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# Fair Voting BC: *The Charter, Courts, and Election Law*

Léonid Sirota\*

## I. Introduction

When discussing fundamental characteristics of Canada's Constitution in the *Secession Reference*, the Supreme Court observed that “[t]he principle of democracy has always informed the design of our constitutional structure.”<sup>1</sup> In saying that, the Court drew on Beetz J's earlier statement that “the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels.”<sup>2</sup> But what if this was all wrong? What if the design of Parliament, and of the legislatures too, for that matter, were not democratic, as the Supreme Court and others with it long thought? What if, indeed, it amounted to a denial of that *sine qua non* condition of democracy, the right to vote?

This is, in substance, the question posed by the appellants in *Fair Voting BC v Canada (Attorney General)*.<sup>3</sup> Constitutional law is not always intuitive, nor should it be, but it is hardly a surprise that the answer to this question was a resounding no, as indeed it had been on a previous occasion.<sup>4</sup> The way in which an overwhelming majority of Canadian voters have

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\* Reading Law School. I am grateful to Richard Mailey for the invitation to contribute this article. All remaining errors are mine.

1 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 62 [*Secession Reference*].

2 *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2 at 57.

3 2025 ONCA 581 [*Fair Voting BC*].

4 *Daoust v Québec (Directeur général des élections)*, 2011 QCCA 1634.

elected their representatives for almost 160 years does not infringe the constitutional right of “[e]very citizen of Canada ... to vote in an election of members of the House of Commons.”<sup>5</sup> That the question even came to be asked highlights the defects in the way the Supreme Court of Canada has interpreted the right to vote and, by extension, the *Charter* more broadly.

But that is not to say that the way in which the Court of Appeal for Ontario answers the question is devoid of interest. Indeed, there are more interesting issues in *Fair Voting BC* than I can cover within the scope of this short comment. I will leave to one side the argument that the voting system put in place by the *Canada Elections Act* is discriminatory, which the Court of Appeal also rejected, correctly in my view, even though the Court’s observations on the role of causation and evidence in equality claims deserve attention. My focus here will be on the argument based on the right to vote, and what the Court of Appeal’s rejection of it tells us about the interpretation of the *Charter*. I will also address the broader issues surrounding the role of the courts in relation to election laws that arise out of the apparent disagreement between Dawes JA’s concurring opinion and Huscroft JA’s majority one.

## II. The Court of Appeal on Section 3 of the *Charter*

Section 3 is, on its face, one of the simplest provisions of the *Charter*.<sup>6</sup> It protects two rights — to vote and to be eligible — in two specific contexts: federal and provincial elections. The Supreme Court has consistently given effect to these textual commands. It has protected Canadian citizens, respectively prisoners and expatriates, against disenfranchisement in *Sauvé v Canada (Chief Electoral Officer)*<sup>7</sup> and *Frank v Canada (Attorney General)*.<sup>8</sup> At the same time, it gave effect to the contextual limits on the scope of section 3. In *Haig v Canada*,<sup>9</sup> the Court held that section 3 did not apply to a referendum. Writing for the majority, L’Heureux-Dubé J insisted that “[s]ection 3 of the *Charter* is clear and unambiguous as is its purpose: it is limited to the elections of provincial and federal representatives. Consequently, since a referendum is in no way such a selection, the citizens of this country cannot claim a constitutional right to vote in a referendum.”<sup>10</sup> More recently, in *Toronto (City) v Ontario (Attorney General)*, Wagner CJ and Brown J for the majority stressed that “[s]ection 3 democratic rights were not extended to candidates or electors to municipal councils” in what was “a deliberate omission” by the *Charter*’s framers, and thus “not a gap to be addressed judicially.”<sup>11</sup>

However, beginning with *Reference re Provincial Electoral Boundaries (Saskatchewan)*,<sup>12</sup> the Supreme Court has also held that, within the electoral contexts to which it applied, this seemingly simple right produces increasingly baroque effects. This was, first, in the name of ensuring “effective representation” of the voters, and then also their “meaningful participa-

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5 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 3 [*Charter*].

