THEME 5

THE VOTE

Record No. 52619

THE SUPREME COURT OF MAURITIUS

1. Jaya Rama VALAYDEN
2. Serge Gaston LADEGOURDIE
3. Marie Joseph Immanuel Guy OLLIVRY

PLAINTIFFS

V

1. **H. E. The President of the Republic of Mauritius**
2. **The Hon. The Attorney-General**
3. **Mr. S. Moosun, The Electoral Commissioner**
4. **Mr. S. Runghen, The Returning Officer for the Constituency of Stanley/Rose Hill (No.19)**

DEFENDANTS

In the presence of:

The Electoral Supervisor Commission & 26 Others

CO-DEFENDANTS

***Before**: Rajsoomer Lallah, C J, V Boolell, J. and Y. K. J. Yeung Sik Yuen, J*

Elections *– Manner of Voting at by-election – Whether requirement to cast more than one vote is constitutional.*

Background facts: *Two vacancies occurred in the National Assembly among members representing the constituency of Stanley/Rose Hill. A writ of election was issued to the returning officer, the fourth defendant, requiring him to cause an election to be held for the return of two members to serve in the National Assembly for that constituency. The 21st of December 1994 was appointed as the nomination day and polling day, if a poll became necessary, was set for the 29th of January 1995.*

On 21 December 1994, a new regulation for voting at a by-election was issued. It required an elector who was registered in a constituency in which a by-election was being held, to cast as many valid votes as there were members to be elected at that by-election.

The first and second plaintiffs sought a declaration that, as electors, they should be able to cast a valid vote for only one candidate instead of two as the new regulation required them to do.

Held: *That the new regulation was not unconstitutional or* ultra vires *or illegal in any other way.*

Cases cited in the Judgement:

Sir Gaetan Duval v *E. François (1982) MR 84*

JUDGEMENT

Two vacancies recently occurred in the National Assembly among members representing the constituency of Stanley/Rose Hill (No. 10). A writ of election was issued to the Returning Officer, the fourth defendant, requiring him to cause an election to be made for the return of two members to serve in the National Assembly for that constituency. In consequence, the 21st of December, 1994 was appointed as the nomination day, the day of election, and the 29th of January, 1995 for the taking of a poll, if a poll became necessary. Some twenty-eight candidates were nominated for election, with the result that the taking of a poll has become necessary. The first and second plaintiffs are electors in the constituency. The second plaintiff is also a candidate as well as the third plaintiff. Twenty-six other persons, co-defendants Nos. 4 to 29, are also candidates for election.

Regulation 33 of the National Assembly Elections Regulations 1958 originally read as follows:

> 33. **How to mark a vote**
>
> The elector shall mark his vote upon the ballot paper by placing a cross opposite the name of each candidate for whom he wishes to vote.

On the 21st of December 1994, the very date appointed as nomination day, that Regulation was amended by G. N. No. 209 of 1994 by the addition of a new second paragraph, the existing paragraph being numbered as

> (1) That new second paragraph reads as follows:
>
> > (2) Where, at a by-election, a writ of election directs a returning officer to cause election of more than one member to be made for a particular constituency, an elector registered in that constituency desiring to record his vote shall cast as many valid votes as there are members to be elected at that by-election.

The three plaintiffs have entered an action under section 83 of the Constitution which empowers a person to seek a declaration or other relief from the Supreme Court where he alleges that his interests are being or are likely to be affected by a contravention of a provision of the Constitution. What are, in practice, the interests which the plaintiffs allege are being affected in relation to them? Mr. Valayden and Mr. Ladegourdie, the first and second plaintiffs, are seeking a declaration that, as electors, they may validly cast a vote for only one candidate instead of two as the new paragraph of Regulation 33 requires them to do. Presumably, this is the right or interest which they seek to maintain, that is to say, the right which they claim to enjoy under the Constitution to vote for only one candidate to the exclusion of any other candidate even though there are two vacancies to be filled.

We are not quite clear about the particular interest of Mr Ollivry, the third plaintiff. This was not made explicit in the Plaint with Summons. He is not an elector as the two other plaintiffs but he is a candidate. Presumably the interest which, in practice, he wishes to safeguard and which he claims, in the words of section 83 (1) of the Constitution, is "being or is likely to be affected" is that if electors cast a vote for him alone, that vote should be counted as valid. We will proceed on that assumption as otherwise he would have no *locus standi* in the case. Needless to add, Mr. Ladegourdie, as a candidate, also claims the same right as Mr. Ollivry.

Two basic points have been put forward by the plaintiffs to challenge the constitutionality or legality of the new paragraph of Regulation 33. First, it is said that the new paragraph is contrary to sections 1 and 31 (2) of the Constitution and the First Schedule thereto. Secondly, it is said that the new paragraph of Regulation 33, having been made under section 84 of the Representation of the People Act, is void in that it purports to amend regulations originally made under section 85 of the Act, which embodies the general regulation-making power to give effect to that Act and that, in any event, regulations under section 84 of the Act or any other provision cannot be resorted to with a view directly or indirectly to amend sections 1 and 31(2) of the Constitution and paragraph 1 of the Schedule. It is further contended that section 84 was only designed to remove difficulties and was of a provisional nature and that, in any event, no difficulty has arisen.

The stand of the Attorney-General, the second defendant, is in substance to the following effect. Two vacancies having arisen simultaneously in the constituency, a single writ was validly issued for the return of two members. Given the absence of legislative provisions governing the number of votes which an elector could validly cast in respect of by-elections either under section 44 of the Constitution or in the First Schedule or in the Representation of the People Act or the Regulations, the electorate and the election officers might have doubts in the matter. With a view to removing this unforeseen difficulty, the powers conferred under section 84 of the Representation of the People Act were resorted to. The Attorney-General also contends, in this connection, that section 84 of the Representation of the People Act was not intended to be merely of a provisional nature and that, in any event, the object of the new paragraph is consistent with the principle laid down in the Constitution whereby electors are compelled, when exercising their right to vote at a general election, to vote for three candidates in constituencies in the island of Mauritius and for two candidates in the constituency of Rodrigues.

The stand of the Electoral Supervisory Commission, the first co-defendant, is to the effect that, a single writ having been issued for the return of the two members, the question arose as to whether there should be two separate by-elections or a single by-election. The difficulty arose as to whether an elector was entitled to cast his vote for at least one candidate but not more than two or for not less and not more than two candidates. The Commission further contends that it was fair and reasonable, for practical reasons and to avoid needless multiplicity of procedures and expenditure, that a single by-election be held for the return of two members. That difficulty had to be resolved before the day of election. It was envisaged at one stage to seek the guidance of

the Supreme Court on the matter. The problem, however, arose as to whom the parties to a proposed action in the Supreme Court should be as candidates had not yet been nominated. And, since the first defendant was ready and willing to make regulations to resolve the difficulty and since the solution proposed was consistent with the general policy of the First Schedule to the Constitution, the Electoral Supervisory Commission subscribed to the proposed solution.

We need to refer to the stand of the remaining parties to the present action. The first defendant and the second co-defendant, that is to say, the President of the Republic and the Rt. Hon. the Prime Minister, have moved to be put out of cause and, in any event, would be abiding by our decision as indeed the third and fourth defendants and all the other co-defendants have indicated that they would.

We will first examine the question whether the new paragraph of Regulation 33 is unconstitutional as contended by Sir Gaetan Duval Q.C. for the plaintiffs. In this regard, Sir Gaetan referred to the past electoral systems of Mauritius to suggest that electors were free to cast no more than one vote, "plumpers" as he called it, even though a greater number of vacancies required to be filled.

The electoral history of Mauritius, with regard to the question for how many candidates a vote can be validly cast, has been rather unusual. Our researches have shown that there had always been, at any rate since 1886 starting with Port Louis and later extended to other districts until the general elections of 1953, multi-member constituencies based on the nine districts of Mauritius where an elector could vote for less than the number of seats requiring to be filled. By virtue of an Order in Council in 1958 (S.I. 1958 II p. 2924 section 29) 40 single-member constituencies were for the first time created where an elector's vote could be validly cast for only one candidate.

In 1966, however, by virtue of an Order in Council (1966 S.I. III p.5191 section 7 and G.N. 82 of 1966) the forty constituencies were paired in order to create twenty constituencies for the island of Mauritius each returning three members and a single constituency for Rodrigues returning two members. For the first time, the principle of block-voting was established in the First Schedule to the Constitution imposing a civic duty on the elector, who wished to exercise his vote at a general election, to cast votes for not less and not more than three candidates in the island of Mauritius and two candidates for Rodrigues.

The creation of this new electoral system followed various proposals for electoral systems made by Professor S. A. de Smith who became Constitutional Commissioner for Mauritius in the latter stages of our constitutional evolution from colonialism to independence (Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly) and by the Banwell Commission (Sessional Paper No.5 of 1966). Some aspects of the Report of Professor de Smith have been considered in the case of *Sir Gaetan Duval* v *E. François 1982 MR p. 84.*

The system which was eventually adopted in the Constitution of 1966 and maintained in our present Constitution is somewhat complicated. It consists essentially of a method of direct election of sixty-two members on the basis of first-past-the-post rules, supplemented by a method of indirect election consisting in the allocation of either further seats on the basis of community and party considerations and not necessarily on the relative success of the candidates in their quality as candidates.

The system adopted would appear to have attempted to reconcile, in some measure, certain communal considerations with wider political considerations, to encourage multi-communal parties, while at the same time ensuring that the result of the elections would not thereby be frustrated. Block-voting was made an integral feature of the system, if only with relative possibilities of success as a device to eliminate, completely, communal voting, since electors were not bound to vote for the candidates of the same party. The device could, however, be looked upon as an encouragement to vote on party lines and registered parties have the same symbol.

We must bear in mind that the method of indirect election, by the electorate itself, with compulsory block-voting in the electoral process, was designed to replace an essentially undemocratic feature in Colonial Legislatures where the colonial power had reserved the right to nominate more than a third of the membership of the Legislature whether those persons had taken part in the election or not (*vide* e.g. section 27 of the Schedule to the Mauritius Constitution Order of 1964, G. N. 24 of 1964). So we are not prepared to follow Sir Gaetan's reasoning by looking blindly at previous Constitutions in conjuring up an implied right to vote for only one candidate when more than one vacancy exists.

Undoubtedly the electoral system, which was designed for a sovereign Mauritius, was different from previous systems. Admittedly, the system of block-voting was expressed in the Constitution to apply to general elections and no specific mention was made of by-elections. With regard to the replacement of the members who were not directly elected by the electorate but were allocated seats on considerations of their community and political party, a particular system of replacement, other than a by-election, was resorted to, as continues to be the case under paragraph 5 (7) of the First Schedule to our present Constitution. The method of a by-election was, nevertheless, preserved for the replacement of members who had been directly elected, although this method disappeared for a time (The Constitution [Amendment] Act [No. 40 of 1973]) but was re-established following the general elections of 1982 (The Constitution [Amendment] Act [No. 2 of 1982]).

No particular express provision was, however, made in the First Schedule, whether in the Constitutions of 1966 or 1967 or indeed in the amendment of 1982, to the number of candidates for which an elector could validly vote in a by-election where more than one vacancy occurred. The result is that we must look rather closely at the very wording of the First Schedule for guidance.

The relevant provision in so far as by-elections are concerned is to be found in paragraph 1 (2) which, incidentally, is not mentioned in the Plaint with Summons. The Provision reads as follows:

> (2) Every member returned by a constituency shall be directly elected in accordance with this Constitution at a general election or *by-election held* in such manner as may be prescribed. (The emphasis is ours.)

This provision clearly indicates that power is conferred on the Legislature to make provision for the manner in which a by-election should be held. "Prescribed" as defined in section III (1) of the Constitution means "prescribed in any law". There is, however, a proviso that, in relation to anything that may be prescribed only by Parliament, "prescribed" means "prescribed in an Act of Parliament". That proviso applies only in the case where the Constitution itself, in explicit terms, requires that the prescription is to be made by Parliament. An example is section 78 (7) where the retiring age is one fixed by the sub-section or such other age "as may be prescribed by Parliament".

Obviously, where the Constitution does not specifically say so, Parliament may prescribe in an Act a number of things and use its general and sovereign law-making power under section 45 to delegate the exercise of specified powers by way of subordinate legislation. In paragraph 1 (2) of the First Schedule, the expression used is simply "as may be prescribed" and not as in section 78 (7) "as may be prescribed by Parliament", with the result that in by-elections it is the duty and responsibility of Parliament, by way of an Act or subordinate legislation, to prescribe the manner in which members may be directly returned by a constituency, whether in general elections or by-elections. We also note that the Constitution itself recognises that regulations in electoral matters may be made as is clear from section 41 (3) where proposed regulations, among other enactments, should be submitted to the electoral authorities.

With regard to *general elections*, Parliament could not prescribe a method of voting by an elector at a general election which would be contrary to paragraph 1 (3) of the Schedule which requires electors to cast valid votes for three candidates in the island of Mauritius and two with regard to Rodrigues. That system of block-voting, as earlier indicated, became an essential part of our electoral system. But paragraph 1 (2) of the Schedule has left Parliament free, in its wisdom, to prescribe, in respect of a *by-election,* the number of valid votes which an elector could cast, depending on the number of vacancies, with no restrictive constitutional provision with regard to the number of votes that should be cast where there is more than one vacancy. Requiring an elector to cast as many votes as there are vacancies to be filled is, in our view, quite consonant with the method of block-voting which the Constitution has made an integral part of the electoral system.

We conclude, therefore, by upholding the submissions of the Solicitor-General, who appeared for the Attorney-General, and of Sir Hamid Moollan Q.C., for the Commission, that, in the absence

of specific provisions in the Schedule or elsewhere in the Constitution, paragraph 1 (2) of the First Schedule to the Constitution gives power to Parliament to make appropriate provision with regard to the number of votes for which an elector could validly cast his vote at a by-election.

One of two solutions could equally have been resorted to: either the conduct of separate by-elections for each vacancy or a singly by-election to fill all the vacancies coupled with a requirement that the elector must cast a vote in respect of each of the vacancies that have occurred. The choice of either solution was the responsibility of those on whom the Constitution and the law have imposed that duty and not the responsibility of the Judiciary. Others may, however, marvel at the extravagance of imposing on the country and its Exchequer three separate by-elections in a constituency where three vacancies have occurred.

We need to address two further points raised by Sir Gaetan. First, it was suggested that requiring an elector to cast a vote for more than one candidate at a by-election when there is more than one vacancy would be undemocratic. We understood Sir Gaetan to have retreated from that position in his closing address. In our view, he was not wrong in doing so. A compulsory provision in the Constitution itself, to vote for three candidates cannot be undemocratic in the context of the kind of democracy which the Constitution proclaims in Section One. What is democratic at a general election does not, in our view, become undemocratic at a by-election.

Secondly, Sir Gaetan suggested that making the impugned Regulations on the same day as nomination day, when potential candidates could not have known about the Regulations, amounted to unfairness as potential candidates could have sought a fellow candidate to benefit from the two compulsory votes. It was said that the Regulations amounted to changing the rules in the middle of the game. Sir Gaetan could not have been really serious. First of all, we have no such complaint in the Plaint with Summons from either Mr Valayden or Mr Ladegourdie or Mr. Ollivry. The suggestion amounts to seeking unsolicited briefs from imaginary persons. Secondly, all candidates knew that there were two vacancies which required to be filled. Thirdly, the rules were not changed as no rules existed on the question at issue. Fourthly, as pointed out by Sir Hamid, there have always been independent candidates elections whether to fill more than one vacancy or not.

We move on to the second point raised in the case, that is to say, whether section 84 of the Representation of the People Act is provisional or otherwise *ultra vires* in the sense that an Act cannot be amended by Regulations.

Since we have already ruled that it is not undemocratic or against any provision of the Constitution to require an elector to cast his vote for as many candidates as there are vacancies at a by-election, we cannot say that an enactment, whether by way of an Act or subordinate legislation, which requires an elector to do so is inconsistent with the Constitution.

There remain two further points. First, whether section 84 is provisional. We see nothing in section 84 which indicates that it was designed to be merely provisional. A power of the kind granted under section 84 is not unusual. No Legislature can pretend to have made provisions for all the situations that require to be regulated by law. We note that even in the Mauritius Constitution Order 1966 [section 8 (2) and (3) of G. N. 7 of 1967], the most extensive power was given to the then Governor, by regulations, to amend or revoke any law relating to the elections to the then Legislative Assembly. We may also bear in mind that Parliament may stand dissolved at any time or for one reason or another may not be sitting or else that time limits imposed in the electoral process may be an impediment. It is perfectly open to the Legislature to give power to certain authorities even to amend the Act subject to certain safeguards.

Indeed, various safeguards are in-built in the Constitution itself as to the exercise of powers under section 84 which enables the President to exercise the power. A pre-condition of the exercise of that power is that the President should act on the advice of the Prime Minister and after consultation with the leader of the Opposition. Furthermore, the overriding provisions of section 41(3) of the Constitution also require him to refer the matter to the Electoral authorities to give their views thereon. There is no suggestion in the Plaint before us that this was not done. Indeed, in the defence presented by the Electoral Supervisory Commission, there is a clear indication that the Commission itself had foreseen the difficulty which had arisen and, assuming its constitutional responsibility, had subscribed to the proposed Regulations. The Electoral Commissioner, for his part, is abiding by the decision of the Court. There has been no suggestion that the Regulations had not been referred to him.

We have noted that, at least on another previous occasion, section 84 has been resorted to for the enactment of Regulations governing the electoral process (*vide* G.N. 16 of 1987). It would appear that in 1982 when by-elections were re-established for members directly elected, it escaped everyone's notice that the electoral law required to be equally amended to provide for the re-established situation and only became a matter of practical concern in 1987. And section 84 was prayed in aid to resolve difficulty.

For the above reasons, we are unable to declare that the amendment brought to Regulation 33 is either unconstitutional, *ultra vires* or suffers from any other illegality. The Plaint with Summons is dismissed with costs. We must add that the Plaint amounted to an application which is described in section 81(4) of the Constitution.

Given the decision that we have arrived at, it would not strictly have been necessary to pronounce on the motion of defendant No. 1 and co-defendant No. 2 to be put out of cause. If only for future guidance, we nevertheless do so. What was being challenged was the legality or constitutionality of an enactment as such. When a law is being challenged, Parliament or the Members constituting Parliament are not put into cause. It would have been quite sufficient to

put the Attorney-General into cause as a defendant. We, therefore, rule that both parties be put out of cause with costs.

Rajsoomer Lallah
Chief Justice

V. Boolell
Judge

Y.K.J. Yeung Sik Yuen
Judge

January 1995

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
CIVIL APPEAL, NO. 1745 OF 1991

Subhash Desai ... **Appellant**

V

Sharad J. Rao & Others ...**Respondents**

(With Civil Appeal No. 2194 of 1991)

Before: *A.M. Ahmadi J, M. M. Punchhi J and N. P. Singh, J*

Elections *– False statements published by candidate – Corrupt practice – Bogus voting – Improper inclusion of names on voters' roll.*

Background facts: *The election of the appellant for Goregaon Legislative Assembly Constituency, was set aside by the High Court on an election petition filed on behalf of the respondent No. 1 (referred to as 'the respondent'). The appellant had contested the election as a candidate of Shiv Sen, and the respondent as of Janata Dal.*

The respondent in his election petition stated that several thousand persons were included on the electoral roll, many of them bogus voters. Thereafter, the details of the corrupt practices committed by the appellant, Shiv Sena, Bhartiya Janata Party, between 18.1.1990 and 27.2.1990 were stated.

