that under the latter approach, Parliament was entitled to privilege a relationship of currency between voters and their communities, and the *CEA* provisions should be upheld.

It should be noted that last month the federal government passed legislation (Bill C-76) that amended the *Canada Elections Act* and guaranteed voting rights to all Canadians residing outside the country, but Friday's ruling could have the effect of preventing future governments from enacting legislation to limit voting rights for citizens living abroad. Under Bill 76, voters residing in other countries must only prove their identity and submit their previous address to determine the riding in which their ballot would be cast.

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