6 See Michael Pal, “The Right to Vote: Section 3 at Forty” in Howard Kislowicz, Kerri Froc & Richard Moon, eds, *The Surprising Constitution* (Vancouver: UBC Press, 2023) 127 at 132 [Pal, “Section 3”].

7 2002 SCC 68 [*Sauvé*].

8 2019 SCC 1 [*Frank*].

9 [1993] 2 SCR 995.

10 *Ibid* at 1033.

11 2021 SCC 34 at para 81 [*City of Toronto*].

12 [1991] 2 SCR 158 [*Boundaries Reference*].

tion” in the electoral process. In the *Boundaries Reference* itself, this was interpreted to impose a requirement of “relative equality” of voters — a peculiar sort of equality that allowed over-representation of rural voters and their corresponding empowerment at the expense of their urban fellow-citizens. In *Figueroa v Canada (Attorney General)*,<sup>13</sup> the participatory dimension of section 3’s purpose was held to render unconstitutional provisions that put parties nominating fewer than 50 candidates at a competitive disadvantage. In *Harper v Canada (Attorney General)*<sup>14</sup> and, most recently, in *Ontario (Attorney General) v Working Families Coalition (Canada) Inc.*,<sup>15</sup> the same principle was held to constrain spending restrictions imposed on so-called “third parties” — that is to say, groups that are not political parties or candidates — before and during election campaigns.

As further discussed below, this jurisprudence is a tangled web woven out of misinterpretations of both section 3 itself and other constitutional provisions. But in *Fair Voting BC*, the Court of Appeal declines the applicants’ invitation to add yet another strand to it. While it follows the general tendency of the Supreme Court’s case law in professing fidelity to a purposive approach to constitutional interpretation, it insists that “[t]he text of the *Charter* and the constitutional settlement it effects necessarily structure and delimit the scope of purposive interpretation.”<sup>16</sup> It seeks to cabin the purposive “expansion”<sup>17</sup> of section 3 rights to the contexts where it has already taken place, notably the electoral participants’ efforts to inform (or misinform) voters during and before an election campaign. By contrast, the Supreme Court had previously suggested that “the *Charter* is entirely neutral as to the type of electoral system in which the right to vote or to run for office is to be exercised.”<sup>18</sup> The Court of Appeal upholds this neutrality.

This is the right approach for an intermediate appellate court to take. Being bound by Supreme Court precedent, it cannot by itself roll back decisions that misinterpret the *Charter*, whether section 3 or other provisions. But that does not mean that the Court of Appeal needs to extend the (il)logic of these decisions. If the Supreme Court chooses to do that, let it take responsibility for this extension. Besides, a competing impulse, which the Court of Appeal also notices, is at play too. A number of recent decisions, notably *R v Stillman*,<sup>19</sup> *R v Poulin*,<sup>20</sup> and lastly *Quebec (Attorney General) v 9147-0732 Québec inc*<sup>21</sup> are, in my view, purposivist in name only: their majorities’ reasoning is rather textualist if not originalist.<sup>22</sup> The Court of Appeal chooses to go with this trend rather than that of section 3 expansionism.

If the Supreme Court hears an appeal in this or a future section 3 case, it will presumably have to decide which of these two tendencies to extend, and which to abandon (that is, if the Supreme Court cares to generate a coherent body of legal doctrine — it has some-

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13 2003 SCC 37 [*Figueroa*].

14 2004 SCC 33 [*Harper*].

15 2025 SCC 5 [*Working Families*].

16 *Fair Voting BC*, *supra* note 3 at para 46.

17 *Ibid* at para 49.

18 *Figueroa*, *supra* note 13 at para 37, quoted and emphasized in *Fair Voting BC*, *supra* note 3.

19 2019 SCC 40.

20 2019 SCC 47.

21 2020 SCC 32 [*Québec Inc*].