Held: *That the appeal against the order of the High Court, declaring the election of the appellant void, was dismissed; that the appeal against the direction given by the High Court to scrutinise the valid votes for the purpose of recount and to declare the result afresh was allowed.*

Cases cited in the Judgement:

Azher Hussain v *Rajiv Gandhi (1986) 2 SCR 782*
Handwari Lal v *Kanwal Singh (1972) 2 SCR 742*
F. A. Sapa v *Singora (1991) 3 SCC 375*
Jagdev Singh Sidhanti v *Pratap Singh Daulta (1964) (6) SCR 750*
Jumuna Prasad Mikhariya v *Lachhi Ram (1955)(1) SCR 608*
Indira Nehru Gandhi v *Raj Narain (1975) (Supp) SCC 1*
Mohan Rawale v *Damodor TaTyaba & Dadasaheb (Special Leave Petition (Civil) No. 5594 of 1992*
Haji C. H. Mohammad Koya v *T. K. S. M. A. Muthukoya (1979) 1 SCR 664*
Kumar Nand v *Brijmohan Lal Sharma (1967) 2 SCR 127*
Gadakh Yashwantrao Kankarro v *E. V. alias Balasaheb Vikhe Patel & Others JT (1993) (6) SC 345*
Baidyanath Panjira v *Sita Ram Mahto, AIR (1970) SC 314*

JUDGEMENT

N. P. SINGH J: The election of the appellant from Goregaon Legislative Assembly Constituency, has been set aside by the High Court, on a election petition filed on behalf of the respondent No. 1. (hereinafter referred to as the "respondent"). The appellant had contested the election as a candidate of Shiv Sena, whereas the respondent as of Janata Dal.

The respondent in his election petition stated that between 18th December 1989 and 2nd January 1990 about 12,000 applications for the inclusion of names in the electoral roll were received and ultimately on 15th January 1990 the final electoral roll was published with the inclusion of the names of several thousand persons, many of whom were bogus voters. Thereafter the details of the corrupt practices committed by the appellant, Shiv Sena, Bhartiya Janta Party, between 18th January 1990 and 27 February 1990 were stated. It was also alleged that they falsely propagated in February, 1990 that Pandal, erected specifically for the offering of prayers by Hindu women at the cost of Rs.50,000, was demolished at the instance of socialists, *viz* Mrinal Gore and K. R. Nevrekar, and as such, the Hindu traitors should be shown their place, for that reason it was necessary to vote for the appellant, who had brought the message of "Hindu Hridaya Samrat" Shri Balsaheb Thackeray. The aforesaid statements were exhibited on several boards in different localities in Goregaon constituency between 21st January 1990 and 27 February 1990.

It was then alleged that there is a Sankalpasiddhi Ganesh Mandir at Goregaon. On 14th February 1990, between 11.00 a.m. and 3.00 p.m., Mahaprasad ceremony was to be celebrated. The trustees had invited thousands of prominent citizens of Goregaon for that celebration including the respondent and his colleagues. The respondent visited the said temple at about 1.00 p.m. with Shri K. R. Nevrekar (PW-3) and fifty workers. The respondent met the trustees and offered his obeisance to the deity. The respondent learnt that the appellant had also attended the said function with his workers an hour before. After accepting the Mahaprasad, the respondent along with his workers left the function at about 2.30 p.m. To the utter surprise of the respondent, the appellant, who was the printer and publisher of the Marathi daily "Samana", published a false report of respondent's visit to the said function, in the issue of "Samana" dated 15th February 1990. The heading of the publication was: " *Riotous behaviour of Janata Dal 'green' Goondas during Shri Ganesh Mahaprasad function at Goregaon.*" The relevant part of the news item translated in English is as follows:

> "During the ceremony of Mahaprasad of Sankalpasiddhi Ganesh Temple at Motilal Nagar in Goregaon, the Janata Dal workers wearing green scarf created a mess by shouting 'Allah Ho Akbar' repeatedly and indulged in indecent gestures. ... The volunteers of Ganesh Mandir Trust, accompanied by the Shiv Sena and B. J. P. workers, were distributing Mahaprasad. There were woman

> workers of the Mahila Front also present at that time. At this moment the Janata Dal candidate Sharad Rao came there with his followers. The supporters accompanying him had tied green scarfs around their heads. These workers came as if dancing in a fair, while the devotees of Ganesh were dining during the Manprasad ceremony. These devotees were made to vacate highway ... 'Allah Ho Akbar' slogan-shouting, these people came to this most disciplined function of the Hindus capable of provoking an evil eye, repeatedly shouting 'Allah Ho Akbar', performing indecent dances in an ugly manner and left after creating a pandemonium. It is understood that this Janata Dal gang also included a Muslim Goonda extended from the Kurla area."

The respondent in the election petition asserted that the aforesaid publication was false, deliberately published to blackmail the said respondent and his party. This was an attempt to create communal division between Hindus and Muslims and to promote the feeling of enmity or hatred between different classes of citizens of India on grounds of religion for the furtherance of the prospects of the election of the appellant and for prejudicially affecting the election prospects of the respondent. Copies of the news report aforesaid in Marathi as well as with English translation, were annexed to the election petition. It was stated by the respondent that aforesaid publication had an impact, in view of the conditions prevailing in Jammu and Kashmir and in the background of the dispute regarding Ram Janma Bhoomi and Babri Masjid.

Lastly, it was alleged that a public meeting was held at Shivaji Park, Dadar, on 24th February 1990 in which the appellant and all other candidates of Shiv Sena-B.J.P. alliance were present. The said meeting was addressed by Bal Thackeray and other leaders, at which Bal Thackeray reiterated that he was "contesting the election in the name of Hindu religion (Hindutva)". The proceedings of the said meeting were reported in various dailies, and even the voters of the constituency in question read the press reports.

In the written statement, a stand was taken on behalf of the appellant that the charge that the appellant had contested the election on the grounds of Hindutva or Hinduism was of no consequence because, since time immemorial, this country was known as Hindustan and the inhabitants of this country were known as Hindus. It was further asserted that Shiv Sena B. J. P. were never against any religion and the said parties had always considered all people "faithful to this country as Hindus, irrespective of their religion. The said parties have always been against anti-nationals whether they are Hindus or not". The appellant denied that Shiv Sena and/or B.J.P. at any time propounded the cause of Hinduism as their goal for the election. He also denied that he or B.J.P. and/or Shiv Sena at any time propagated religious hatred amongst the communities, as alleged, or that he had made any statement, saying "show these Hindu traitors their place, vote in the interest of Hindus for Subhash Desai".

In respect of the allegation of the respondent regarding publication of the false report in the issue of "Samana" dated 15th February 1990 about the visit of the respondent to the function of 14th February 1990, it was said:

> "With reference to paragraph 50A of the petition, this respondent categorically denies that this respondent has published any false and/or perverted and/or incriminatory account of the petitioner's alleged visit to the said function as alleged. This respondent states that this respondent published a News Item submitted to him by his News Reporter. This respondent categorically denies that the News Item published in the Daily Newspaper "Samana" was in any manner and/or perverted and/or incriminatory as alleged. This respondent in good faith published the said News Item submitted to him by News Reporter."

It was further stated in the said written statement:

> "...this respondent categorically denies that the report published in the Newspaper "Samana" on 15th February 1990 was a false and/or fraudulent report and/or that the same was deliberately published to blackmail the petitioner and/or his party Janata Dal as alleged ..."

The High Court, on the materials produced before it, held that the appellant had committed corrupt practices: (i) under Section 123 (3) of the Representation of the People Act, 1951 (hereinafter referred to as the "Act") by making appeal to the voters to vote in his favour, because he was a Hindu; (ii) under Section 123 (3A) of the Act by creating feeling of hatred between the different classes of electors, on the grounds of religion; (iii) under Section 123 (4) of the Act, by publishing statements of fact, which were false, which the appellant believed to be false or did not believe to be true, in relation to the personal character and conduct of the respondent, calculated to prejudice the prospects of the election of the respondent. The High Court also examined the grievance made by the respondent regarding the registration of electors in the electoral roll in contravention of the provisions of the Representation of the People Act, 1950 and held that those who had been mechanically added to the electoral roll, without following the procedure prescribed for inclusion of the names of the electors, could not have exercised their right to vote and, as such, those votes had to be treated as void. After setting aside the election of the appellant, the High Court appointed one Mr. Ajitlal Pranlal Yajnik, Ex-Prothonotary and Senior Master, as Commissioner, to ascertain the names of the persons, whose names were added in the electoral roll on 15th January 1990. The Commissioner thereafter was to find out the persons who had voted from that list, after scrutinising their ballot papers. A direction was given to recount the votes after eliminating all those votes by persons, who had been included in the electoral roll on 15th January 1990. After recount, it was to be ascertained as to whether the appellant or the respondent had

secured the highest number of valid votes at the said election. However, the direction for recount was stayed by this Court during the pendency of the appeal.

Mr. Sanghi, the learned Senior Counsel appearing for the appellant, referred to different paragraphs of the election petition as well as the affidavit, supporting the statements made therein. According to him, the election petition was liable to be dismissed at the threshold because it neither contains statements of material facts nor full particulars of the corrupt practices alleged to have been committed by the appellant, as required by Section 83(1) of the Act. The statements had not been verified in the manner transcribed by the Code of Civil Procedure, and by proviso to sub-section (1) (c) of Section 83 of the Act.

Section 86 vests power in the High Court to dismiss an election petition which has not been properly presented as required by Section 81; or where there has been non-compliance of Section 82, i.e. non-joinder of the necessary parties to the election petition; or for non-compliance of Section 117, i.e. non-deposit of the required amount as security for the costs of the election petition. Section 86 does not contemplate dismissal of the election petition for non-compliance of the requirement of Section 83 of the Act. But Section 83 enjoins that an election petition shall contain concise statement of material facts, and shall set forth full particulars of any corrupt practice that the petitioner alleges, which should be verified and supported by affidavit, so far the allegations of corrupt practices are concerned. This provision is not only procedural, but has an object behind it so that a person declared to have been elected, is not dragged to court to defend and support the validity of his election, on allegations of corrupt practice which are not precise and details whereof have not been supported by a proper affidavit. Apart from that, unless the material facts and full particulars of the corrupt practices are set forth properly in the election petition, the person whose election is challenged is bound to be prejudiced in defending himself of the charges which have been levelled against him. In view of the repeated pronouncements of this Court, the charge of corrupt practice is quasi-criminal in nature. The person challenging an election on the ground of corrupt practice cannot take the liberty of making any vague or reckless allegation, without taking the responsibility for the correctness thereof. Before the Court proceeds to investigate such allegations, the Court must be satisfied that the material facts have been stated along with the full particulars of the corrupt practice alleged by the petitioner which have been duly supported by an affidavit. In cases where the Court finds that neither material facts have been stated, nor full particulars of the corrupt practice, as required by Section 83, have been furnished in the election petition, the election petition can be dismissed, not under Section 86, but under the provisions of the Code of Civil Procedure, which are applicable, read with Section 83(1) of the Act, saying that it does not disclose a cause of action. This aspect has been examined by this Court in detail in the cases of *Azhar Husain* v *Ajiv Gandhi (1986) 2 SCR 782; Handwari Lal* v *Kanwal Singh* (1972) 2 SCR 742.

From the perusal of the election petition, it shall appear that the respondent has stated the corrupt practices alleged to have been committed by the appellant in paragraphs 47 to 52. It has been alleged that the appellant was a candidate of Shiv Sena and had the support of B.J.P. and Vishwa Hindu Parishad at the election in question. He has stated the atmosphere created because of the Ayodhya and Babri Masjid dispute. The statement has been made regarding putting up of boards in different places in the constituency in question, requesting the voters to vote in the interest of Hindus and to show the traitors their place. Then the details of the celebration on 14th February 1990 at the aforesaid Sankalpasiddhi Ganesh Mandir, where the respondent is alleged to have come to receive Prasad with his workers, have been stated. Thereafter, the respondent has stated about publication in "Samana" the next day, 15th February 1990, relevant part whereof has been quoted above. Lastly, about the public meeting, held at Shivaji Park on 24th February 1990, which was attended by the appellant and other candidates of Shiv Sena-B.J.P. alliance, where Bal Thackeray reiterated that the said alliance was contesting the election in the name of the Hindu religion, has been stated.

The scope of Section 83 (1) has recently been examined in the case of *F. A. Sapa* v *Singora (1991) 3 SCC 375*, where it was pointed out that the underlying idea in requiring the election petition to set out in a concise manner all the 'material facts' as well as the 'full particulars' where the complaint is in respect of the commission of corrupt practice, is to 'delineate the scope, ambit and limits of the inquiry at the trial by the election petition'. In the present case, the allegations made, in the election petition, may be true or false, but it is not possible to hold that the election petition does not disclose any material fact or give the material particulars of any of the corrupt practices. It need not be pointed out that even if the Court is satisfied that, in respect of one of the corrupt practices alleged, material facts and full particulars thereof have not been stated, still the election petition cannot be dismissed if, in respect of another corrupt practice, the material facts and full particulars have been stated in accordance with the requirement of Section 83(1) of the Act.

In respect of the contention that the affidavit, supporting the corrupt practices alleged to have been committed by the appellant, is not as required by Section 83(1)(c) proviso, it was pointed out that reference was made in the affidavit to Paragraph 74G, which contains the grounds for declaring the election of the appellant to be void and has no relation to the paragraphs giving particulars of corrupt practices. It is true that instead of saying that the statements made in Paragraph 74G of the election petition about the commission of corrupt practices, were true to the knowledge of the appellant, it should have been stated that the statements, made in Paragraphs 49, 50, 50A, 51 and 52 of the said petition were true to his knowledge. But, from bare reference to the other part of the affidavit, it shall appear that it has also been said that making of a religious appeal to the people and the particulars of the corrupt practices mentioned in Paragraphs 49, 50, 50A, 51 and 52 of the said election petition and the exhibits referred thereto, were true to the knowledge of the appellant. According to

us, it cannot be held, in the facts and circumstances of the present case, that there was no affidavit supporting the allegations of corrupt practices, as required by Section 83(1)(c) proviso.

Coming to merit, according to the appellant, any call given to the voters to vote for a candidate who serves the interest of the Hindus, cannot be held to be a corrupt practice. It was urged that if it is held to be a corrupt practice within the meaning of sub-section (3) or (3A) of Section 123 of the Act, then those sub-sections have to be declared *ultra vires* Article 25 of the Constitution. According to the appellant, Article 25 of the Constitution, subject to the public order, morality and health and other provisions of the said part of the Constitution, guarantees all persons right "freely to profess, practice and propagate religion". As such when a candidate at an election propagates his religion and asks the voters to profess and practice a particular religion, which may include Hinduism, that right cannot be restricted by any Act or statute. If the framers of the Constitution have guaranteed that right to every citizen of this country, then any person who is a candidate at any election, can also propagate his religion and ask the voters to do or not to do an act which may be in the interest of such religion, including not to vote for a person whose election will prejudicially affect the propagation of the religion in question.

When the framers of the Constitution guaranteed every citizen, right to freely profess, practice and propagate his religion, that right does not extend to creating hatred amongst two groups of persons, practising different religions. Sub-section (3) and sub-section (3A) of Section 123, never purport to curb the right guaranteed by Article 25 of the Constitution. They only purport to curb the appeal on the grounds of religion, or propagating religion, to create a feeling of enmity or hatred between different classes of citizens of India during the election campaign by the candidate or his agent or any person with his consent for furtherance of the prospects of the election of that candidate, or for prejudicially affecting the election of any other candidate. Sub-sections (3) and (3A) of Section 123, in no way are in conflict with Article 25 of the Constitution – both can co-exist. Article 25 enables every citizen of India to profess, practice and propagate his religion, whereas sub-sections (3) and (3A) of Section 123 purport to ensure that an election is not influenced by considerations for religion, race, caste community or language. Sub-sections (3) and (3A) of Section 123 merely prescribe the conditions, which must be observed if a candidate wants to enter in Parliament or Legislative Assembly. The right to stand for an election is a special right created by a statute and can be exercised on the conditions laid down by the said statute. Keeping in view that the election should not be contested on the grounds of religion, race, caste, community, or language and the result of an election is not affected by promoting feelings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community, or language, the framers of the Act have declared an appeal on the grounds of religion, races, caste, community or language and propagating religion, race, caste, community

or language for creating feeling of enmity or hatred between different classes of citizens as corrupt practices, which shall vitiate the election.

On behalf of the appellant, reference was made to the case of *Jagdev* v *Singh Sidhandi* v *Pratap Singh Daulta,* 1964(6) SCR 750, where this court had to consider whether an appeal made to the electorate to vote for a particular candidate on the grounds of his language was covered by Section 123 (3). It was said that the expression "on the ground(s) of his language" must be read in the light of the fundamental right which is guaranteed by Article 29 (1) of the Constitution. It was pointed out that the said expression cannot be read as trespassing upon the fundamental right guaranteed by Article 29 (1); political agitation for conservation of the language of a section of the citizens cannot therefore be regarded as corrupt practice within the meaning of Section 123 (3) of the Act. But at the same time, it was said:

> "The corrupt practice defined by cl. (3) of s. 123 is committed when an appeal is made either to vote or refrain from voting on the ground of a candidate's language. It is the appeal to the electorate on a ground personal to the candidate relating to his language which attracts the ban of s. 100 read with s.123 (3). Therefore it is only when the electors are asked to vote or not to vote because of the particular language of the candidate that a corrupt practice may be deemed to be committed. Where however for conservation of language of the electorate appeals are made to the electorate and promises are given that steps would be taken to conserve that language, it will not amount to a corrupt practice."

In the case of *Jumuna Prasad Mukhariva* v *Lachhi Ram* 1955 (1) SCR 608, Section 123(5) of the Act, as they then stood, were challenged as infringing the fundamental right of freedom of expression under Article 19 (1) of the Constitution. This Court rejected the contention, saying that the provisions of the Act do not stop a man from speaking: they merely prescribed conditions which have to be observed for being elected.

On behalf of the appellant, it was then pointed out that in the election petition, while alleging corrupt practices, references were made in respect of the speeches and publications, of the period prior to 31st January 1990, which was the date when nomination papers were filed. The publications and speeches alleged to have been made prior to 31st January 1990 have to be ignored because the framers of the Act require the High Court to judge the conduct of the candidate, his agent or persons with the consent of the candidate or his election agent, only after a person becomes a candidate for the particular election. A person becomes a candidate for the election in question only after filing the nomination paper. In this connection, reference may be made to Section 79 (b) of the Act which defines 'candidate' to mean a person who has been or claims to have been duly nominated as a candidate at any election.

Section 34 of the Act says that a candidate shall not be deemed to be duly nominated for election from a constituency unless he deposits or causes to be deposited the amounts prescribed in the said section. When a person becomes a candidate was examined by this Court in the well-know case of Indira *Nehru Gandhi* v *Raj Narain*, 1975 (Supp.) SCC 1. and it was held:

> "The 1951 Act uses the expression "candidate" in relation to several offences of the purpose of affixing liability with reference to a person being a candidate. If no time be fixed with regard to a person being a candidate it can be said that from the moment a person is elected he can be said to hold himself out as a candidate for the next."

Recently, this Court in the case of *Moham Rawale* v *Damodar Tatyaba @ Dedasaheb.* (Special Leave Petition (Civil) No.5594 of 1992 disposed of on August 6, 1972), has said:

> "We hold that all the averments in paragraphs 1 to 20 of the memorandum of election petition in so far as they refer to a period prior to 23.4.1991 cannot amount to allegations of corrupt practice."

This cut-off date 23rd April 1991 was fixed with reference to the date when nomination papers were filed by the appellant concerned, because since that date the appellant will be deemed to have legally acquired the status of a candidate. According to us, any allegation of corrupt practice against the appellant, made by the respondent in respect of the period prior to the filing of nomination by the appellant on 31st January 1990, cannot be taken into consideration for judging the legality or validity of his election.

The corrupt practices alleged against the appellant after the filing of the nomination paper are (i) appellant published a News Item in the issue of "Samana" on 15.2.1990 which was a statement of fact, which was false and appellant believed it to be false or did not believe it to be true in respect of personal character and conduct of the respondent to prejudice his prospect at the said election, which is covered by Section 123 (4) of the Act; (ii) Bhartiya Janta Party, the election ally of Shiv Sena, propagated in last week of February, 1990 that authorised Pandal erected for offering prayers by Hindu women was demolished at the instance of Mrinal Gore and K. R. Nevrekar, and several boards in different localities in Gorgaon between 21st January 1990 and 27th February 1990 were exhibited saying show these Hindu traitors their place; (iii) a public meeting was held at Shivaji Park, Dadar, on 24th February 1990 in which the appellant and other candidates of Shiv Sena-B.J.P. alliance were present. That meeting was addressed by Bal Thackeray and others. Bal Thackeray reiterated that the said alliance was 'contesting the election in the name of Hindu religion (Hindutva)'. The proceedings of the said meeting were reported in various dailies.

We propose first to examine the charge regarding publication by the appellant in the issue of "Samana" dated 15th February 1990, the relevant part of the said publication has already been quoted above. In the said publication, it was said that during the ceremony of Mahaprasad of Sankalpasiddhi Ganesh Temple, the Janata Dal workers, wearing green scarfs, created a mess and shouted 'Allah Ho Akbar' and repeatedly indulged in indecent gestures; these workers came as if dancing in a fair. The devotees of Ganesh, who were dining during the Manaprasad ceremony, had to vacate the highway. These people came to the most disciplined function of the Hindus, shouting 'Allah Ho Akbar' slogan repeatedly, in which a Muslim Goonda, externed from the Kurla area, was also there.

Section 123 (4) is as under:

> "123. *Corrupt practices* – The following shall be deemed to be corrupt practices for the purposes of this Act:
>
> ....
>
> (4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election."

On a plain reading, the requirements of Section 123 (4) shall be satisfied when the publication is held: (i) a statement of fact; (ii) which was false; (iii) which the appellant either believed to be false or did not believe to be true; (iv) which relates to the personal character or conduct of the respondent; (v) the statement was reasonably calculated to prejudice the prospect of the election of the appellant.

If the publication is held to be false and it is established that it was the appellant who published the same believing it to be false or not believing it to be true, then for the other two ingredients: relating to personal character or conduct and that it was calculated to prejudice the prospects of the election of the respondent, not much evident is required. During the election tempo, because of the serious nature of the charge levelled against the respondent, in respect of his conduct, the effect of the said publication on his election prospects can be easily assumed. It cannot be disputed that the publication aforesaid must have prejudicially affected the election prospect of the respondent, because he is alleged to have entered with his workers, dancing and shouting 'Allah Ho Akbar', during a solemn religious ceremony of Mahaprasad of Sankalpasiddhi Ganesh Mandir. This publication has direct reflection on the

character and conduct of the respondent, at whose instance pandemonium was created in the temple of Sankalpasiddhi Ganesh, during Mahaprasad ceremony.

It has been asserted on behalf of the respondent that the statement of fact, published in the said issue of "Samana", was false. The respondent or his workers never shouted slogans of 'Allah Ho Akbar', during the Mahaprasad ceremony of Sankalpasiddhi Ganesh Mandir. They did not create any pandemonium by indecent dances or ugly gestures. He has also denied that when he had gone to attend the said Mahaprasad ceremony, any Muslim Goonda externed from the Kurla area had accompanied him.

The object of sub-section (4) of Section 123 is not only to protect any candidate at the election from character assassination and vilification, but to maintain the purity and fairness of the selection. The framers of the Act were conscious of the fact that some candidate, or his agent or persons on his behalf, may publish facts in respect of the personal character of the candidate concerned, which are false, with an object to malign such candidate in public during the election in order to affect his prospect at the election. The momentum, the mood and the emotional upsurge during the elections are well known and even small things which in normal times may not assume much significance, have serious consequences during the election and affect the minds of the electors and in some cases may be a decisive factor, to seal the fate of one candidate or the other. Sub-section (4) of Section 123 maintains the delicate balance between the freedom of speech of an individual, the interest of the public to get full information about the candidate concerned, but not to affect the prospect of the candidate concerned by publishing facts about his personal character or conduct which are false.

The charge of the corrupt practice being quasi-criminal in nature, had to be proved to the satisfaction of the court by the election petitioner-respondent. In the present case, the controversy can be: (i) whether the appellant published the statement of fact referred to above in the issue of "Samana"on 15th February 1990; (ii) whether that statement of fact was false; (iii) whether appellant either believed it to be false or did not believe it to be true. So far as the other ingredients of sub-section (4) of Section 123, i.e. (i) whether it relates to the personal character or conduct of the appellant; (ii) whether such statement was reasonably calculated to prejudice the prospect of the election of the appellant, according to us, there should not be much controversy, because in view of the allegation that the appellant, along with his workers during Mahaprasad celebration of Sankalpasiddi Ganesh Mandir, created ugly scenes with repeated shouting of 'Allah Ho Akbar' along with a Muslim criminal, it will amount to a statement relating to the personal character and conduct of the appellant, and in the atmosphere prevailing during the election, it was calculated to prejudicially affect the prospect of the election of the appellant. As such, it has only to be examined as to whether the respondent has been able to prove: (i) that the statement of fact, regarding the Mahaprasad

ceremony of Sankalpasiddhi, had been published by the appellant or his agent or any person with his consent; (ii) that such publication was false, because no such incident had taken place; (iii) that the appellant published it, believing it to be false or not believing it to be true. The onus of proving the ingredients of sub-section (4) of Section 123 is on the respondent, who alleged the commission of the corrupt practice under said sub-section.

The respondent has stated on oath not only in his election petition, but also in his evidence that the report in the issue of "Samana" dated 15th February 1990, that he, along with his workers, had shouted 'Allah Ho Akbar' in the Ganesh temple, was a false report and the said news had been printed and published by the appellant to malign him in the eyes of the Hindu voters who were in majority in his constituency. He has further stated that he, on the invitation given by the Sankalpasiddhi Ganesh Mandir Trust, along with his election agent and few other activists, at about 1.00 p.m., went to the Ganesh Mandir. He was received warmly by the trustees. He had Darshan and Mahaprasad and after an hour left with Nevrekar (PW-3), his election agent, and others. He was surprised to see the publication in the "Samana" of 15th February 1990 containing the report about his visit to Ganesh temple. It appears, a protest was lodged by a communication dated 17th February 1990 to "Samana" in respect of the publication aforesaid, saying that it was incorrect and false. Nevrekar (PW-3) has fully supported respondent in his evidence in respect of the visit of the respondent to the Sankalpasiddhi Ganesh Mandir.

On behalf of the appellant, a stand was taken before this Court that merely because the appellant was the publisher of "Samana", he shall not be deemed to have published the news item and, in this connection, reference was made to the Press Act and Rules framed thereunder. It was urged that names of the editor, printer and publisher on the newspaper in question only raises a presumption. The contrary can be proved in facts and circumstances of a case. Reliance was placed on the judgement of this Court in the case of *Haji C. H. Mohammed Koya* v *T. K. S. M. A. Muthukoya* (1979) 1 SCR 664. But the remarkable aspect of the present case is that the appellant admitted that he had published the report aforesaid in the "Samana" on 15th February 1990 as alleged by the respondent. He also asserted that the facts stated in the publication in question were correct. He said in the written statement that "he published a News Item submitted to him by his News Reporter ... This respondent in good faith published the said News Item submitted to him by his News Reporter." The appellant categorically denied in the written statement "that the report published in the Newspaper "Samana" on 15th February 1990, was a false and/or fraudulent report ... " Having admitted in the written statement that he had published that news item, in his evidence he stated:

> "On 1.2.1990 I had gone to Sankalpa Siddhi Ganesh Mandir festival on invitation, I went there at about 12.00 noon. I took Darshan. I took Mahaprasad. I went away at about 12.30. p.m.. I do not know what happened

> thereafter. On that day, in the evening as I was coming from the Fort area, Bombay, I dropped in the office of Samna. One reporter by name Sanjay Dahale showed me a handwritten copy of a news item. He showed me this in the corridor as he was about to go out. That news about Sankalpa Sidhi Ganesh Mandir festival. Since I was in hurry, I could not read the same fully. I told him to verify and if it is true, have it printed. I then went away."

In the written statement he admitted the fact that he had published the news item in question, submitted to him by his news reporter, but in the evidence he has taken a stand, saying that he had seen that news item before publication in hurry and could not read the same fully and he asked the reporter, namely Sanjay Dahale, to verify whether it was true and then to print it. In the written statement he categorically denied that the report published in the newspaper "Samana" on 15th February 1990 was false report. In other words, he took a stand that what was published was a correct statement of fact; in evidence he never asserted that the publication regarding the respondent's going to the temple with his workers and creating an ugly scene was not false or at least he believed it to be true. He simply pleaded ignorance about the alleged report and publication regarding the respondent's going to the said temple with his workers. There is no suggestion given on behalf of the appellant to the respondent or to his witnesses, who had challenged the correctness and had asserted the falsity of the report published in "Samana" on 15th February 1990 that the news item published was correct and not false. So far, the burden of proving to the satisfaction of the court that the publisher thereof believed to be false or believed not to be true, was on the respondent being the election petitioner. But in the facts and circumstances of the present case, according to us, once the respondent asserted and stated on oath that the statement of facts published in the "Samana" was false and the said statement had been published by the appellant, knowing it to be false or believing it not to be true, it will be deemed that the respondent has discharged the initial onus which rests on him. Then the onus shifts to the other side, i.e. to the appellant. In the case of *Kumar Nand* v *Brijmohan Lal Sharma* (1967) 2 SCR 127, it was pointed out that the onus to prove the charge of a corrupt practice under Section 123 (4) was on the election petitioner, but the onus on him to prove that the maker of the statement believed it to be false or believed it not to be true, is very light and can be discharged by complaining candidate swearing to that effect; once that is done, the burden shifts to the candidate making a false statement of fact to show what was his belief. Wanchoo, J (as he then was), speaking for the Said:

> "... But though the onus is on the election petitioner to show all these things, the main things that the election petitioner has to prove are that such a publication was made of a statement of fact and that that statement is false and is with respect to the personal character or conduct of the election petitioner. The burden of proving that the candidate publishing the statement believed it

> to be false or did not believe it to be true though on the complaining candidate is very light and would be discharged by the complaining candidate swearing to that effect. Thereafter it would be for the candidate publishing the statement to prove otherwise."

Recently in the case of *Gadakh Yashwantrao Kankarrao* v *E.V. alia Balasaheb Vikhe Patil & Others, JT* 1993 (6) SC 345, it was pointed out that it is very difficult for the election petitioner to prove by any direct evidence that the person, who is alleged to have made a false statement or published the same, believed it to be false or believed it to be not true, because belief of the maker is related to the state of mind of the maker which can be found to have been established only on the basis of the surrounding circumstances and the materials on the record. When a charge has been levelled that while publishing the statement of fact which was false, the appellant either believed it to be false or did not believe it to be true, he should have come out with the justification for publishing such a news item. In the instant case, no justification has been given by the appellant, except what has already been mentioned above, that the news item was shown to him by the reporter while he was in hurry and he told him to print and publish the same after verifying the correctness thereof. This statement in his evidence runs counter to or is at variance with the statement made by him in his written statement, admitting that he had published that news item, submitted to him by his news reporter. He also denied that the said news report was false, meaning thereby that it was a correct report. But, at the stage of evidence, neither the appellant has asserted nor any witness on his behalf has come forward to state before the court that any such incident, as mentioned in the news item, had actually happened. In such a situation, the irresistible conclusion is that the respondent has been able to establish that the publication by the appellant of the statement of the fact regarding his personal conduct at the Sankalpasiddhi Ganesh Mandir was not only false, but the appellant believed it to be false or did not believe it to be true. In view of the serious nature of the allegations published, it was not even urged before us that they do not relate to the personal character or conduct of the appellant or that such publication was not reasonably calculated to prejudice the prospect of the election of the respondent. Once it is proved that the aforesaid news item was published by the appellant and it was false and the appellant believed it to be false or did not believe it to be true, then certainly it related to the personal character or conduct of the respondent, calculated to prejudice his prospects at election. Because of that publication, the appellant has not only committed a corrupt practice under Section 123 (4) but also under sub-section (3A) of Section 123. By publishing the news item, he shall be deemed to have promoted feeling of enmity and hatred between different classes of citizens on ground of religion for the furtherance of his prospects at the election and for prejudicially affecting the prospects of the election of the respondent.

We are in agreement with the finding of the High Court that, of the materials on record, the charge of corrupt practices under sub-section (3A) and sub-section (4) of Section 123, has

been established against the appellant, vitiating his election to the Legislative Assembly. In view of the finding aforesaid, we do not consider it necessary to examine as to whether corrupt practice under sub-section (3) of Section 123 of the Act, has also been established.

Now the question which remains to be considered is as to whether the High Court was justified in examining the acts and omissions on the part of the Electoral Registration Officer before the final publication of the electoral roll and in directing to verify whether the names of several persons had been included in the electoral roll before final publication of the electoral roll, in accordance with the provisions of the Representation of the People Act, 1950 or not, and to recount the votes polled in favour of the appellant and the respondent, after ignoring the votes of persons who were not entitled to be included in the electoral roll and then to declare the result of the election afresh. In the election petition from paragraph 8 to 46, grievance has been made regarding the preparation of the electoral roll, alleging that the authorities entrusted with the preparation of electoral roll and revision thereof have failed to perform their duties as enjoined by the Representation of the People Act, 1950. According to the respondent, the draft electoral roll was published on 17th December 1989. Between 18 December 1989 and 2nd January 1990 about 12,000 applications were received, for inclusion of names in the electoral roll. The objections were to be filed up to 9th January 1990. On 15th January 1990, the final electoral roll was published including the names of 11,057 persons. It appears that on 24th January 1990 a writ petition was filed on behalf of PW-3, the election agent of the respondent, challenging the inclusion of 11,057 persons in the electoral roll. On 1st February 1990, the said writ petition was disposed of by the High Court, directing the Assistant Registration Officer to verify the list of 5,002 voters, submitted by the writ petitioner. Pursuant to that direction, the names of the persons who had been included in the electoral roll were verified and 1,499 names were deleted. The names of 1,499 persons were deleted before the last date of filing the nomination papers. Against this background, we do not appreciate as to how, in an election petition, challenging the election of the appellant, the respondent could have raised the same issue regarding the inclusion of the names of the electors, contrary to the provisions of the Representation of the People Act, 1950. Apart from that, Section 62 (1) of the Act says 'No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency'. In sub-section (2) to (5) restrictions have been provided when the right to vote under sub-section (1) of Section 62 of the Act can not be exercised. Section 100(1) (d) (iii) says, that the result of the election, in so far as it concerns a returned candidate has been materially affected, by improper reception, refusal or rejection of any vote or the reception of any vote which is void. While hearing an election petition, on the aforesaid ground, the High Court has to examine as to whether there has been improper reception, refusal or rejection of any vote or reception of any vote which is void. In the case of *Baidyanath Panjira* v *Sita Ram Mahto* AIR 1970 SC 314, in spite of the bar prescribed under Section 23 (3) of the Representation

of the People Act, 1950 that no amendment shall be made or direction for inclusion of a name in the electoral roll of a constituency shall be given after the last date for making nominations, names of several persons were included after filing of the nomination papers. An objection was taken in the election petition that such persons were not entitled to vote. While referring to Section 62 (1) of the Act it was said:

> "That provision no doubt stipulates that every person who is for the time being registered in the electoral roll of any constituency except as expressly provided by the Act shall be entitled to vote in that constituency. The question is which is the electoral roll referred to in that section? It is the electoral roll that was in force on the last date for making nominations for an election or is it the electoral roll as it stood on the date of the polling? For answering that question we have to go back to Section 23(3) of the 1950 Act. In view of that provision the electoral roll referred to in Section 62 (1) of the Act must be understood to be the electoral roll that was in force on the last day for making the nominations for the election."

According to the aforesaid judgement of this Court, reference in Section 62 (1) to the electoral roll shall mean electoral roll in force on the last day for making the nominations for the election and votes by persons added after the last day for making nominations, in contravention of Section 23 (3) of the Representation of the People Act, 1950, shall be deemed to be void and as such covered by Section 100 (1) (d) of the Act. In the present case, the names that had been included in the final publication had been made before making the nominations. As such, the direction by the High Court, after declaring the election of the appellant to be void, to verify as to whether the final publication of the electoral roll on 15th January 1990 with inclusion of names of electors was in accordance with law and if the said inclusion was not in accordance with the procedure prescribed by the Representation of the People Act, 1950, then to exclude their votes after opening the ballot boxes and to recount the valid votes polled in favour of the respondent and the appellant for purpose of fresh declaration of the election result, cannot be upheld.

Accordingly, the Civil Appeal No. 1745 of 1991 against the order of the High Court, declaring the election of the appellant void is dismissed. The Civil Appeal No. 2194 of 1991 against the direction given by the High Court, to scrutinise the valid votes for purpose of recount and to declare the result afresh is allowed. In the facts and circumstances of the case, there will be no order as to costs.

Before we part with this judgement, we may point out that of late, it has been noticed that many applications for inclusion of names in the electoral roll of the constituency concerned, are made on the eve of the election. It need not be impressed that names of only such

persons are to be included who satisfy the Electoral Registration Officer that they are entitled to be included in the in the electoral roll. If proper verification and scrutiny is not done while revising the electoral roll, the process of revision may vitiate the sanctity and the purity of the election itself. Let a copy of this judgement be forwarded to Election Commission.

.....J
(A. M. AHMADI)

.....J
(M. M. PUNCHA)

.....J
(N. P. SINGH)

New Delhi
31 March 1994

Court File No.35272/89
Newmarket File No.7138/90

SUPREME COURT OF ONTARIO

IN THE MATTER OF THE Dominion
Controverted Elections Act'
R. S. C. 1970, Chapter C-28

AND IN THE MATTER OF Controverted
Election for the Election District of York
North

B E T W E E N :

MICHAEL O'BRIEN

...Petitioner

and

JEAN-MARC HAMEL, MARGARET BRITNELL, MAURIZIO BEVILACQUA, EVELYN BUCK and CHRIS EDWARDS

...Respondents

R.J. Rolls, Q.C. and M.S. Hayes for the petitioner

E. A. Ayers, Q.C. and R. Travers for the respondents Hamel and Britnell

J. A. Graham for the respondent Bevilacqua

Heard: May 7 and 8, 1990.