22 See Léonid Sirota, “Purposivism, Textualism, and Originalism in Recent Cases on *Charter* Interpretation” (2021) 47:1 *Queen’s LJ* 78.

times demonstrated a conspicuous lack of interest in doing so<sup>23</sup>). It should follow the Court of Appeal's lead: even if — and it is only a hypothesis I do not endorse — the Supreme Court can no longer untangle the web it spun in the *Boundaries Reference* and *Figueroa*, it can say “thus far, and no further,” as the Court of Appeal suggests. The textualist approach embodied in the line of cases leading to *Québec Inc* and, perhaps more to the point, in the section 3 cases that upheld Canadian citizens' right to vote while confining its scope to the types of elections it names, is superior to the unconstrained, endlessly malleable purposivism deployed in the *Boundaries Reference* and in *Figueroa*.

I pause here to note that Michael Pal reads the *Boundaries Reference* as reflecting a kind of originalism rather than properly purposive interpretation.<sup>24</sup> He points out that the idea of “effective representation” and the “relative equality” of voters into which it was translated were meant to ensure that section 3 preserved the pre-1982 status quo, in which malapportioned electoral districts were common.<sup>25</sup> That is so, but originalism — especially public meaning originalism, with which Professor Pal identifies this reasoning — is concerned with fixing the meaning of constitutional text, not with preserving existing institutions which may or may not be consistent with the meaning of the text. Indeed, inconsistency may well exist even if the text's framers do not anticipate it.<sup>26</sup>

To the extent it is originalist in any sense, the reasoning of the *Boundaries Reference* seeks to give effect to original expected applications — that is, it asks how the Constitution's framers would have resolved the issue had they turned their mind to it. This is a form of counterfactual reasoning no contemporary originalists regard as worth engaging in.<sup>27</sup> As Professor Pal himself observes, “[t]here is no investigation” in the *Boundaries Reference* “of what the phrase ‘every citizen’ would have meant to the public in 1982,”<sup>28</sup> which would have been the hallmark of an originalist interpretation. Insofar as the majority's “analysis relies ... on historical practice,” as Professor Pal says, this is not in the service of “revealing public meaning,”<sup>29</sup> but in order to divine an unexpressed and hence fictitious purpose of section 3, which then displaces the provision's text agreed upon by the *Charter's* framers.

One need not be a committed originalist to see this as a problem. Perhaps it is more appropriate to read a constitutional text in accordance with its present-day rather than original meaning; perhaps one's reading should be informed by the underlying moral commitments of the constitutional order or even by some divinely inspired common good — this is not the

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23 Compare *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31; *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22. For a discussion, see Leonid Sirota, “Marxist Administrative Law”, *Double Aspect* (21 June 2024), online: <<https://www.doubleaspect.blog/2024/06/21/marxist-administrative-law/>> [perma.cc/2SMK-BCMF].

24 Pal, “Section 3”, *supra* note 6 at 128.

25 *Ibid* at 128–29.

26 Perhaps the best-known example concerns the unconstitutionality of segregation under the US Constitution, Amend XIV: see Michael W McConnell, “Originalism and the Desegregation Decisions” (1995) 81:4 *Va L Rev* 947.

27 See Benjamin Oliphant & Léonid Sirota, “Has the Supreme Court of Canada Rejected ‘Originalism?’” (2016) 42:1 *Queen's LJ* 107 at 124–126.

28 Pal, “Section 3”, *supra* note 6 at 129.

29 *Ibid*.

place to argue otherwise. In any case, however, one ought to recognize that, as Huscroft JA put it in *Fair Voting BC*, “Canadians did not adopt a generic charter of rights. We adopted a very specific charter of rights: the *Canadian Charter of Rights and Freedoms*, which establishes as supreme law the specific rights and freedoms it enumerates and so enshrines.”<sup>30</sup> At the same time, the matters not covered by this specific enumeration of rights remain subject to ordinary politics. Thus, citizens as *Charter* rights-holders benefit from the (admittedly relative) clarity constitutional adjudication focused on the *Charter*’s text provides in comparison with judicial decision-making based on unstated purposes. So too do legislators, as well as citizens in their capacity as voters.