***Elections** – Bogus voting – The count – Effect of bogus votes – Whether election valid.*

***Background facts:** On the election night (November 21, 1988), the petitioner, Michael O'Brien, was declared the winner of the election by a margin of 58 votes. The following day, after a recount, the respondent, Maurizio Bevilacqua, was declared the winner by 6 votes. After another recount, Mr Bevilacqua was confirmed the winner by 66 votes.*

The petitioner then sought a judicial recount and, on December 5, 1988, the Hon. Judge Fadak declared Mr. O'Brien the winner by 99 votes. Mr. O'Brien was duly sworn in and commenced sitting in the House of Commons as the member for York North.

Mr Belivacqua appealed the last recount and on December 30, 1988, Mr Justice Doherty allowed the appeal and referred the matter back to Judge Fadak for another recount. Judge Fadak certified Mr. Bevilacqua the winner by a margin of 77 votes. Mr. Bevilacqua was then returned as the member of York North, and Mr O'Brien launched this petition.

The petitioner asked that the election of the respondent Bevilacqua on November 21, 1988 was invalid by reason of non-compliance with certain provisions of the Canada Elections Act, R. S. 1984 C.14 as amended.

***Held:** That the election of Maurizio Bevilacqua was void and invalid, that the election of November 21, 1988 was not conducted in accordance with the principles laid down in the Elections Act and the non-compliance did affect the result of the election. It affected the result because the number of impugned ballots exceeded the plurality of 77 votes, to which reference had been previously made.*

***Cases Cited in the Judgement**:*

Blanchard v *Cole [1950] 4 D. L. R. 316*
Re Dominion Controverted Elections Act; Neilsen v *Simmons (1957) 25 WWR.*, 68
McMaclean v *Dow (1968), 67 D. L. R. (2nd) 56*
Morgan v *Simpson [1974] 3 All E. R, 722 (CA)*
Pollard v *Patterson [1975] 2 W. W. R. 211, [1976] 3 W.W.R 270 (C.A)*
Montreal Street Railway v *Normandy [1917] A. C. 171.*

GRAY and MACFARLAND JJ: The petitioner asks this court to find, pursuant to the provisions of *The Dominion Controverted Elections Act*, R. S. C. 1970, Chapter C-28 that the election of the respondent Bevilacqua (hereafter referred to as "the respondent") as the Federal Member of Parliament for the Electoral District of York North on November 21, 1988 was invalid by reason of non-compliance with certain provisions of the *Canada Elections Act*, R. S. 1984, c.14 as amended.

The petitioner, Michael O'Brien, was the Progressive Conservative candidate for the riding of York North. The respondent, Jean-Marck Hamel, was the Chief Electoral Officer for Canada during the last federal election. Margaret Britnell was the Returning Officer for York North during this election. Maurizio Bevilacqua, Evelyn Buck and Chris Edwards were the respective candidates for the Liberal, New Democratic and Libertarian parties. Evelyn Buck and Chris Edwards have taken no part in this petition.

The Facts

On the election night (November 21, 1988) the petitioner, Michael O'Brien, was declared the winner of the election by a margin of 58 votes. The following day, after a recount, the respondent, Maurizio Bevilacqua, was declared the winner by 6 votes. After another recount, Mr. Bevilacqua was confirmed the winner by 66 votes.

The petitioner then sought a judicial recount and, on December 5, 1988, the Honourable Judge Fedak declared Mr. O'Brien the winner by 99 votes. Mr. O'Brien was duly sworn in and commenced sitting in the House of Commons as the Member for York North.

However, Mr Bevilacqua appealed the last recount and, on December 30, 1988, Mr Justice Doherty allowed the appeal and referred the matter back to Judge Fedak for another recount. Judge Fedak certified Mr. Bevilacqua the winner by a margin of 77 votes. Mr. Bevilacqua was then returned as the Member for York North, and Mr O'Brien launched this petition.

The petition proceeded on the basis of an Agreed Statement of Fact.

The parties have examined the poll books and have discovered a number of irregularities, which, the petitioner submits, invalidates the election. These irregularities are set out as follows:

(a) Eighteen persons in a *rural* polling division, not on the official electoral list for that poll, were permitted to vote after being vouched for by a person who was also not on the list for that poll.

(b) Eight persons in a *rural* polling division, not on the official electoral list for that poll, were permitted to vote after being vouched for by a person who was not on the list for that poll, but who was on the list for another polling division.

(c) Nineteen persons in a *rural* polling division, not on the official electoral list for that poll, were permitted to vote after being vouched for by a person who was also not on the list for that poll, but who was an election officer.

(d) Twelve persons in a *rural* polling division, not on the official electoral list for that poll, were permitted to vote after being vouched for by a person who had previously been properly vouched for by another person.

(e) One person in a *rural* polling division was vouched for by a person who was not on the official list, but who had previously voted after showing identification.

(f) One person voted twice, once by means of an advance poll and again by regular ballot.

(g) Twenty-two persons in a *rural* polling division were permitted to vote after showing identification.

(h) Four persons in an *urban* polling division were permitted to vote even though they were not on the official list for that poll.

(i) One person in an *urban* polling division was permitted to vote after presenting a Personal Request for Registration, Correction or Deletion from (EC 4130).

(j) One person in an *urban* polling division was permitted to vote after presenting an Application for Registration of an Elector form (EC 4050).

(k) Sixteen persons in an *urban* polling division who had apparently been enumerated, although not placed on an official electoral list, were permitted to vote after showing an Enumeration Record (EC 3010). In one case, two persons were enumerated on one form. Both were permitted to vote, by means of adding the letter A to the voter number, in effect creating another ballot for that poll.

In addition, four persons in a *rural* polling division voted after being vouched for by persons whose identity does not appear in the poll book. Another thirteen persons were permitted to vote in a *rural* polling division, but the poll book does not indicate whether they were vouched for.

Of approximately 86,000 votes cast in the riding of York North, the total number of votes called into question is 121. As already stated, the plurality of votes, by which Mr. Bevilacqua succeeded, was 77.

It should also be made clear that there is no evidence that these irregularities arose out of the misconduct of any voters or election officials.

Summary of Counsels' Submissions

The petitioner's position may be summarised very briefly. The secrecy of the ballot is sacrosanct, so much so that the petition before this Court proceeded on the basis of complete anonymity of the voters whose ballots are now called into question. Since no one, not even this court, may enquire for which candidates these votes were cast, 121 votes may be discounted. Since this number exceeds the plurality of votes obtained Mr. Bevilacqua by 34 votes, the election must be voided.

Mr. Bevilacqua argues that the provisions of the *Canada Elections Act* which govern the voting procedure are directory, not mandatory, in nature. If the election was conducted in accordance with the *principles* of the *Canada Elections Act*, non-compliance with formal requirements should not invalidate the election. He goes further and submits that a voter should not be disenfranchised because of mistakes committed by election officials.

Mr. Bevilacqua concedes, however, that one of the votes referred to in both paragraphs (f) and (k) (the "extra" voter) above were irregular and should be disregarded.

The Law

(i) The Statutory Provisions

Federal elections are governed by the *Canada Elections Act.* This statute is said to contain provisions reflecting an earlier era.

The provisions dealing with rural polls provide that a voter who is not on the official list may nevertheless cast a ballot if he is vouched for by another person in the poll whose name does appear on the list. It calls to mind a time when rural communities were much smaller than they are today, when people knew most of their neighbours, and when distances were much greater and the population much less mobile.

The starting point is section 14(1) which recognises that every person over the age of 18 who is a Canadian citizen is qualified to vote. Section 16 (1) goes further and provides that:

> Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors for the polling division in which he is

> ordinarily resident on the enumeration date for the election and to vote at the polling station established therein. (Emphasis added.)

It is clear, therefore, that the Act contemplates a distinction between a person who is *qualified* to vote and one who is *entitled* to do so. Age and citizenship thus do not confer an automatic entitlement to vote. More is obviously required, and that is to ensure that one's name is on the appropriate voters' list on election day.

If a person does not get enumerated, he or she may still be permitted to vote by following the procedure outlined in the Act. This will differ depending on whether the elector resides within an urban or a rural polling division.

The Urban Poll

Section 39(2) indicates that urban polls are "closed" polls, i.e. an elector may only vote if his or her name appears on the official list for that poll. There are two exceptions. The first is for those persons who are required to be at another poll on election day, such as a deputy returning officer or poll clerk. Such a person may obtain a transfer certificate allowing him or her to vote at the poll where he or she is officiating. The second exception is where an elector, although properly enumerated, is omitted from the list. The elector may apply to the returning officer and obtain a certificate which will permit him or her to vote. In both cases, the elector's name is then added to the official list.

The Rural Poll

The procedure for a rural poll is somewhat different. A rural poll is an "open" poll. Therefore, if an elector's name does not appear on the list, as already indicated, he or she may still cast a ballot if vouched for by a properly qualified elector.

Section 47 (1) reads thus:

> Subject to this section, any person who is qualified to vote in an electoral district in which an election is pending and is, on polling day, ordinarily resident in a rural polling division may, notwithstanding that his name does not appear on the official list of electors for the rural polling division, vote at the appropriate polling station established therefore.

(2) *Any person described in sub-section (1) is entitled to vote only*

(a) *upon his being vouch(ed) for by an elector whose name appears on the official list of electors for the rural polling division* and who is ordinarily resident therein and personally attends with him at the polling station and takes an oath in the prescribed form; and

(b) upon himself taking an oat in the prescribed form.

(3) The poll clerk shall make such entries in the poll book as the deputy returning officer directs him to make, including the name of the elector who vouched for the applicant elector and such other entries as are required by the Act. (Emphasis added.)

In a rural polling division, the name of the elector vouched for is *not* added to the official list.

The final relevant provision is section 83, which states:

No election shall be declared invalid by reason of:

(a) non-compliance with the provisions of this Act relating to

(i) limitations of time; or

(ii) *the taking of the poll on the counting of the vote;*

(b) any want of qualifications in the persons signing any nomination paper;

(c) any error in the name, or omission of, or error in, the address or occupation of any candidate as stated on a nomination paper received by a returning officer; or

(d) any insufficiency in any publication of any proclamation, notice or other document, or any mistake in the use of the Forms contained in this Act or in the use of the forms contained in this Act or prescribed by the Chief Electoral Officer pursuant to this Act, if it appears to the tribunal that is considering the question that the election was conducted in accordance with the principles laid down in this Act, *and that such non-compliance did not affect the result of the election.* (Emphasis added.)

(ii) The Relevant Case Law

In a matter such as this, the petitioner submits that it is the duty of the Court to examine the election process itself to determine that it was properly and fairly conducted. As already indicated, we are not concerned with the vast majority of the votes cast by those *entitled* to do so. That entitlement is met by satisfying one or other of the statutory requirements set out earlier.

The petitioner referred to the plurality of 77 votes, by which Mr. Bevilacqua was ultimately declared the winner, as a "magic number". The cases have consistently held that if the number of irregular votes exceeds the plurality of votes cast, the election cannot stand. A leading case is Blanchard v Cole, [1950] 4 D.L.R. 316 (N. S. C . A.) at 320, wherein the Court held:

> It would appear reasonable to hold that once the Court comes to the conclusion that votes were cast to a number equal to or greater than the majority claimed, by persons who had no right to cast them, it is the duty of the Court not only to declare the person having a minority of the properly marked ballots neither duly marked nor duly returned, but being unable in such circumstances to declare the candidate having the majority of the properly marked ballots duly elected, to declare the election void.

This case arose under the vouching provisions of the *Canada Election Act,* and the court held that, since some of the electors were not vouched for, their ballots were therefore invalid. The principle has, however, been extended to include cases where the elector was improperly vouched for by someone who was not on the official list, as in the present case, and it has been held that "[i]f the vouching was done by an unqualified person, the result is the same as if there was no vouching." (*Re: Dominion Controverted Elections Act; Neilson* v *Simmons* (1957), 25 W.W. R. 68 at 76).

It is clear, therefore, that, subject to any curative provisions in section 83 of the Act, the votes cast after improper vouching must be declared invalid.

With regard to the urban polls, as already stated, the list is "closed". The exceptions permitting one's name to be added to the list are extremely limited and detailed. It is only in the two sets of circumstances set out above that a voter's name can be added to the list. Election officers are not otherwise permitted to enlarge the list. To do so may well endanger the election process and could lead to abuse (*McMechan* v *Dow* (1968), 67 D. L. R. (2d) 56 at 63).

In some urban polls, electors whose names did not appear on the list were permitted to vote after producing a passport or, more often, a driver's licence which contained their address and a photograph. These procedures, although no doubt well-meaning on the part of the election officials at the poll, are contrary to the scheme of Act. For this reason also, this Court is unable

to validate the ballots of those electors who were permitted to vote after producing various registration forms or enumeration records.

The respondent urges this Court to find that, although the statutory provisions may not have been strictly complied with, the ballots cast are nevertheless valid, because the methods used were as good as the statutory scheme. For example, in the case where drivers' licences were presented, for election officials were able to satisfy themselves as to the identity of the elector by means of the photograph with the licence. We have no doubt that the election officials carried out their duties diligently and tried to ensure that the principles of the Act were properly followed. However, the fact of the matter is that these methods did not comply with the statute.

It is not good enough to say that the method pursued was just as good as, or even better than, the statutory method. It is the statutory method that gives meaning and validity to the vote. The vote without the statute is of no effect, is meaningless, binds nobody. (Stoddart *v* Town of Owen Sound (1912), 27 O.L.R. 221 at 230 (H.C.J.), leave to appeal refused (1912); 4 O.W. N. 170 (C.A.))

We should therefore turn to a consideration of the effect of section 83 on these irregularities. As indicated above, section 83 sets out a number of circumstances which will not render an election void. The section is somewhat awkwardly expressed in the negative. With regard to a similar provision in the English Act, Lord Denning in *Morgan* v *Simpson,* [1974] 3 AII E.R. 722 (C.A.) held that the section should be transformed to the positive to show when an election *is* to be declared invalid. In Canada, the case of *Pollard* v *Petterson,* [1975] W.W.R. 211 at 215; [1976] 3 W.W.R. 270 (C.A.); application for leave to appeal dismissed 53 D.L.R. (3d) 215n (S.C.C.), stands for the principle that section 83 may only operate to correct irregularities, not a failure of statutory compliance.

The curative effect of section 146 (the equivalent of section 83 of the *Canada Elections Act*) may not be invoked to condone what is more than a mere irregularity, but rather a failure in the observance of the statutory requirements for the conduct of the poll. The saving grace afforded by the section can hardly cover a substantial omission of a positive requirement.

It is in this sense that the respondent argues that the provisions of the Act are derogatory, and that section 83 may be resorted to in order to correct such deficiencies. He submits that where an act done in neglect of the public duty would work injustice to persons who have no control over those entrusted with the duty and which would not promote the main object of the Legislature, such neglect of duty should not affect the validity of the acts done *(Montreal Street Railway* v *Normandin,* [1971] A.C. 171 at 175), and that the no-compliance of an election official with the provisions of the Act should not disenfranchise a voter. To give a directory reading to the statute would thus have the effect of excusing inadvertent shortcomings on the part of the election officials and thus avoid invalidating the ballots.

Such an argument does not, however, take into account the concluding words of section 83 which provide that no-compliance with the Act may only be cured where "the election was conducted in accordance with the principles laid down in this Act, *and that such no-compliance did not affect the result of the election".* It is the latter test that causes some difficulty. The question formulated by the petitioner was whether there were "ballots in the box that should not have been there". Having regard to the statutory provisions, if all of the impugned ballots are to be declared invalid, and the number of these ballots exceed the margin of votes by which Mr. Bevilacqua was declared the successful candidate, it is evident that no-compliance with the statute might well have affected the result. In that sense, this is not a question of a mere irregularity which may be cured by section 83.

The Charter of Rights and Freedoms

The respondent argued, over objection by the petitioner, that the issue in the present case should be decided with regard to the principles laid down by the *Charter of Rights and Freedoms*, particularly section 3 and the limitations imposed by section 1. Neither the Court nor the petitioner was aware of the argument proposed by the respondent until the morning that the petition was heard when the respondent's factum was served on the petitioner and filed with the Court. In spite of the fact that there had been some mention of a proposed "Charter argument" six months before this hearing, at which time counsel for the petitioner suggested that the respondent serve a Notice of Constitutional Question pursuant to section 122 of the *Courts of Justice Act*, S. O. 1984, c 11, no such notice was in fact served upon the appropriate Attorneys-General. Counsel for the petitioner quite rightly objected to the introduction of such an issue at this late stage of the proceedings and opposed the respondent's request for an adjournment. The Court did not grant adjournment and counsel for the respondent made his submissions as set forth in paragraphs 7, 8, 9, 10, 11 and 12 of the respondent's factum.

Conclusion

After a consideration of the provision of the relevant sections of the elections acts and the decisions we have referred to, we have determined that the election of the respondent Bevilacqua was void and invalid. The election of Maurizio Bevilacqua as Federal Member of Parliament for the Electoral District of York North on November 21, 1988 was not conducted in accordance with the principles laid down in the Elections Act and the non-compliance did affect the result of the election. It affected the result because the number of impugned ballots exceeds the plurality of 77 votes, to which reference has been previously made.

We will certify in writing our determination to the Honourable Speaker of the House of Commons appending thereto a copy of the notes of evidence pursuant to the provisions of section 58(1) of the *Dominion Controverted Elections Act, supra.*

Released: May 28, 1990

ONTARIO COURT OF JUSTICE

B E T W E E N :

THE COMMISSIONER OF CANADA ELECTIONS AND YVONNE TARTE	*E. A. Ayers, Q. C.* *and T. O. Buckley* Counsel for the Appellants

...Appellants

and

THE FORD MOTOR COMPANY OF CANADA LIMITED	*Harry Freedman,* Counsel for the Respondent

...Respondent

Heard: April 12, 1991

Elections: *Time off to vote – Deduction of payment for time-off – whether offence under the Act.*

Background Facts: *Ford Motor Company of Canada Ltd was charged for not paying certain of its employees the amount those employees would normally have earned had they not taken time off to vote, contrary to Sections 148 (2), 149 and 150 (1) of the Canada Elections Act [R.S.C 1985 C E 2].*

At the trial, the Judge discussed the charges against the Company. The appellants contended that the trial judge misinterpreted the relevant provisions of the Act, and that the company should have been found guilty of an offence for making the deductions from the employees' wages.

Held: *The appeal was dismissed.*

Cases cited in the Judgment:

The Queen in Right of Canada v *The Saskatchewan Wheat Pool (1983), 1 S.C.R. 204*
City of Kamloops v *Neilseen et al 10 D. L. R. (4th) 641*
Tuck and Sons v Priester (1887) 19 O B D 629

McCART J: This is an appeal heard by me in St. Thomas, Ontario on April 12, 1991 from the judgement of His Honour Judge G. A. Phillips delivered on June 21, 1990.

On August 30, 1989 Ford Motor Company of Canada Limited ("Ford") was charged that on November 21, 1988 it did not pay certain of its employees the amount such employees would normally have earned if they had worked from 4.00 p.m. until 5.30 p.m., contrary to sections 148 (2), 150 (1) and 149 of the Canada Elections Act. The appellants elected to proceed summarily. The trial was held on June 21, 1990 resulting in a dismissal of the charge against Ford.

The relevant sections of the Canada Elections Act provide as follows:

> "148. (2) No employer shall make any deduction for the pay of any employee or impose on or exact from him any penalty by reason of his absence from his for work during the consecutive hours that the employer is required to allow him pursuant to subsection (1)."
>
> "149. For the purposes of section 148, where an employee is normally paid on an hourly, piece-work or other basis, the hours of his employment on polling day at an election are the hours that he would normally work on that day if it were not polling day and, if, subject to subsection 148 (3), the employee is absent at any time during the consecutive hours that the employer is required to allow the employee pursuant to subsection 148 (1), the employer shall be deemed to have made a deduction from the employee's pay if the employer does not pay the employee that amount that the employee would normally have earned during that time if he had worked during that time."
>
> "150. (1) any employer who, directly or indirectly, refuses or by intimidation, undue influence or in any other way interferes with the granting of any elector in his employ of the consecutive hours for voting, as provided in section 148, is guilty of an illegal practice and of an offence."

Ford complied with section 148 (1) in that it shut down operations at 4.00 p.m. on November 21, 1988 thus giving its employees four consecutive hours for the purpose of voting, the polls not closing until 8.00 p.m. The day-shift at Ford commenced work at 7.00 a.m. and finished at 4.00 p.m. They were paid for 8.5 hours of work, a half-hour having been deducted for lunch. It is alleged by the appellant that for some considerable length of time the day-shift had been working until 5.30 p.m. and thus, their pay from 4.00 until 5.00 p.m. was wrongfully deducted in contravention of the provisions of section 148 (2) and 149 of the Act.

In the trial before His Honour Judge Phillips and in argument before me, much time was spent regarding the "normal" work week and "normal" hours of work each day. The collective agreement between Ford and its workers stipulated that the normal work week consists of 40

hours and by implication and custom this translates into a five-day work week at eight hours per day. His Honour Judge Phillips found that the collective agreement provided a reliable guide in interpreting and defining section 149 of the Canada Elections Act as the parties had agreed upon the use of the word "normal" in the description of hours of work.

In respectful opinion, however, Judge Phillips misses the point. Section 149 requires that employers pay to its hourly employees on polling day for the hours that they would normally work *on that day* if it were not polling day. There is no question on the evidence that the production workers at Ford had worked ten hours per day for several years prior to November 21, 1988 and that they continued to do so after November 21, 1988. They were paid straight time for the first eight hours and time and one-half for the additional two hours. It was conceded that there would be reductions from time to time in the hours worked for a variety of reasons such as a parts shortage, breakdowns and reduced demands for the particular model they were assembling. It is clear to me that section 149 is not concerned with the normal work week. It is only concerned with the hours that the employees of Ford would have worked had it not been election day. On the evidence I am satisfied beyond a reasonable doubt, that, but for the election on November 21, 1988, the production workers would have worked ten hours that day. Consequently I find that the employees of Ford were entitled to have been paid for ten hours' work on November 21, 1988 and that they received pay for only 8.5 hours of work.

It was submitted by counsel for the respondent that even if Ford made a deduction from pay under section 149 to which it was not entitled to do, such deduction did not constitute an offence under section 150 of the Canada Elections Act. Section 150 (1) of the Act makes it an offence for an employer in any way to interfere with the granting to an elector in his employ of the consecutive hours for voting as provided in section 148. The section contains no specific reference to an employer making deductions from an employee's pay. Neither sections 148 nor 149 create offences. They are merely declaratory in nature.

It was urged upon me by counsel for the appellants that to interpret section 150 other than by incorporating into it section 148 in its entirety would render the provisions of section 148(2) meaningless. I have some difficulty in subscribing to that opinion. It seems to me that if Parliament intended it to be an offence to fail to pay a worker for the hours he normally would have worked on election day pursuant to section 148 it would have expressly so stated in section 150 (1), or it could have drafted section 150 in such a way as to provide that an employer who violates the provisions of the whole of section 148 is guilty of an offence. As was pointed out by Mr. Freedman there are numerous examples throughout the Canada Elections Act which makes it an offence to contravene or fail to observe any of the provisions of a particular section; for example, see sections 129 (3) and 159 (2).

It seems to me that the only logical remedy for an employer's failure to pay a worker for time off would be a civil action for recovery of such loss to pay, or perhaps, in case, a worker could pursue his remedy under the collective bargaining agreement. Counsel for the appellants argued

that breach of a statutory duty does not give rise to a civil cause of action and he referred to *The Queen in Right of Canada* v *The Saskatchewan Wheat Pool* (1983), 1 S. C. R. 204, in support of his position that breach of a statutory provision will not confer a civil cause of action unless Parliament specifically confers the cause of action in the statute. In my opinion, however, the *Saskatchewan Wheat Pool* case simply stands for the proposition that mere breach of a statutory condition, absent an intentional or negligent failure to comply with a statutory duty, does not give a right to recovery merely on proof of the breach. In this connection, I refer also to the judgment of Madam Justice Wilson in *City of Kamloops* v *Neilsen et al* 10 D. L. R. (4th) 641 where she says at p. 679:

> "The plaintiff 's claim here is against a public authority for breach of a private law duty of care arising under a statute. (This should not be confused with breach of statutory duty *per se: see The Queen in Right of Canada v Saskatchewan Wheat Pool* (1983), 143 D. L. R. (3rd) 9 [1983] 1 S. C. R. 205, [1983] 3 W. W. R. 97.)";

and again at p. 681 her decision states:

> "In order to obtain recovery for economic loss the statute has to create a private law duty to the plaintiff alongside the public law duty. The plaintiff has to belong to the limited class of owners of occupiers of the property at the time the damage manifests itself..... Finally, and perhaps this merits some emphasis, economic loss will only be recoverable if as a matter of statutory interpretation it is a type of loss the statute intended to guard against."

In his text "Construction of Statutes" Driedger says in the opening paragraph of chapter 10 that:

> "It was "presumed", in the absence of a clear indication in the statute to the contrary, that Parliament did not intend prejudicially to affect the liberty or property of the subject."

At p. 207 Dredger goes on to say that penal statutes are to be construed "strictly" and he quotes from the decision of Lord Esher in *Tuck and Sons* v *Priester* (1887) 19 Q. B. D. 629 at p. 638:

> "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction."

In my view the only reasonable interpretation of section 150 (1) is that it simply imposes a penalty and creates an offence for interfering with the employee's right to have four consecutive hours for voting. Furthermore, while the improper deduction of wages may be a breach of a private law duty, impeding an elector's right to vote is a public mischief because it is in the

public's interest that all properly qualified electors be given the right to exercise his or her franchise.

In the result therefore the appeal is dismissed.

Justice J. F. McCart.

Released: May 8, 1991

ONTARIO COURT (GENERAL DIVISION)

B E T W E E N:

THE COMMISSIONER OF CANADA ELECTIONS AND YVONNE TARTE

...Appellant

and

THE RELIGIOUS HOSPITALLERS OF HOTEL-DIEU OF ST. JOSEPH OF THE DIOCESE OF LONDON

...Respondent

Elections *– Time off to vote – Intimidation of employer by superior – Whether offence under Election Act.*

Background facts: *The respondent was charged with unlawful interfering and for intimidating an employee with respect to the grants of additional time for voting, contrary to sections 148 and 150 of the Canada Elections Act. A poster was set up by the respondent informing its employees of their right to four hours on polling day to vote, but one employee was only granted two hours after having been intimidated by her superior.*

Held: *Charges were dismissed and the decision was confirmed on appeal.*

REASONS FOR JUDGEMENT

BEFORE THE HONOURABLE MR. JUSTICE JOSEPH P. McMAHON,
on the 22nd day of January, 1991, at WINDSOR, Ontario.

CHARGES: s. 148, 150 Canada Elections Act.

APPEARANCES:

Mr. T. Buckley	For the Appellant
Mr. L. Kavanaugh	For the Respondent

REASONS FOR JUDGEMENT

McMAHON, O. C. G. J (Orally) In this matter the Religious Hospitallers of Hotel-Dieu of St. Joseph of the Diocese of London were charged that on or about the 21st day of November, 1988, at the city of Windsor in the County of Essex, that it unlawfully interfered with the granting of additional time for voting to its employee, Marie Boyd, so as to provide the said Marie Boyd with four consecutive hours for the purpose of casting her vote.

The count then went on to put in particulars which are binding upon the prosecution, that on the 21st day of November, 1988, the said Marie Boyd alleges that she was intimidated by Penny Stuart, the supervisor of the said Marie Boyd, thereby interfering with the granting to the said Marie Boyd by Hotel-Dieu Hospital of additional time for the purpose of casting her vote contrary to Sections 148 and 150 of the Canada Elections Act.

The second count which was also dismissed at the trial was not appealed. As I have indicated the charge against the accused was dismissed by His Honour Judge Nosanchuk of the Provincial Court of this county.

I have had the distinct pleasure and opportunity of reading Judge Nosanchuk's reasons for judgement, and I will say at the outset that I concur with him wholeheartedly, not only on his interpretation of the facts in this case, but on his interpretation of the law. I do not intend to refer to all of the numerous cases that have been cited by counsel. I am only going to state what I think is the present situation in Canada and in Ontario.

First, I am finding, as His Honour did, that this is a statute of strict liability. I am finding that means that the onus is upon the accused once the fact has been established to put forward in an evidentiary way the defense of due diligence.

Prior, the law was that the accused person in such circumstances was required to establish due diligence on the balance of probabilities or the preponderance of evidence, that of course has now been changed and the onus is now on the accused to raise an evidentiary issue, if that issue is raised by proper evidence then the onus continues on the prosecution to establish guilt beyond a reasonable doubt.

Section 148 (1) of the Elections Act of Canada reads:

> "Every employee who is qualified to vote shall, while the polls are open on polling day at an election, have four consecutive hours for the purpose of casting his vote and, if the hours of his employment do not allow for those four consecutive hours, his employer shall allow him such additional time for voting as may be necessary to provide those four consecutive hours."

Section 150 (1) reads: "Any employer who, directly or indirectly refuses...", and I will stop there, because there is absolutely no evidence that the defendant in this case refused to provide the proper hours, and in fact the wording of the charge completely sets that aside, so that the charge was,

> "...by intimidation, undue influence or in any other way interferes with the granting to any elector in his employ of the consecutive hours for voting, as provided in Section 148, is guilty of an illegal practice and of an offence."

Now, what are the undisputed facts in this case? The undisputed facts really are found in the judgment of Judge Nosanchuk and admitted by everyone, was a memo was issued by, I believe he has been referred to as the Director of Personnel, Lorne E. Dunkley of the hospital. This memo was posted in the hospital and was read by the aggrieved person and the memo is directed to all department heads, supervisors and head nurses, and it reads as follows:

> "As you are no doubt aware, there is a Federal election scheduled for Monday, November 21, 1988. The Canada Elections Act requires that employers make certain provisions concerning time available to employees for voting purposes. These provisions are as follows:
>
> 1. They apply only to employees who are 18 years of age or older and are Canadian citizens.
>
> 2. The voting polls are open 0900 hours (9.00 a.m.) to 2000 hours (8.00 p.m.). Employees who qualify as electors are entitled to four (4) consecutive hours while the polls are open in order to vote. If an employee's hours of employment do not allow for this, he/she must be granted sufficient time off work at the convenience of the employer to allow the employee such time for voting as is necessary to provide for the four consecutive hours. Such time off is to be without deduction from pay. As you can see from the above regulations, employees whose work schedule commences after 0900 hours (9.00 a.m.) and before 1300 hours (1.00 p.m.) do not possess the requisite four (4) hours for voting and, as such, the Hospital would be required to provide for additional time off unless the employee declined or waived his or her need for additional time off. This also applies to employees scheduled from 1600 hours (4.00 p.m.) who have not had four (4) hours prior to commencing work that day.
>
> Please review the work schedules of all the staff under your direction and determine if your schedules conflict with the four (4) hour requirement. Should you have any questions or wish to discuss the provisions as they apply to your schedules, please contact us."

Marie Boyd is a nurse in Hotel-Dieu Hospital, and at the time in question was employed as what has been described as the Telemetry Unit of the Cardiac Department. Her immediate supervisor or head nurse is one Penny Stuart. Marie Boyd lives in the Town of Tecumseh. On the date in question, Miss Stuart approached Marie Boyd to ask in effect when she was leaving to vote, and a discussion took place as to whether she required four hours.

I am satisfied in the finding of Judge Nosanchuk that Miss Stuart did at that time indicate that Miss Boyd in a sense would be abdicating her professional responsibility if she took a total of four hours to go to the Town of Tecumseh in order to register her vote. As a result of that discussion Miss Boyd left at one o'clock, went to Tecumseh, cast her vote and returned by 3.00 p.m.

So let us first recognise a very important fact: Miss Boyd was not deprived of her right to vote. She was deprived of a further two hours in which she could cast that vote. It has been argued by counsel for the respondent that the wording in Section 148 would indicate that the four hours must be used for the purpose of voting. I think that is probably the well-meaning intention, but clearly the section provides for four hours, and the employer is required to grant that four hours.

Obviously, Miss Boyd, in this case, could use two hours for voting and two hours to conduct her personal business and be paid for it by the Religious Hospitalllers of Hotel-Dieu, and of course, she was deprived of that privilege of going about her personal business at the expense of the hospital by the intimidation set forth by Miss Stuart.

Now, the first question for a determination was whether or not this offence was an offence requiring *mens rea* or what is referred to in law as a strict liability offence. Judge Nosanchuk found that in his view it was a strict liability offence. Counsel for the respondent has argued that there are no deeming provisions in this particular act so it should be viewed as a *mens rea* offence.

I am prepared to accept the finding of His Honour Judge Nosanchuk and I will view this act as a strict liability offence. Now, what in that count does it mean? It means of course that the onus is cast upon the Religious Hospitallers of St. Joseph to establish an evidentiary, or I should say, to set aside an evidentiary burden. Now, clearly how can anybody with any amount of rationality not say that the memorandum that was filed as Exhibit Number One which was posted by the direction of the personnel management and was read by Miss Boyd, and was ready by Penny Stuart, did not in effect dispose of that evidentiary burden regardless of what else the respondent did or did not do, clearly that was evidence and a vital piece of evidence regarding the act of the accused.

Next then, it was the question before the court as to whether or not Miss Stuart could be regarded as a directing mind of the corporation. This is on the basis of the so-called identification theory. I am not again going to refer to the authorities that have been filed with me, *The Canadian*

Dredging case and others, but I am satisfied as was Judge Nosanchuk satisfied that a head nurse in the Telemetry Section of a Cardiac Unit is not a directing mind of the Religious Hospitallers of St. Joseph of Hotel-Dieu.

We had in this case a firm action taken by the personnel director who might and should I think qualify as a directing mind. Subsequent to that, there was a visit by a person referred to as Mr Tramel (phonetic) who I understand is the co-ordinator of nursing. He met with Miss Stuart early that day to inquire if satisfactory arrangements had been made so that everyone would have their four hours.

Now, it obviously was Miss Stuart's view that just because the Act said you had four hours you also had a professional responsibility, and she made that quite plain to Miss Boyd. I am satisfied that this was probably an intimidating conversation with Miss Boyd, and caused Miss Boyd to restrict her activities with regard to voting to two hours instead of four, but are the directing minds of the hospital responsible for the Act? I think clearly the answer is no.

Now, it has been argued quite forcefully before me by counsel for the appellant that due diligence includes more than things that you do, it includes things that you did not do, and that in this case there was no evidence by the respondent that extra staffing had been made available. In the view of the appellant, the obligation was upon the respondent to probably check the day before to insure that people would be free to use their four hours.

I am advised by counsel for the respondent that yes there was no evidence. Nobody was asked what extra staff was available. Nobody was asked whether it would interfere with the work of the hospital if Miss Boyd took her four hours. There was evidence that staff was not a problem, that there was another head nurse on duty from 11 to 11 on that day, and that there were not staffing difficulties when Miss Boyd left for her two-hour voting exercise, but that really in my view has no relevance to the count before the court, because the count does not say that Hotel-Dieu or the hospital did not grant the four hours. It said that it interfered with the grant of the four hours, and that is a real distinction. Clearly the hospital in Exhibit One granted the four hours, now where is there any evidence whatsoever that the hospital interfered with the grant of those four hours?

I am prepared to accept that Penny Stuart by her comments may have intimidated and therefore interfered with Marie Boyd's right to the four-hour period, but there is absolutely no evidence that the hospital and any of its individual directing minds in any way interfered with her right to a grant of four hours. When one discusses, "Well, did they make a provision for other staff?", what did they do that interfered with her right to a grant of those four hours? The answer obviously is that they did nothing that interfered with her right to the grant of those four hours. That in effect was the finding of Judge Nosachuk, and I not only concur with it – I should not say I not only feel that I should not overturn that finding, I concur completely with his finding.

I do not see how any judicial officer could have come to any other finding based on the evidence that was before him than the learned trial judge did in this case. The appeal will be marked dismissed. Now, having said that gentlemen, I am prepared to hear Mr. Kavanaugh, (a) on my right to grant costs on this appeal; and (b) on my right to grant costs personally against the Commissioner under the Election Act whose name commenced as I understand it this information.

Mr Kavanaugh: Well, Your Honour, I am constrained to say obviously at the outset that either way it is the public coffers that is sort of funding litigation.

The Court: Well, you see Mr Kavanaugh, this is why I am so incensed, I can possibly regard the laying of the charge is one thing. We have on one hand the Commissioner, whatever his title is, the Commissioner under the Elections Act, who is supported entirely by the tax-payers of our country, of all of whose expenses are paid by the tax-payers of our country, that is on one side. On the other side you have the Religious Hospitallers of St. Joseph of Hotel-Dieu of the Diocese of London. This is a hospital which has been operating in our city well back into the 19th Century which has been providing services for generations and generations of people of this county. Through the evolution of history this hospital, I presume, now operates on 95 per cent either grant or payments under the OHIP provisions, and that is all tax-payers' money. So we have one person supported by the tax-payers suing or charging another person supported by the tax-payers, and not only proceeding to trial at the Provincial Court level, but then embarking upon a further expenditure of public money on both sides on what to me was an absolutely obscene and nonsensical appeal. I think somebody should suffer for it. I am so upset.

Mr Kavanaugh, I do not want to embarrass you by asking you what your bill is going to be to the hospital, but surely that money could have expended to a much greater affect on doing what the hospital is required to do and that is to take care of sick people. Here we are today, gentlemen, from ten o'clock this morning until twenty to three this afternoon squandering in legal fees, money that should more properly be expended elsewhere for the benefit of the citizens of our country.

I am mad. I am incensed. I think you can see that I am mad and that I am incensed. This is just absolutely stupid and I think someone should suffer for it. I will tell you quite properly, if I have the power, and that is why I am asking Mr. Kavanaugh, if I have the power I want to assess costs fixed at $2,000 against the Commissioner to be paid personally and not to be paid by the Government of Canada. Now, I do not know whether I have the power to do that in an application under a provincial statute which is not under the Criminal Code.

Mr Kavanaugh: Well, frankly Your Honour, as I said – with that caveat, of course, if you are ordering it personally then it does not come out of the tax-payers' money or fund. I am embarrassed to tell you that I have not taken specific instructions on this because we just did not apply our minds to it. Now, I can take instructions quickly. I have a senior member of

administration or a member of senior administration present, but did Your Honour have in mind you would entertain full submissions on your authority because on that point I...

The Court: No, I have too much to do the rest of this week.

Mr Kavanaugh: Yes.

The Court: Then I will be off for a week, and I do not want to bring Mr. Buckley all the way back down here and expend further money. If you.....