Section 3, like the *Charter* of which it is part, is no mere shadow on the wall of Plato’s cave.<sup>31</sup> There is no perfect constitution of which it is but an inadequate representation and to which the judges, in their enlightened wisdom, have a privileged access unavailable to ordinary citizens and legislators. When they decide constitutional cases, the courts do not bring us closer to some as-yet-unrealized end or ideal: they simply interpret the law, albeit “the supreme law of Canada.”<sup>32</sup> The Court of Appeal’s decision in *Fair Voting BC* properly reflects this.

Of course, the effect of the Court of Appeal’s decision is to deny a remedy for what some people will regard as an injustice. Admittedly, I do not, and a sceptical reader can discount the views expressed here accordingly. But the *Charter* exists to limit the power of legislatures and governments in specific ways, not to remedy injustice wherever it might exist in Canada, and this too is true regardless of one’s views about the exact way in which it should be interpreted.

### III. What Courts Can and What They Cannot Do

The Court of Appeal’s emphasis on the constitutional text’s constraining role in the interpretation of section 3 stands in contrast to that taken by many of the Supreme Court’s decisions. These have tended to be results-oriented and to reflect the Court’s own conception of acceptable electoral arrangements and its role in relation to them.

To be clear, this conception is by no means always unattractive. Indeed, in my view, the outcomes of *Figueroa* and *Working Families* are unquestionably good in the sense that a sound constitutional order would produce them. The legislation struck down in both cases was the product of transparent self-dealing by governing parties,<sup>33</sup> and getting rid of this sort of interference with fair elections is the most easily justifiable use-case of judicial review of legislation.<sup>34</sup> The legislation at issue in the *Boundaries Reference* was of the same sort,<sup>35</sup> and in my

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30 *Fair Voting BC*, *supra* note 3 at para 46.

31 Plato, *Republic*, translated by Benjamin Jowett (Oxford: Clarendon Press, 1881).

32 *Constitution Act, 1982*, *supra* note 5, s 52(1).

33 On this phenomenon generally, see Michael Pal, “Breakdowns in the Democratic Process and the Law of Canadian Democracy” (2011) 57:2 McGill LJ 299; on the value of “third party” participation in democratic discourse, see Léonid Sirota, “‘Third Parties’ and Democracy 2.0” (2015) 60:2 McGill LJ 253.

34 See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

35 Pal, “Section 3”, *supra* note 6, at 128.

view a sound constitutional order would condemn it too. The trouble, however, is that in several ways relevant here the Canadian constitutional order is less than sound.<sup>36</sup>

One issue is that the Supreme Court has long wilfully misread section 15 of *Charter*. In doing so, it reduced the equality rights provision from a general guarantee of equality before the law to a much narrower (if still expansive, and possibly unduly so) prohibition on discrimination based on a limited number of enumerated or closely analogous grounds.<sup>37</sup> Blatant discrimination between small and large political parties and between rural and urban voters ought to fall foul of a right to equality before the law, requiring justification under section 1 of the *Charter*, which should not be easily forthcoming for laws serving little more than a government's electoral interests. But the cramped interpretation of section 15 by the Supreme Court takes these arguments off the table.

Another problem with the Canadian constitutional order is that it includes section 33 of the *Charter*, which allows a partisan majority acting like thieves in the night to disapply most of the Constitution's protections for fundamental rights, including for the freedom of political speech, to any legislation they fancy. That is what the Ontario legislature did when enacting the censorship regime at issue in *Working Families*,<sup>38</sup> so it too could not be challenged on the obvious ground that it unjustifiably restricted the freedom of expression protected by section 2(b) of the *Charter*.