Mr Buckley: May I make a submission Your Honour?

The Court: Yes, certainly.

Mr Buckley: I think I should be heard on this point. I am not aware that there is a power. I have not reviewed it... I am just not aware that there is a power. At this risk of further incensing Your Honour, I wish to say that Judge Nosanchuk found that this was an entirely justifiable prosecution.

The Court: I read that in this judgement. I said at the outset – I thought I said, the prosecution itself I did not mind....

Mr Buckley: If I may.....

The Court: .....but once he made his finding of fact in law then I just saw no merit in the appeal.

Mr Buckley: If I might state on the change in the law in December of 1990 with the release of the Ellis-Don decision in the production of the burden, it is my understanding that the Wholesale Travel Case, which is the foundation of that is under appeal to the Supreme Court of Canada.....Your Honour may be bound by that decision in this court, it may well be the case that the Supreme Court of Canada will find differently without criticising the Court of Appeal in any respect, and that would change insignificantly the burden on the defense.

The Court: Do you have the Notice of Appeal, Madam Clerk?

Mr Kavanaugh: May I just say this to you Your Honour, I want to direct you to – I would submit you do have the authority generally. Costs are always in .....in the court even as you are.....

The Court: Not normally against a crown in a criminal prosecution.

Mr Kavanaugh: True, but in the Elections Act in Section 276, I believe you have the full Act in from of you. I do not have the – I have a paraphrasing of it and I read it Your Honour it says:

> "Any court of criminal jurisdiction before which a prosecution is instituted for an offence against this Act may order payment by the defendant to the prosecutor of such costs and expenses as appear to the court to have been reasonably incurred in and about the conduct of the prosecution." Now, that is by the defendant to the prosecutor. Later on there is a provision.....

The Court: Did you say 176?

Mr Kavanaugh: 276 Your Honour. Your Honour, sub-three of that ....

The Court: Yes.

Mr Kavanaugh: Do you have that section Your Honour?

The Court: Yes.

Mr Kavanaugh: In sub-three:

> "In case of an information by a private prosecutor for an offence against this Act, if judgment is given....",

and I would submit that the consent was filed by Mr. Tarte and proceed on that basis, "...if judgement is given for the defendant, he is entitled to recover from the prosecutor the costs sustained by the defendant by reason of the proceedings, which costs shall be taxed by the proper officer of the court in which judgement is given."

So I would submit statutorily you have the authority.

Mr Buckley: Your Honour, the private prosecution would be by Marie Boyd, citizen. This is a prosecution out of the office of the Commissioner of Canada Elections, and it is not – it refers back to the consent of the Commissioner. 256, that refers to when someone else brings it on but when the Commissioner in fact brings a prosecution in my submission that is not a private prosecution.

The Court: Well, I tend to agree with Mr. Buckley that, since it is the Commissioner and his office with regard to his office who commenced this prosecution. I cannot view it strictly as a private prosecution, and certainly it is not a crown prosecution in the sense that we normally deal with it. So it is some hybrid, I guess between a crown prosecution and a private prosecution, but I trust Mr. Buckley that you make my views well known to your seniors or whoever – the

members of the Commission and the Commissioner because if I had the power there would be costs assessed against him personally.

Mr Buckley: Your Honour, I will report the judgement fully to my client.

Mr Kavanaugh: Thank you Your Honour.

The Court: The appeal will be dismissed without costs.

THIS IS TO CERTIFY that the
foregoing is a true and accurate
transcription from the record made
by sound recording apparatus, to
the best of my skill and ability.

.....
Loretta Beneteau,
Certified Court Reporter.

COURT FILE NO.REF.1851/92

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

(WEEKLY COURT)

B E T W E E N:

FREDRICK STUART CLIFFORD	Charles Campbell for the Applicant
...Appellant	
and	
THE ATTORNEY- GENERAL OF CANADA and JEAN-PIERRE KINGSLEY in his capacity as CHIEF ELECTORAL OFFICER OFCANADA	*E. A. Ayers, Q.C. Freya J. Kristjanson* for the Respondent Jean-Pierre Kingsley, Chief Electoral Officer of Canada
...Respondents	
	Donald MacIntosh Cheryl Mitchell for the Respondent The Attorney-General of Canada

Heard: October 23, 1992

Referendum *– Right to Vote – Whether enactment preventing applicant from voting was valid.*

Background facts: *The applicant sought a declaration against the Attorney-General and the Chief Electoral Officer of Canada that the preclusion of his participation in the referendum of October 26, 1992 violated his right which was guaranteed by sections 2(b), 3, 6(1) and 15 (1) of the Canadian Charter of Rights and Freedoms. The applicant further sought a declaration that section 139 of the Canada Election Act, R..S. C. 1985, C. E. 2 as incorporated in the Referendum Act, S. C. 1992, C 30 was inconsistent with the appellants rights, being in violation of the same sections of the Charter.*

Held: *That the applicant had failed to establish a violation of his Charter rights.*

Cases cited in the Judgement:

Andrews v *Law of British Columbia (1989) 1 SCR 143*
Haig et al v *The Queen (released 20 October 1992)*

BORINS J (Orally): This is an application by Frederick Stuart Clifford against the Attorney-General of Canada and the Chief Electoral Officer of Canada for a declaration "that the preclusion of the applicant's participation in the referendum of October 26, 1992 " violates rights guaranteed to him by sections 2 (b), 3, 6 (1) and 15 (1) of the *Canadian Charter of Rights and Freedoms.* The applicant further seeks a declaration that section 139 of the *Canada Elections Act*, R.S.C. 1985, c. E-2 as incorporated in the *Referendum Act,* S.C. 1992, c.30 "is inconsistent with the applicant's rights" being in violation as the same sections of the *Charter.* The remedy sought is the deletion of certain words contained in section 139 (a) of the *Canada Elections Act* the effect of which it is submitted will enable the applicant to cast his vote in the referendum.

At the outset I find it necessary to observe that because this application is argued only four days before the date of the referendum, the consequent necessity of deciding it expeditiously and, in any event, before the referendum has not afforded me the opportunity to prepare extensive reasons for judgment. In other circumstances I would have announced my decision with reasons for judgement to follow. However, in the event that appellate proceedings might be contemplated before the referendum is held, I feel that it is necessary to provide brief reasons for my decision.

The convenient starting point is the following passage from the reasons for judgement of Mr. Justice Hugessen on behalf of a majority of the Federal Court of Appeal in *Haig et al* v *The Queen* released on October 20, 1992 which describes the basic scheme for voting in the referendum:

Under the Referendum Act the Governor in Council may order the holding of a referendum to obtain the opinion of 'the electors of Canada or of one or more provinces' on a 'question relating the Constitution of Canada' (subsection 3(1). The Act establishes a scheme for voting on the question which is based on and adopted from the Canada Elections Act. That scheme, like that for holding federal elections, is very largely based on considerations of geography: provinces are divided into electoral districts which are in turn divided into polling divisions. To be entitled to vote at an election an elector, besides being qualified, must have his or her name included on the list of electors in the polling division in which he or she resides. That is so for a referendum as well: one votes in the province, the electoral district and polling division of one's residence.

Section 139(a) of *Canada Elections Act* enables certain eligible electors absent from the polling division on the date of the referendum to vote by proxy. Scheme II to the Act contains Special Voting Rules which enable Canadian Forces electors and Public Service electors and their spouses and dependents living abroad to vote. Other than through the Special Voting Rules, a Canadian citizen who is outside Canada for purposes of his or her employment and who does not qualify to vote by proxy can vote in the referendum only if he or she returns to the polling division in which the person is ordinarily resident and where his name or her name has been included in the list of electors.

The facts are very brief. The applicant is a sixty-five year old Canadian citizen ordinarily resident in Mississauga, Ontario who is living and working in Bangladesh on a temporary basis pursuant to his employment with a Canadian employer. His name is on the list of electors in the polling division in which he is ordinarily resident. He is not eligible to vote pursuant to the Special Voting Rules nor does he qualify to vote by proxy under section 139 (a) of the *Canada Elections Act* as he does not come within the seven job categories given the right to vote by proxy. His daughter Sandra Clifford is prepared to vote by proxy for her father but she is ineligible to be a proxy voter as she does not meet the requirements of section 140 of the Act. Therefore, the only way the applicant can vote in the referendum is by returning to Mississauga and voting in the polling division in which he is ordinarily a resident. However, financial reasons prevent him from doing so.

Jean-Marc Hamel testified on behalf of the respondents. Until his retirement in 1990, Mr. Hamel was the Chief Electoral Officer for twenty-five years. He recently served as consultant to the Royal Commission on Electoral Reform and Party Financing which submitted its report in November, 1991. I doubt that there is any person in Canada who is more informed than Mr. Hamel on the subject of electoral law and procedure in Canada and elsewhere in the western world. His evidence was very helpful.

Mr Hamel testified that one of the central objects of the *Canada Elections Act,* as incorporated in the Referendum Act, is to ensure the integrity of the vote. This is accomplished in Canada by door-to-door enumeration, Canada being the only country in the western world which still does so. This results in the preparation of a list of electors for each polling division in the country. The integrity of the vote by members of the Canadian Forces and the Public Service serving abroad is achieved by maintaining a permanent register of these people and by other means. The integrity of the proxy vote is maintained by the safeguards contained in sections 139 and 140 of the *Canada Elections Act.* He stated that there is no permanent register of other Canadian citizens living or working abroad temporarily although recommendations have been made over the years that such a register be maintained to enable such persons to vote in federal elections. It was Mr. Hamel's opinion that the maintenance of a permanent list of voters is generally accepted as a means of ensuring the integrity of the vote. He said that the most recent statistics available from the Department of External Affairs suggest that from 2.3 to 2.5 million Canadian citizens have a residence abroad, including the United States of America.

Mr. Hamel stated that Canadian legislation presupposes that a person who will not be in his or her polling district on election day will either vote at an advanced poll, vote by proxy if the conditions of the Act are satisfied or vote abroad if a member of the Canadian Forces or the Public Service. He testified that Canada is the only country in the western world which does not make provision for absentee voting for all citizens who are residing abroad who wish to participate in a national election. He added that, even if the *Referendum Act* contained legislation to enable absentees such as the applicant to vote in the referendum, the time between the proclamation of the Act last June and the date of the referendum would have been insufficient to

enable the Chief Electoral Officer to establish a system for absentee voting containing the safeguards necessary to ensure the integrity of absentee voting in the referendum. It is also relevant to note that the administrative responsibilities encountered by the Chief Electoral Officer as a result of any amendment to the referendum legislation has been recognised by section 42 of the *Referendum Act* and section 331 of the *Canada Elections Act.*

As I have indicated, Mr. Clifford does not satisfy the requirements of section 139 (a) to enable him to vote by proxy and his daughter does not satisfy the section 140 requirements to cast her father's vote as his proxy. Although Mr. Hamel agreed with the applicant's counsel that if the Court were to grant the remedy which is requested and, in effect, to read sections 139 and 140 to enable Mr. Clifford to vote by proxy and there is enough evidence to ensure the integrity of the proxy vote, he was of the opinion that this would create a potential problem. Mr. Hamel said that the granting of the remedy would mean that an indeterminate number of other absentee voters would then become eligible to vote by proxy and that, by the statutory deadline enabling them to do so, which is 10.00 p.m. tonight, there would be no time for the election officials to make the inquiries necessary to ensure the integrity of the vote. To this I would add that if Mr. Clifford were to receive the remedy which he is seeking at literally the eleventh hour, the practical reality is that he would likely be the only absentee voter who would have the opportunity to take advantage of the relaxation of the requirements in section 139 and 140 which, in my view, would place him in an advantaged position, relative to all other similarly situated absentee voters.

I come now to consider the merits of Mr. Clifford's application that his *Charter* rights as emanating from "the *preclusion* of [his] participation" in the referendum (emphasis added). The significance is that he does not suggest that the legislation has deprived him of his right to vote in the referendum as clearly it does not. Nor, in my view, in the strict meaning of the term does the legislation preclude him from voting. However, it is obvious he will not have the opportunity to vote for two reasons. The first reason is that he is neither a member of the Canadian Forces or the Public Service entitled to vote abroad, nor is he a person eligible to vote by proxy under section 139 (a) of the *Canada Elections Act.* The second reason is his financial inability to travel from Bangladesh to Mississuauga to vote in the polling sub-division in which he is an eligible voter.

As I understand the argument presented by counsel for the applicant, two grounds are advanced in support of the declaration that his *Charter* rights have been violated. The first ground is that the relevant legislation does not address the circumstances of Canadian citizens temporarily residing abroad for purposes of employment, such as Clifford, by its failure to provide such persons the opportunity to cast their vote from, or in, their place to temporary residence. The second ground is more specific. It is that the category of voters entitled to vote by proxy as found in section 139 (a) is too narrow and should include persons in the category of the applicant.

Although I am of the view that the failure of the legislation enables people such as Mr. Clifford to cast an absentee vote in the referendum constitutes a serious omission, I have not been

persuaded that either this omission or the narrow scope of section 139 (a) constitute a violation of the rights guaranteed to Mr. Clifford by section 2 (b, 3, 6(1) and 15(1) of the *Charter*. The main reason for this conclusion is that the legislation does not deprive Mr. Clifford of his **right** to vote, even though it adversely affects the ability or opportunity which it affords him to exercise his right to vote. I appreciate that it may be said that this takes an unduly technical view of the case. However, in doing so I follow the lead of Mr. Justice Hugessen in the *Haig* case and, in particular, the following passage from his reasons for judgement at p. 6:

> .... For reasons of convenience, practicality and necessity Courts have traditionally acted with restraint in matters relating to the conduct of elections and we will continue to do so. This, however, is a matter of the judicious exercise of discretion in the fashioning (and even in the granting) of certain remedies. It does not and cannot restrict the Court's jurisdiction, power and duty to take cognizance of alleged denials of constitutional rights at election time.

In concluding that the applicant has failed to establish a violation of his *Charter* rights, I have considered the purpose or effect of the referendum legislation. I do not see how the legislation in any manner affects the mobility rights of Mr. Clifford guaranteed by s.6(1). Assuming for the purpose of my reasons that the freedom of opinion and expression guaranteed by section 2 (b) includes the right to vote in the referendum and that the language of section 3 is broad enough to encompass the referendum or that the referendum should be read into section 3, it is my view that the purpose or effect of the legislation is not to impose an absolute deprivation of Mr Clifford's right to vote in the referendum. Similarly, for the purposes of section 15(1) and assuming its application to the circumstances of this case, considering Mr Clifford's right to vote together with the alleged frailties of the legislation in regard to absentee voters, I am not satisfied that there has been a violation of his equality rights. As Mr. Justice McIntyre stated in *Andrews* v *Law Society of British Columbia,* [1989] 1 S.C.R. 143 at 168:

> It is not every distinction or difference in treatment at law which will transgress the equality guarantees of s.15 of the *Charter.*

In the circumstances it is unnecessary to consider the application of s.1 of the *Charter.*

Before leaving this application there is one observation which I feel bound to make. I understand fully Mr. Clifford's feelings and his frustration brought about by the difficulties he has encountered in attempting to register his vote in the referendum. Mr. Hamel testified that Canada is the only country in the western world which does not have universal legislation enabling all Canadian citizens temporarily resident outside of Canada for employment or other reasons, the means of voting in a federal election or referendum from, or in, their place of temporary residence. As I understood his evidence, it was Mr Hamel's opinion that the *Canada Elections Act* should be amended to provide for such absentee voting and he directed the attention of the Court to a similar recommendation contained in the report of the Royal Commission on Electoral

Reform and Party Financing released a year ago. Indeed a similar recommendation is also contained in the White Paper on Election Law Reform of June 1986.

Had I found any section of the Referendum Act or the Canada Election Act to be unconstitutional, it would have been within my powers to establish a period of temporary validity to provide a suitable transitional period to enable Parliament to enact remedial legislation with respect to absentee voting. Even though I have not found it necessary to make such a declaration, in my view it is not inappropriate to recommend that before the next election or referendum, should there be another one, that Parliament should enact such legislation.

Accordingly, I dismiss the application.

Released: November 10, 1992

SUPREME COURT OF CANADA

GRAHAM HAIG, JOHN DOE AND JANE DOE

and

THE CHIEF ELECTORAL OFFICER

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF QUEBEC

CORAM:
The Rt. Hon. Antonio Lamer, P.C.
The Hon. Mr. Justice La Forest
The Hon. Mme. Justice L'Heureux-Dubé
The Hon. Mr. Justice Sopinka
The Hon. Mr Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Madam Justice McLachlin
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major

Appeal heard:
March 4, 1993

Judgement rendered:
September 2, 1993

Reasons for judgement by:
The Hon. Mme Justice L'Heureux-Dubé

Concurred in by:
The Hon. Mr. Justice La Forest
The Hon. Mr. Justice Sopinka
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Major

Concurring reasons by:
The Hon. Madam Justice McLachlin
Concurring reasons by:
The Hon. Mr Justice Cory

Dissenting reasons by:
The Hon. Mr Justice Iacobucci

Dissenting reasons by:
The Rt. Hon. Antonio Lamer, P.C.

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Dominique A. Jobin

Citation
F. C. A [1992] 3 F. C. 611 145
N. R. 233, 97 D. L. R. (4TH) 71
F. C. T. D.: [1992], 3. F. C. 602, 57
F. T. R. 6 (Joyal J.), AND (1992), 57
F. T. R. 1, 97 D. L. R. (4TH) 64

(Denault J.)

Haig *v* Canada

Graham Haig, John Doe and Jane Doe *Appellants*

v

The Chief Electoral Officer *Respondent*

and

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Intervener*

Indexed as: Haig *v* Canada, Haig *v* Canada (Chief Electoral Officer)

File No: 23223

1993: March 4; 1993: September 2.

Present: Lamer CJ and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachin, Iacobucci and Major JJ.

On appeal from the federal court of appeal.

Constitutional Law – Charter of Rights – Right to Vote – Federal referendum held everywhere in Canada except Quebec – Quebec separate referendum subject to provincial legislation – Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec refeum because of different residency requirements in federal and provincial legislation – Whether appellant's exclusion from federal referendum infringing s.3 of Canadian Charger of Rights and Freedoms – Referendum Act, S. C. 1992, c 30 – Canada Elections Act, R. S. C. 1985, c. E-2.

Constitutional law – Charter of Rights – Freedom of expression – Federal referendum held everywhere in Canada except Quebec – Quebec referendum subject to provincial legislation – Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation – Whether appellant's exclusion from federal referendum infringing section 2(b) of Canadian Charter of Rights and Freedom – Whether section 2(b) includes a positive right to be provided with a specific means of express – Referendum Act, S.C. 1992, c.30 – Canada Elections Act, R. S. C., 1985, c. E-2.

Constitutional law – Charter of Rights – Equal benefit of the law – New residents of a province – Province of residence – Federal referendum held everywhere in Canada except Quebec – Quebec referendum subject to provincial legislation – Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation – Whether appellant's exclusion or Quebec's exclusion from federal referendum infringing section 15(1) of Canadian Charter of Rights and Freedoms – Referendum Act, S. C. 1992, c. 30 – Canada Elections Act, R.S.C.,1985, c. E-2.