One can understand the temptation to work around these flaws by the expedient of giving section 3 a broad interpretation that will enable judicial remedies for misguided or self-interested electoral legislation, even if it does so by undermining the quality of elections rather than citizens' ability to take part. Provincial legislatures — and likely Parliament too — feel increasingly free to use section 33 to set aside the *Charter's* protections for the freedom of expression. Hence, Professor Pal is surely right that “[c]laimants can ... increasingly be expected to try to characterize the harm” of which they are complaining “as one to the right to vote in section 3, so as to escape the possible use of the notwithstanding clause.”<sup>39</sup> He is also right that “[c]ourts inclined to prevent such harms will have incentives to use section 3 rather than section 2 or section 15 if claimants give them the opportunity to do so in their arguments.”<sup>40</sup>

However, to identify a flaw in the constitutional order is not to say that it may be remedied by the nearest institution to hand in whatever way that institution can come up with. At a minimum, attempts to do so will result in “some conceptual confusion.”<sup>41</sup> Moreover, once the confusion sets in, it will be exacerbated from case to case, as one confused precedent builds on another, and purported clarifications only make matters worse. But, in addition to such practi-

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36 There are, of course, many other things that are wrong with the Canadian Constitution: see e.g. Léonid Sirota, “Things I Dislike about the Constitution”, *Double Aspect* (4 September 2018), online: <doubleaspect.blog/2018/09/04/things-i-dislike-about-the-constitution/> [perma.cc/CG7Y-R938].

37 The Hon Ian Binnie, “Judging The Judges: ‘May They Boldly Go Where Ivan Rand Went Before’” (2013) 26:1 Can JL & Jur 5.

38 See Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 42nd Parl, 1st Sess, No 273A (12 June 2021) at 14097: “The House met at 0001” (second reading debate on Bill 307, the misnamed *Protecting Elections and Defending Democracy Act, 2021*).

39 Pal, “Section 3”, *supra* note 6 at 139.

40 *Ibid.*

41 *Ibid.*

cal concerns, there is a point of principle at stake. Constitutional defects — especially the ones that are inherent in the constitutional text — must be corrected by the means the Constitution of Canada itself prescribes: amendment pursuant to Part V of the *Constitution Act, 1982*.

The Supreme Court can, to be sure, overrule its own decisions. I think it should overrule the *Boundaries Reference*, for instance, ideally after first overruling its misinterpretation of section 15 of the *Charter*. Be that as it may, overruling a bad interpretation of one provision is a very different matter from misinterpreting another to compensate for a previous misinterpretation that is being left in place. The Supreme Court's existing case law on the right to vote is doing just that, contracting or expanding this right in order to achieve outcomes that should perhaps have resulted from the application of other rights but which have little to do with voting.

To insist that the courts only interpret and apply section 3 on its own terms, as best they understand them in accordance with what they regard as the correct interpretive methodology, is not to call for judicial minimalism or even restraint. The Supreme Court did not heed the government's appeals to judicial restraint in *Sauvé* and *Frank* — and it was right not to. The *Charter* provides that every citizen is entitled to the franchise, and it would have been entirely wrong to disregard that in the name of deference to political choices to ignore this command.

By contrast, the *Boundaries Reference* is an example of judicial abdication, as Professor Pal suggests. To be sure, the Supreme Court justified its conclusion in a way that enabled it to expand its power in later cases.<sup>42</sup> But so far as the *Boundaries Reference* itself was concerned, the Court's opinion reflected its desire to avoid inserting itself into contentious issues of election law. And that desire is not in any way praiseworthy. Just as the courts should refuse to intervene when the law gives them no reason to, as in *Fair Voting BC*, they should not shy away from intervening when the law provides such a reason.

In *Fair Voting BC*, the brief concurring opinion of Dawe JA draws attention to this issue. Huscroft JA insists that the section 3 right to vote “stands apart from the electoral system in which that right is exercised. In 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.”<sup>43</sup> As a result, the courts have no “role ... in evaluating proposals for electoral reform.”<sup>44</sup> Dawe JA counters that “[o]nce it is recognized that section 3 guarantees citizens a right to effective representation, it follows that section 3 must constrain both the extent to which an electoral system can permissibly deviate from absolute voter parity, and the justifications that can permissibly be relied on by the legislature to support any such deviations.”<sup>45</sup>

These opinions may well be talking past each other to some extent: Huscroft JA, as I read him, uses “electoral system” to refer to the methods of aggregating individual votes, such as first-past-the-post and proportional representation, which are at issue in *Fair Voting BC*. Dawe JA, by contrast, brings up a different issue, namely the apportionment of constituencies within

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42 A parallel with *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) may be too grand, but is perhaps not altogether out of order.

43 *Fair Voting BC*, *supra* note 3 at para 42.

44 *Ibid* at para 11.

45 *Ibid* at para 102.

a system that relies on some form of geographic representation, such as first-past-the-post. This is a matter that arises once an electoral system, in Huscroft JA's sense, has already been chosen. If the phrase "electoral system" is understood in a broader sense that encompasses these subsequent choices, Dawe JA may well be right "not [to] read the majority's reasons as suggesting that every imaginable electoral system would be constitutionally compliant."<sup>46</sup>

The obvious flaw in Dawe JA's argument is that, as Huscroft JA points out, the *Charter* does not, in fact, "guarantee ... a right to effective representation." The rights protected by section 3 are the right to vote and the right to be a candidate. At most, effective representation is a *purpose*, whose achievement is not only dependent on but also limited by the courts' duty to give effect to the *Charter's* text.<sup>47</sup> But while it may be that electoral systems such as first-past-the-post, alternative vote, and various versions of proportional representation would all be *Charter*-compliant, courts do have a role to play in ensuring the constitutionality of election laws where the *Charter's* text requires it.

Apportionment is indeed one area where the courts ought to be involved, and more than they have been so far. As explained above, the best argument for this is that unequal electoral districts mean that voters are not "equal before and under the law" as required by the text of section 15 of the *Charter*. However, Professor Pal suggests a different approach, which is that "[t]he text of section 3 implies equality among voters in its use of the phrase '[e]very citizen' and in the absence of any express limitations in the text of the provision."<sup>48</sup> In my view, the more natural reading of the words "every citizen" is as a protection against disenfranchisement, as in *Sauvé* and *Frank*, but Professor Pal's suggestion deserves further consideration.

Of course, this is not to say that any deviation from absolute equality of numbers would be unconstitutional. Governments would remain able to justify a degree of disparity among electoral districts as a reasonable limit on either section 15 or section 3 rights. But they ought to be required to provide a justification, and Dawe JA is right to say that not all justifications should be acceptable.

Access to the franchise is another area where the courts may be called upon to enforce section 3. *Sauvé* and *Frank*, as well as the *Elections Modernization Act*,<sup>49</sup> mean that no group of adult citizens remains explicitly disenfranchised as a matter of law. But whether all citizens are able to exercise their right to vote — or whether legislation either creates implicit impediments or fails to make necessary provision for the exercise of this right — is another question. For example, in *Henry v Canada (Attorney General)*,<sup>50</sup> it was argued that voter identification requirements had the effect of infringing the applicants' section 3 right, although the British Columbia Court of Appeal held that they were, rather, a reasonable limit on this right. As Maxime St-Hilaire and I have pointed out, neither the applicants nor the government produced much evidence in *Henry*, and, in any event, the identification requirements have since

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46 *Ibid* (emphasis in the original).