Elections – Federal referendum – Interpretation of federal referendum legislation – Federal referendum held everywhere in Canada except Quebec – Quebec referendum subject to provincial legislation – Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation – Whether federal referendum legislation may be interpreted to extend entitlement of vote in federal referendum to appellant – Referendum Act, S.C. 1992, c. 3(1) – Canada Elections Act, R.S.C. 1985, c.E-2, ss. 50, 53, 55(5) – Regulation Adapting the Canada Elections Act, SOR/92-430.

Elections – Federal referendum – Powers of Chief Electoral Officer – Federal referendum held everywhere in Canada except Quebec – Quebec referendum subject to provincial legislation -- Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation – Whether Chief Electoral Officer had power to adapt Canada Elections Act so as to extend entitlement to vote in federal referendum to appellant – Referendum Act, S.C. 1992, c.30, s.7 (3) – Canada Elections Act, R.S.C., 1985, c. E-2, s.9 (1) – Regulation Adapting the Canada Elections Act, SOR/92-430, section 4.

In September 1992, the federal government directed that a referendum be held on October 26, 1992 on a question relating to the Constitution of Canada in all provinces and territories, except Quebec. Quebec was to hold a separate referendum on the same date and on the same question but in accordance with the provincial legislation. As a result of the different requirements as to residency in the federal and provincial legislation, the appellant Haig, who had moved from Ontario to Quebec in August 1992, was not qualified to vote in the Quebec referendum because he had not resided in that province for six months prior to the referendum, or to vote in the federal referendum because, on the enumeration date, he was not ordinarily resident within one of the polling divisions established for the federal referendum. The appellant brought an application in the Federal Court, seeking a declaration that section 3 of the federal *Referendum Act* included a resident who was ordinarily resident in a province at any time in the six-month period prior to the referendum; or, in the alternative, a declaration that denying him a vote in the federal referendum violated his rights under sections 3, 2(b) and 15(1) of the *Canadian Charter of Rights and Freedoms*. He also sought a mandamus requiring the Chief Electoral Officer to make reasonable provisions to allow him and others in his situation to be enumerated. The court dismissed the application and the majority of the Federal Court of Appeal affirmed the judgement.

Held (Lamer C. J. and Iacobucci J. dissenting):
The appeal should be dismissed. The federal *Referendum Act* and the *Canada Elections Act* are constitutional. The appellant's exclusion from the federal referendum did not violate his rights under sections 2(b), 3 and 15(1) of the *Charter*.

Per La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Major JJ: The federal *Referendum Act* and the *Canada Elections Act* did not grant the appellant an entitlement to vote in the federal referendum. The purpose of the *Referendum Act* is not to obtain the opinion of electors in all Canadian provinces at all times. Section 3(1) of that Act expressly provides that consultation by referendum may be carried out on a national, provincial or multi-provincial basis. The appellant was ordinarily resident in Quebec on the enumeration date set for the federal referendum and since Quebec was not one of the provinces listed in the federal proclamation, no polling divisions were established in that province for the federal referendum. Therefore, while the appellant came within the definition of a qualified voter, he was not on the enumeration date ordinarily resident in an established polling division and had no entitlement to vote in the federal referendum. The appellant did not retain a right to vote in Ontario by virtue of section 55(5) of the *Canada Elections Act*. This section merely states that a person cannot be without an ordinary residence and cannot be construed as meaning that the appellant could not lose his ordinary residence in Ontario for the purpose of voting in the federal referendum until he had qualified as an elector in Quebec, under the relevant Quebec legislation. Such an interpretation would go not only against the wording but also against the spirit of the federal *Referendum Act*, which clearly extends an entitlement to vote only to those people ordinarily resident in a jurisdiction specified by proclamation. Residency is not a purely technical matter, but is a fundamental aspect of the referendum scheme itself.

The Chief Electoral Officer did not have the power to extend the entitlement to vote in the federal referendum to the appellant. Though section 7(3) of the federal *Referendum Act* gives the Chief Electoral Officer a discretionary power to adapt the *Canada Elections Act* in such a manner as he considers necessary for the purposes of applying that Act in respect of a referendum, this power does not extend to authorise a fundamental departure from the scheme of the *Referendum Act.* Residence is a pivotal feature of the referendum scheme as captured in both pieces of federal legislation and the Order-in-Council directed that a referendum be held in a number of clearly specified jurisdictions. The discretionary power of the Chief Electoral Officer could not be exercised to extend the entitlement of vote beyond the parameters established in the Order-in-Council. Section 9(1) of the *Canada Elections Act* only contemplates situations where the provisions of the legislation do not accord with particular needs arising out of any "mistake, miscalculation, emergency or unusual or unforseen circumstance". The appellant's situation does not fall within these terms. The exclusion of electors not resident in the provinces in question on the enumeration date is the clear and unambiguous consequence of the legislative scheme adopted. Further, section 9(1) is also restricted to adoptions designed to facilitate the execution of the intent of the *Canada Elections Act.* The object of this Act, as adapted for the referendum, is to ensure that those who are entitled to vote are given an opportunity to do so. The object is not to enfranchise those who are not entitled to vote.

Section 3 of the Charter does not guarantee Canadians a constitutional right to vote in a referendum. The wording of section 3 is clear and unambiguous and guarantees only the right to vote in elections of representatives of the federal and the provincial legislative assemblies. The purpose of section 3 is to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives. Since a referendum is in no way such a section – a referendum is basically a consultative process – Canadian citizens cannot claim a constitutional right to vote in a referendum under section 3. The appellant's section 3 *Charter* rights were therefore not infringed.

In the context of the 1992 federal referendum, freedom of expression did not include a constitutional right for all Canadians to be provided with a specific means of expression. Though a referendum is undoubtedly a platform for expression, section 2 (b) of the *Charter* does not impose upon a government any positive obligation to consult its citizens through the particular mechanism of a referendum, nor does it confer upon all citizens the right to express their opinions in a referendum. In another context, however, section 2 (b) could impose a positive governmental action. A referendum as a platform of expression is a matter of legislative policy and not of constitutional law. However, while section 2 (b) does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. Here, the federal government did not violate section 2 (b) either in holding its referendum or in holding it in less than all provinces and territories. The appellant was unable to vote simply because, on the enumeration date, he was not ordinarily resident in a province where the federal referendum was held, a limitation which does not infringe the appellant's freedom of expression as guaranteed in the *Charter.*

In providing a platform of expression to less than all Canadians, the federal government did not infringe the appellant's section 15 (1) guarantee of equal benefit of the law. The new residents of a province do not constitute a disadvantaged group within the contemplation of section 15 (1). People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were unable to vote in the Quebec referendum, the group is not one which has suffered historical disadvantage or political prejudice. Nor does the group appear to be "discrete and insular". As well, the exclusion of one province from the federal referendum legislation does not violate section 15 (1). The decision of the Governor in Council to hold a referendum only in a specific number of provinces is a constitutionally permissible exercise of the discretion accorded to the government under section 3 (1) of the federal *Referendum Act.* Both the decision to hold a referendum and the cession as to the number of provinces in which a referendum will be held are policy decisions left entirely to governments and legislatures. In a federal system, province-based distinctions do not automatically give rise to a presumption of discrimination. Section 15 (1), while prohibiting discrimination, does not alter the division of powers between governments, nor does it require that all federal legislation must always have uniform application to all provinces.

Per McLachlin J: The reasons of L'Heureux-Dubè J. were generally agreed with. Parliament's decision to hold a referendum in only some areas of Canada, and thus to exclude the residents outside these areas from the federal referendum, is not contrary to the *Charter.* However, had the law enacted a truly national referendum, the appellant's freedom of expression would have been violated. But even with a broad and liberal reading of residency requirements aimed at enfranchising as many Canadians as possible in every situation where that result could be attained without infringing the law, there was no legal basis upon which the Chief Electoral Officer could have registered a Quebec resident in a referendum which by its terms excluded Quebec.

Per Cory J: That right to vote is of fundamental importance to Canadians and to our democracy. In all enfranchising statutes, the provisions granting the right to vote should be given a broad and liberal interpretation and restrictions on that right should be narrowly construed and strictly limited. Every effort should be made to interpret the statute to enfranchise the voter. These principles, applicable to the right to vote in elections, should be applied in the same manner to the right to vote in a referendum. The Chief Electoral Officer thus has a duty to insure that as many Canadians as possible are enfranchised in every situation where that result can be attained without infringing the law. Flexibility must be given to the concept of residence, particularly in enfranchising status. The concept of residence as a requirement of exercising the right to vote was designed to facilitate the attainment of the principle of one person one vote and should not be used as a means of depriving a person of this right. It follows that the term "ordinarily resident" in an enfranchising statute should be interpreted broadly in the context of today's mobile society and in the light of the vital importance of the right to vote. There is no reason for departing from this approach and practice under the *Referendum Act.* Here, under the requisite flexible test of residency, it would be wrong to automatically hold that those who have moved to Quebec before the referendum enumeration date could, on that basis alone, be denied the right to

vote in a federal polling division outside Quebec. Unfortunately, since the appellant did not apply to be enumerated in his former riding, it is impossible to determine on the facts presented if there was a sufficient connection to a riding within the federal referendum to warrant his addition to the voter's list. Since the referendum is now long past, this is not a proper case in which to grant declaratory relief.

Per Iacobucci J (dissenting): The appellant entitled to vote in the federal referendum. The referendum contemplated by the federal *Referendum Act* was aimed at all Canadians citizens entitled to vote in a federal election; to accomplish that end, the federal referendum was co-ordinated with the Quebec referendum. While, in a formal sense, two referenda were held, to focus on the technicalities of separate referenda can only obscure the national character of the referendum. The appellant's right to express his political views by participating in a national referendum is guaranteed by section 2 (b) of the *Charter.* The right to express opinions in social and political decision-making is clearly protected by section 2 (b). The referendum was an important expressive activity relating to constitutional change in this country and Parliament was apparently under a political obligation to follow the referendum's results. The effect of the federal *Referendum Act,* however, was to deprive the appellant and others recently arrived in Quebec of their rights to participate in the referendum. Accordingly, their section 2 (b) rights were violated. In the absence of any evidence on section 1 of the *Charter,* the violation of the appellant's section 2 (b) rights has not been justified. The proper remedy would have been to expand the definition of "elector" in section 3 (1) of the *Referendum Act.* The Chief Electoral Officer, relying on section 7 (3) of the *Referendum Act* could have used section 9 (1) of the *Canada Elections Act* to permit the appellant to vote.

Per Lamer C J (dissenting): Cory J's approach to the definition of residency for voting purposes and Iacobucci J's reasons concerning section 2 (b) of the *Charter* were agreed with.

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By Cory J

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APPEAL from a judgement of the Federal Court of Appeal, [1992] 3 F.C. 611, 145 N.R. 233, 97 D.L.R. (4th) 71, dismissing the appellants' appeal from an order of Denault J (1992), 57 F.T.R. 1, 97 D.L.R. (4th) 64, and dismissing their appeal (except on a procedural point) from an order of Joyal J, [1992] 3 F.C. 602, 57 F.T.R.6. Appeal dismissed, Lamer C J and Iacobucci J dissenting.

Philippa Lawson, for the appellants.

N.J. Schultz and H. McManus, for the respondent the Chief Electoral Officer.

Jean-Marc Aubry, Q.C. and *Richard Morneau,* for the respondent the Attorney General of Canada.

Jean-François Jobin and *Dominique A. Jobin,* for the intervener.

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Solicitor for the intervener: The Department of Justice, Ste-Foy.

SUPREME COURT OF CANADA

GRAHAM HAIG, JOHN DOE, and JANE DOE
and
THE CHIEF ELECTORAL OFFICER
and
THE ATTORNEY GENERAL OF CANADA
and
THE ATTORNEY GENERAL OF QUEBEC

CORAM: **The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major J J**

L'HEUREUX-DUBE J: On October 26, 1992, two referenda were held in Canada, each concerning proposed amendments to the Canadian Constitution. Graham Haig was not able to cast a ballot in either. This was unfortunate. The only issue in the present appeal is this: was Graham Haig entitled to cast a ballot in the federal referendum?

At the specific moment in Canada history, there was a confluence of political pressures, concerns and events. Among these was the on-going and often politically-heated constitutional dialogue. In order to seek the views of Canadians on this crucial issue of constitutional change, the federal government and the provincial governments who so desired had available a variety of options: commission surveys, opinion polls, referenda, etc. Quebec had legally bound itself to hold a referendum on sovereignty, while British Columbia and Alberta had articulated the possibility that they would hold provincial referenda dealing with constitutional change, and that they would consider themselves bound by the results. It was in this context that the federal government undertook to hold a referendum in those provinces where a provincial referendum would not otherwise be held. This choice was in accord with the desire and the authority to the provinces to consult their own electors as they saw fit.

In the end, only two referenda were held: one in Quebec pursuant to Quebec's provincial referendum legislation, the other in the rest of Canada pursuant to the federal referendum legislation. The model chosen by the federal government was one which was open to them under the relevant legislation, which specifically allowed for referenda to be conducted in one or more provinces. The model chosen was, at the time, thought to be politically sound by both the federal and the provincial governments.

The mechanics of the two referenda were governed by the elections legislation of each government. The federal and the Quebec elections legislation, though similar in certain respects, are *not* mirror images of each other, but contain different provisions on a number of issues including: the preparation of electoral lists, methods of voting, financing, referendum publicity

and spending, the roles and functions of the Chief Electoral Officers and their staff, and residency requirements. The residency provisions of the Quebec elections legislation, in particular, diverge from those in the federal legislation by requiring six months residency in order to be eligible to vote. It was this residency requirement which resulted in some Quebec residents, Mr. Haig in particular, not being able to cast their vote, and which is at the heart of this case.

Were the Quebec residents who were not entitled to vote in the Quebec referendum nonetheless entitled to vote in the federal referendum? To answer this question, it is essential to more fully refer to the political events and legislative context leading up to October 26, 1992.

Facts

On April 17, 1982, the *Constitution Act,* 1982 was proclaimed into force. The Meech Lake Accord, which proposed certain amendments to the *Constitution Act, 1982,* was not ratified by all provincial legislatures within the allotted time period, and failed on June 23, 1990. As a result of these events, Bill 150, *An Act respecting the process for determining the political and constitutional future of Quèbec,* S. Q. 1991, c. 34, section 32, came into force on June 20, 1991. According to Chapter 1 of this Bill, the Government of Quebec was required to hold a referendum on the sovereignty of Quebec no later than October 1992.

On June 23, 1992, the *Referendum Act,* S.C. 1992, c. 30, came into force. This Act provided a mechanism for the federal government to obtain the opinion of the electors of Canada, or the electors of one or more provinces, on issues related to the Canadian Constitution.

On August 28, 1992, the Prime Minister of Canada, the ten provincial premiers, the leaders of the territorial governments and representatives of four aboriginal associations, came to an agreement which has become known as the "Charlottetown Accord". This agreement proposed substantial amendments to the Constitution of Canada.

On September 3, 1992, as a direct result of the Charlottetown Accord, Bill 44, *An Act to amend the Act respecting the process for determining the political and constitutional future of Quebec, S. Q.* 1992, c. 47, was introduced into the Quebec National Assembly. This Bill, which came into force on September 8, 1992, amended Bill 150 so that the Government of Quebec was still obligated to hold a referendum on October 26, 1992, but the subject of the referendum would be the Charlottetown Accord, rather than Quebec sovereignty. Similarly, on September 8, 1992, the Prime Minister of Canada announced that a referendum would be held on October 26, 1992, the subject of which would also be the Charlottetown Accord.

On September 9, the Premier of Quebec, pursuant to section 8 of the *Referendum Act,* R.S.Q., c. C-64.1, put before the National Assembly the proposed text of the question to be the subject of the October 26, 1992 Quebec referendum. The same day, pursuant to section 5(1) of the

Referendum Act (Canada), the proposed text of the question which was to be the subject of the federal referendum was put before the House of Commons. Both questions were identical. The House of Commons approved the text of the federal referendum question on September 10, and the Senate approved the text on September 15. The National Assembly, pursuant to sections 8 and 9 of the *Referendum Act* (Quebec) approved the text of the Quebec referendum question on 16 September.

On September 17, 1992, pursuant to section 3 (1) of the *Referendum Act* (Canada), a proclamation was issued by Order-in-Council P.C. 1992-2045 directing that a referendum be held to obtain the opinion of the electors of "the provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta, Newfoundland, the Yukon Territory and the Northwest Territories" on a question relating to the Constitution of Canada. The referendum was to be held October 26, 1992, its conduct to be governed by the *Canada Elections Act* R.S.C., 1985, c. E-2, as adapted for the purposes of the referendum. One of these provisions states that any *Canadian* citizen of 18 years of age who, on the enumeration date, was ordinarily resident within one of the polling divisions established for the referendum, would be entitled to cast a ballot.

On September 27, 1992, pursuant to section 13 of the *Referendum Act* (Quebec), the Government of Quebec ordered Quebec's Chief Electoral Officer to hold a referendum on October 26, 1992, to be conducted in accordance with the provisions of the *Elections Act,* R.S.Q., E-33, as adapted for the purposes of the referendum. According to one of these provisions, any *Canadian* citizen of 18 years of age who, on the polling day, had been domiciled in Quebec for six months, would be entitled to cast a ballot.

In August of 1992, Graham Haig moved from Ontario to Quebec. On the enumeration day for the federal referendum, Mr Haig was no longer ordinarily resident in a polling division established for the federal referendum and so, pursuant to the provisions of the *Canada Elections Act,* he was not included on the list of voters entitled to vote in the federal referendum. At the same time, having been domiciled in Quebec for less than six months, he did not meet the eligibility requirements under the *Election Act* (Quebec), and so was not included on the list of voters eligible to vote in the Quebec referendum. The result was, of course, that Mr. Haig was not enumerated and consequently could not vote in either referendum.

Proceedings

On September 30, 1992 Mr. Haig instituted proceedings in the Federal Court, Trial Division, filing on originating notice of motion under section 18.1 of the *Federal Court Act,* R.S.C., 1985, c. F-7. On behalf of himself and un-named others (represented by John Doe and Jane Doe), an application was brought against Her Majesty the Queen and the Chief Electoral Officer, seeking a declaration that section 3 of the *Referendum Act* (Canada) included the applicants, and

mandamus, requiring the respondents to make reasonable provisions to allow for the enumeration of the applicants. Notice was given to the Attorney General of Canada that the constitutional validity of the federal Order-in-Council would be challenged.

On October 7, 1992, counsel for Her Majesty the Queen made a preliminary application before Denault J in the Federal Court, Trial Division, to have Her Majesty the Queen struck as a respondent on the basis that the court had no jurisdiction under section 18.1 of the *Federal Court Act* to grant the remedies requested against the Queen. Denault J granted the application, striking the Queen as respondent: (1992), 57 F.T.R.1, 97 D.L.R. (4TH) 64. The applicants then brought an additional application to add the Attorney General of Canada as respondent. Both applications were heard before and dismissed by Joyal J in the Federal Court, Trial Division: [1992] 3 F.C.602, 57 F.T.R.6.

The appellants appealed the orders of Denault J and Joyal J, and the respondent Chief Electoral Officer cross-appealed. The appeals and cross-appeal were joined and heard on October 19, 1992 before the Federal Court of Appeal, which added the Attorney General as a party, dismissed the appeal from the order of Denault J as moot, dismissed the Chief Electoral Officer's cross-appeal, and also dismissed the original application on its merits: [1992] 3 F.C. 611, 145 N.R. 233, 97 D.L.R.(4th) 71. The appellants now appeal to this Court. The Chief Electoral Officer initially cross-appealed on an issue of jurisdiction related to parliamentary privilege, but that cross-appeal was discontinued on February 25, 1993.