47 See Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59:4 *Alta L Rev* 919.

48 Pal, "Section 3", *supra* note 6 at 129.

49 SC 2018, c 31.

50 2014 BCCA 30.

been modified.<sup>51</sup> Whatever the merits of that decision, however, if future cases in which identification or other requirements, or failure to provide the facilities required for voters to be able to cast a ballot, may have the effect of disenfranchising citizens who undertake a reasonable effort to exercise their right to vote, courts must hold the governments imposing such requirements to their full burden of justification under section 1 of the *Charter*.<sup>52</sup>

Even the choice of electoral system in Huscroft JA's sense is not quite constitutionally unconstrained, at least at the federal level. Parliament's freedom in this regard is not absolute because "the principle of proportionate representation of *the provinces* in the House of Commons" is constitutionally entrenched.<sup>53</sup> Any electoral system that results in members of Parliament not representing specific provinces — for example, a system of pure proportional representation based on Canada-wide party vote totals — would not be constitutional. Provinces are not subject to this requirement, of course, and could adopt a system of proportional representation if they wish.

Beyond this, the courts' involvement in ensuring the constitutionality of electoral rules will likely be triggered by the application of sections 2(b) and 15 of the *Charter*. A comprehensive discussion of how this may come about would be beyond the scope of this comment. I will only make two brief points, which reiterate what has been said so far. First, legislatures may choose to evade constitutional constraints by resorting to section 33 of the *Charter*, including in order to enact electoral legislation motivated by partisan self-interest. Their ability to do so is a grave flaw of the Canadian Constitution, but it is not the courts' role to rectify this flaw by expanding the interpretation of section 3 or of other written or unwritten constitutional rules, or indeed by adopting a cramped meaning of the clear, if pernicious, terms of section 33. Two constitutional wrongs do not make a right.

Second, insofar as legislatures do not invoke section 33 and the courts are called upon to verify the compliance of electoral legislation with section 2(b), in particular, they should not simply defer to legislative judgments. This remains the case when legislation is presented as advancing supposedly commendable values such as egalitarianism. Whether a law limits the rights protected by section 3 or section 2(b), the courts' role remains the same: ensuring that the limits, where they are found to exist, are demonstrably justified. The contrast between the healthy scepticism the Supreme Court showed in *Sauvé* and *Frank* and its deference to Parliament in *Harper* is striking, and there is nothing in the *Charter's* text to warrant the latter approach.

## IV. Conclusion

The Court of Appeal's decision in *Fair Voting BC* is a helpful reminder that the Constitution of Canada says what it says, and not what an activist for one cause or another might wish it to say. The *Charter* protects the right to vote, but that guarantee cannot be transfigured into a

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51 See Maxime St-Hilaire & Léonid Sirota, "Canadian Voter Identification Requirements in a Comparative Perspective" in Gregory Tardi, ed, *The Informed Citizens' Guide to Elections: Electioneering Based on the Rule of Law* (Toronto: Carswell, 2015) 517 at 520.

52 See also the discussion Pal, "Section 3", *supra* note 6 at 136.

53 *Constitution Act, 1982*, *supra* note 5, s 42(1)(a) (emphasis added). The principle itself is spelt out in the *Constitution Act, 1867*, 30 & 31 Vict c 3, ss 51 and 51A.

promise of aggregating individual votes in a specific manner in the name of an extra-textual promise of “effective representation.” Although the Supreme Court has sometimes acted as if this ideal displaced the *Charter’s* text, the Court of Appeal is right to acknowledge the text’s constraining effect.

This is not to say that courts have no role to play in ensuring that electoral regulations comply with the Constitution. But their role is to interpret and apply the Constitution we already have, rather than a more perfect version that could have been but was not enacted. Courts are not at liberty to add new constitutional constraints on legislation, as the applicants in *Fair Voting BC* were hoping they would. Nor are they at liberty to abandon existing constraints, as the governments tried to get them to do in cases such as the *Boundaries Reference*, *Sauvé*, and *Frank*. It is understandable that neither activists nor governments — or any number of other people, myself included — find the Constitution of Canada quite to their liking. It is the result of a series of political compromises, and is flawed as such compromises tend to be. But this Constitution, and no other, “is the supreme law of Canada,”<sup>54</sup> and for better as well as for worse, we must bear with it until we can change it in the manner the Constitution itself provides for.

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54 *Constitution Act, 1982*, *supra* note 5, s 52(1).