Relevant Legislation

Referendum Act, R.S.Q., c. C-64.1

> 7. The Government may order that the electors be consulted by referendum
>
> (a) on a question approved by the National Assembly in accordance with sections 8 and 9, or
>
> (b) on a bill adopted by the National Assembly in accordance with section 10.
>
> As soon as the National Assembly is informed of the question or bill contemplated in the first paragraph, the Secretary General of the National Assembly shall notify the chief electoral officer thereof in writing.
>
> The chief electoral officer shall send a copy of the notice to the returning officer of each electoral division.

16. The lists of electors shall be established within the eighteen days following the day on which the National Assembly was informed of the question or bill contemplated in section 7.

Election Act, R.S.Q., E-3.3 (as adapted pursuant to ss.44 to 47 of the *Referendum Act,* R.S.Q., c.C-64.1)

1. Every person who

(1) has attained eighteen years of age;

(2) is a Canadian citizen;

(3) has been domiciled in Quebec for six months, or in the case of an elector outside Quebec, for twelve months;

(4) is not under curatorship; and

(5) is not deprived of election rights, pursuant to section 568, is a qualified elector.

Every person registered in the registry of electors outside Quebec is deemed to be domiciled in Quebec.

2. To exercise his right to vote, a person must be a qualified elector on polling day and be registered on the list of electors of the polling subdivision where his domicile is situated on the day of the notification provided for in section 7 of the Referendum Act, or be registered in the registry of electors outside Quebec.

Referendum Act, S.C. 1992, c.30

3.(1) Where the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada, the Governor in Council may, by proclamation, direct that the opinion of electors be obtained by putting the question to the electors of Canada or of one or more provinces specified in the proclamation at a referendum called for that purpose.

6. (1) On the issue of a proclamation, the Chief Electoral Officer shall, in accordance with the proclamation, issue writs of referendum in the form set out

in Schedule 1 for all electoral districts in Canada or in the province or provinces specified in the proclamation.

7.(1) Subject to this Act, the *Canada Election* Act , as adapted pursuant to subsection (3), applies in respect of a referendum, and, for the purposes of that application, the issue of writs of referendum shall be deemed to be the issue of writs for a general election.

(2) The provisions of the *Canada Elections Act* referred to in Schedule II do not apply in respect of a referendum.

(3) Subject to this Act, the Chief Electoral Officer may, by regulation, adapt the *Canada Elections Act* in such manner as the Chief Electoral Officer considers necessary for the purposes of applying that Act in respect of a referendum.

(4) The Chief Electoral Officer may make regulations

(a) respecting the conduct of a referendum; and

(b) generally for carrying out the purposes and provisions of this Act.

Canada Elections Act, R.S.C., 1985., c.E-2 (as adapted for the purposes of a referendum, SOR/92-430).

9.(1) Where, during the course of a referendum, it appears to the Chief Electoral Officer that, by reason of any mistake, miscalculation, emergency or unusual or unforseen circumstance, any of the provisions of this Act do not accord with the exigencies of the situation, the Chief Electoral Officer may, by particular or general instructions extend the time for doing any act, increase the number of referendum officers or polling stations or otherwise adapt any of the provisions of this Act to the execution of its intent, to such extent as he considers necessary to meet the exigencies of the situation.

.....

50.(1) Every person who

(a) has attained the age of eighteen years, and

(b) is a Canadian citizen,

is qualified as and elector.

.....

53.(1) Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors for the polling division in which that person is ordinarily resident on the enumeration date for the referendum and to vote at the polling station established therein.

55.(1) The rules in this section and sections 56 to 59 and 62 apply to the interpretation of the expression "ordinarily resident" and "ordinarily resided" in any section of this Act in which those expressions are used with respect to the right of a voter to vote.

(2) Subject to this section and sections 56 and 59 and 62, the question as to where a person is or was ordinarily resident at any material time or during any material period shall be determined by reference to all the facts of the case.

(3) The place of ordinary residence of a person is, generally, the place that has always been, or that the person has adopted as, the place of his habitation or home, and to which he intends to return when he is away from it.

(4) Where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary resident is where the person sleeps.

(5) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

Order-in-Council P.C. 1992-2045, dated September 17, 1992.

WHEREAS, pursuant to subsection 3(1) of the Referendum Act, the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on the question hereinafter set out relating to the Constitution of Canada;

WHEREAS, pursuant to section 4 of that Act, no proclamation may be issued before the text of the referendum question has been approved under section 5 of that Act;

AND WHEREAS, the text of the referendum question hereinafter set out was approved by the House of Commons under section 5 of that Act of September 10, 1992 and was concurred in thereunder by the Senate on September 15, 1992;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Prime Minister, pursuant to subsection 3(1) of the Referendum Act, is pleased hereby to order that a proclamation do issue directing

that the opinion of electors be obtained by putting to the electors of the provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta Newfoundland, the Yukon Territory and the Northwest Territories, at a referendum called for that purpose, the following question relating to the Constitution of Canada:

"Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?

_____ _____"

Yes No

Judgements

*Federal Court, Trial Division (*Denault J)

On the application by the respondent Her Majesty the Queen for an order striking her from the originating notice, Denault J refused to hear the merits of the case, emphasising that the mandatory notice period for constitutional questions had not yet expired, and dealt only with the procedural issues.

Finding section 18 of the *Federal Court Act* available only where the relieve sought arises from a decision of a "federal board, commission or other tribunal", he held that the Crown does not come within the definition of "federal board, commission or other tribunal " set out in section 2 of the *Federal Court Act* and, in addition, that the section 18 procedure is not appropriate where the issues to be resolved are of a serious and complex nature. He concluded that sections 17 and 48 applied and that an action against the Queen had to be commenced by statement of claim. As such, Denault J granted the respondent's motion, and struck Her Majesty the Queen from the originating notice.

*Federal Court, Trial Division (*Joyal J), [1992] 3 F.C.602

At the hearing on the amended Originating Notice, the Crown (appearing in an institutional capacity and not as a party respondent) argued that since the real issue was the constitutional validity of a federal statute, the court lacked any jurisdiction to consider the matter under s.18 of the *Federal Court Act.* In view of the peculiar circumstances and in spite of the earlier order of Denault J, Joyal J took the jurisdictional questions under advisement, and allowed the case to proceed on the merits.

In Joyal J's view, the right to vote embodied in section 3 of the *Canadian Charter of Rights and Freedoms* relates only to election to the federal Parliament and legislative assemblies, and does

not include a right to vote in any other instance. Since the federal Order-in-Council did not include Quebec, the question of whether or not Quebec should have been included was a policy decision and not a justiciable issue. He concluded that the applicants had no rights to vote in the federal referendum, and that their only recourse, if any, might be to resort to the Quebec courts. In his opinion, at p.608, the predicament facing the applicants was one:

> which is often found when the political structure of a community is based on a federal system where both levels of authority enjoy their respective and exclusive jurisdictions.

While concluding that he had jurisdiction under section 18 of the *Federal Court Act,* Joyal J dismissed the applicants' *Charter* arguments, finding no violation of freedom of expression under section 2(b), of mobility rights under section 6, nor of equality rights under section 15(1). Given this conclusion on the merits, he dismissed the application to add the Attorney General as a party.

Federal Court of Appeal (Hugessen and Stone JJ A, and Dècary J A (dissenting)), [1992]3 F.C. 616.

On the jurisdictional question, Hugessen J A, for the majority found that the Chief Electoral Officer fell within the definition of 'federal board, commission or other tribunal'. The appellants' complaint was that the Chief Electoral Officer had failed to exercise his power and jurisdiction to correctly apply and adapt the *Canada Elections Act* to the referendum. Such an allegation properly comes under section 18 of the *Federal Court Act,* and the Attorney General of Canada is expressly authorised to be made a party to such proceedings. Since, in the context of a *Charter* challenge to federal legislation, the Attorney General is also a necessary party, the majority found that Joyal J should have allowed the application to add the Attorney General of Canada.

The appeal from the decision of Joyal J on the procedural point having been allowed, the appeal from Denault J's order on the related point was declared moot and quashed. With respect to the Chief Electoral Officer's cross-appeal, Hugessen J A observed that, although courts have traditionally acted with restraint in matters relating to the conduct of elections, a Chief Electoral Officer has no historical privilege or statutory immunity against claims which are founded in the *Charter.* The cross-appeal was accordingly dismissed.

On the merits, the majority held that Joyal J had reached the right conclusion, finding that if there was any denial of the appellants' rights, it flowed exclusively from the operation of the provincial legislation (at p.616):

> While it is no doubt true that it is the federal order in council restricting the federal referendum to all provinces and territories other than Quebec which has created the background for the appellant's present situation, it remains that it is the Quebec legislation alone which is at the root of his complaint. He does not

> now reside in any province in which the federal referendum is being held and the federal legislation does not affect him one way or the other. As a resident of Quebec he is subject to that province's referendum legislation and it is solely that legislation which denies him the right to vote.

Commencing that the very scheme of the *Referendum Act* (Canada) and the *Canada Elections Acts* is based upon questions of geography, the majority found no constitutional impropriety in the Order-in-Council which limited the number of provinces in which the federal referendum would be held (at p.617):

> ...because a referendum is limited to constitutional questions, and because the amending formula (and indeed the Constitution itself) envisages processes and substantive rules which may differ according to the province or number of provinces involved, it is entirely normal that different questions may be put to the electors in one or more provinces or that a question may be put to the electors in some provinces but not others. [Footnote omitted.]

Dècary J A, dissenting, agreed that the Federal Court of Appeal had jurisdiction under section 18 of the *Federal Court Act,* and that the Attorney General of Canada and the Chief Electoral Officer were properly made parties to the proceedings. However, he disagreed with the majority's conclusion on the merits. Taking judicial notice of "political realities", Dècary J A was of the view that the federal referendum, though not being held in all ten provinces, was in reality a *national* referendum and that Parliament had not intended that any citizen of Canada would be disenfranchised with respect to this important issue.

He asserted that if the appellants were denied the right to participate in the referendum, their freedom of expression guaranteed by section 2(b) of the *Charter* would be infringed. He also found that their rights to the equal benefit of the law guaranteed in section 15(1) of the *Charter* would be infringed, finding that in the circumstances of this case, province of residence could be a personal characteristic capable of constituting a ground of discrimination. Dècary J A further commented at p.622 that:

> The source of the infringement, should the appellant be denied his rights, would not be the Quebec legislation but, rather, the federal legislation which would have failed to take into account for the purposes of a national referendum the existing differences in provincial legislation with respect to electors' qualifications.

Since Parliament is presumed to act in conformity with the *Charter,* Dècary J A determined that the issue could be resolved through statutory interpretation without placing the holding of the referendum itself in jeopardy. He concluded at p.623 that the term "elector of a province" could be interpreted to include:

> in a particular province electors who are ordinarily resident of that given province on enumeration date and who do not qualify under the residency requirements of the latter, but who were ordinarily resident in that particular province at any time in the six-month period prior to the referendum.....

He recognised that his interpretation was "somewhat stretched", but would have granted the declaratory relief sought on the ground that the Federal Court of Appeal was the "next-to-last" resort of people in the appellants' position.

Constitutional Questions

The following constitutional questions were phrased by the Chief Justice:

> 1. If the *Referendum Act,* S.C. 1992, c. 30, and the *Canada Elections Act,* R.S.C.,1985. c. E-2, exclude from voting at the federal referendum Canadian electors who have moved to Quebec but who failed to meet Quebec's six months residency requirements for voting in the provincial referendum, do these Acts, in whole or in part, violate ss. 2(b), 3 or 15 (1) of the *Canadian Charter of Rights and Freedoms?*
>
> 2. If the answer to the first constitutional question stated herein is in the affirmative, is such infringement justified under s.1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit, demonstrably justified in a free and democratic society?
>
> 3. Does Order-in-Council P.C. 1992-2045, enacted pursuant to s. 3(1) of the *Referendum Act,* S.C. 1992, c. 30, infringe the rights or freedoms guaranteed the applicants under ss. 2(b), 3 or 15(1) of the *Canadian Charter of Rights and Freedoms?*
>
> 4. If the answer to the second constitutional questions stated herein is in the affirmative, is such infringement justified under s.1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit, demonstrably justified in a free and democratic society?

Issues

The Constitutional questions formulated above raise but one central issue: Did Mr. Haig and those persons in a similar situation have the right to cast a ballot in the federal referendum held

on October 26, 1992, either as a matter of statutory interpretation, or due to the operation of the *Charter*? I would answer this question by examining the following issues:

1. The proper interpretation of the federal referendum legislation, in particular, section 3(1) of the Referendum Act (Canada), and sections 53 and 55 of the Canada Elections Act.

2. The powers of the Chief Electoral Officer under section 7(3) of the *Referendum Act* (Canada) and section 9(1) of the *Canada Elections Act* to modify the provisions of the Canada Elections Act.

3. The Constitutionality of the *Referendum Act* (Canada) and the Order-in-Council made thereunder, with respect to alleged violations of sections 3, 2(b) and 15(1) of the *Charter.*

Statutory Interpretation of the Referendum Legislation

The first question is whether the federal referendum legislation is capable of bearing an interpretation that would allow the appellants to vote in the federal referendum. The answer to this question lies in the scope that can be given to the phrase "Electors of ... one or more provinces specified in the proclamation" in section 3(1) of the *Referendum Act* (Canada).

The appellants suggest that the Court should take a broad and purposive approach to this interpretative task. I agree. Following a number of authorities on the subject, the words of Dickson C J in *Canadian National Railway Co.* v *Canada (Canadian Human Rights Commission), [1987] 1* S.C.R. 1114, at p. 1134, support this proposition:

> Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act* which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.

The purpose, then, of the *Referendum Act* (Canada) is encapsulated in section 3(1) of that Act:

> 3.(1) Where the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada, the Governor in Council may, be proclamation, direct that the opinion of electors be obtained by putting the question to the electors of Canada or of one or more provinces specified in that proclamation at a referendum called for that purpose.

Section 3(1) expressly provides that consultation by referendum may be carried out on a national, provincial or multi-provincial basis. Clearly, the purpose is **not** to obtain the opinion of electors

in all Canadian provinces at all times. There could not be clearer language. In order to achieve its purpose, the *Referendum Act* (Canada) fashions a mechanism for obtaining the opinion of electors on questions relating to the Constitution of Canada.

Section 7(1) of the *Referendum Act* (Canada) adopts the *Canada Elections Act* (as adapted) as the model to be used in seeking the opinion of electors, a model in conformity with the purpose of the Order-in-Council. In order to be qualified as an elector under this model, section 50 specifies that a person must be 18 years of age and a Canadian citizen. Aside from this preliminary question of qualification, the *Canada Elections Act* model is one which is essentially founded on notions of geography. Once a referendum has been proclaimed, section 6(1) of the *Referendum Act* (Canada) directs the Chief Electoral Officer to issue writs of referendum for the provinces specified in the proclamation. Writs are issued for these provinces, these provinces are divided into electoral districts, and the electoral districts are further divided into polling divisions. The entitlement to vote under this model is contingent upon a person being ordinarily resident in one of these established polling divisions. This entitlement is clearly is set out in section 53(1), which bears repetition:

> 53.(1) Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors *for the polling division in which that person is ordinarily resident on the enumeration date* for the referendum and to vote at the polling station established therein. (Emphasis added.)

In short, in order to vote in a federal referendum, a person must be both qualified as an elector, *and* be ordinarily resident in an established polling division in one of the provinces or territories where the referendum is held. Mr. Haig, as a Canadian citizen over the age of 18 years, comes within the definition of a qualified voter under section 50 of the *Canada Elections Act.* Did he also qualify, on the enumeration date, as "ordinarily resident" in one of the polling divisions established under the federal referendum legislation?

The interpretation of the expression "ordinarily resident" is governed by the rules set out in sections 55 to 59 and 62 of the *Canada Elections Act.* The general rule is that a person is ordinarily resident in the location where that persons makes his or her home. Making that determination can be complex, but section 55(2), reproduced earlier, provides required flexibility, stating that a person's ordinary residence is to "be determined by reference to all the facts of the case."

In the case before the Court, however, that determination was simple. Mr Haig's undisputed affidavit evidence is that he ceased to be ordinarily resident in Ontario in August of 1992, and was ordinarily resident in Quebec on the enumeration date set for the federal referendum. Since Quebec was not one of the provinces listed in the federal proclamation, no writ was issued, and no polling divisions were established in Quebec for the federal referendum. On the enumeration date, Mr. Haig was not ordinarily resident in an established polling division, and he thus had no

entitlement to vote in the federal referendum. This would appear to be sufficient to dispose of the matter as far as statutory interpretation of the *Referendum Act* (Canada) and the *Canada Elections Act* are concerned. Both the purpose and the language of the legislation are clear and unambiguous, and the facts are not contested.

Mr. Haig submits, however, that despite being a resident of Quebec on the federal enumeration date, he retained the right to vote in Ontario, relying on section 55(5) of the *Canada Elections Act* which states:

> 55. ...
> (5) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

He argues that, according to this section, he could not lose his ordinary residence for the purpose of voting in the federal referendum *until he had qualified as an elector in Quebec,* under the relevant Quebec legislation. In my view, section 55(5) cannot by any stretch of the imagination bear this meaning.

First, such an interpretation simply cannot be sustained on the wording of the section. Section 55(5) is clear, stating merely that a person cannot be *without* an ordinary residence. There was no allegation that Mr. Haig was without an ordinary residence at any time. On the contrary, and by his own admission, he had an ordinary residence, and that was in the province of Quebec. What he complains of is not that he lacked an ordinary residence. His complaint is that, though resident in Quebec, he had not yet met the six-month residency requirement set out in section 1 of the *Election Act* (Quebec), and so was not entitled to vote in the Quebec referendum. Neither was he entitled to cast a ballot in the federal referendum held in Ontario, as he was no longer ordinarily resident in that province. Whether one adopts a plain or purposive reading, section 55(5) of the *Canada Elections Act* provides no assistance to Mr.Haig.

Second, the interpretation proposed goes not only against the wording, but also against the spirit of the *Referendum Act* (Canada), which expressly allows for a consultation of **less** than all Canadians. Accordingly, the appellants rely on the incorrect assumption that **all** Canadians were entitled to vote in *this* federal referendum, and that the question of where one actually casts one's ballot was a purely technical matter. This is clearly not so. Two distinct referenda were held. The federal referendum was held in nine provinces, and two territories. The entitlement to vote in this referendum was tied to ordinary residence in one of these jurisdictions on the enumeration date. The spirit of the Act was clearly to extend an entitlement to vote *only* to those people ordinarily resident in a jurisdiction specified by proclamation. It would go directly against this spirit and intent to find otherwise.

It is critical to appreciate that residency is *not* a purely technical matter, but in a fundamental aspect of the referendum scheme itself. This is so for a number of reasons, not the least of which

is the sheer mechanics of holding a referendum. The enumeration scheme provided for under the *Canada Elections Act* involves scrutineers going to the ordinary residence of each voter to place his or her name on the electoral roll. In order to apply this statutory structure to the appellant, the Chief Electoral Officer would have had two choices. The first would be to send enumerators into Quebec to find and enumerate those residents of Quebec who were not yet entitled to vote in the provincial referendum. In addition, to the time and expense incurred in enumerating those residents who have been in Quebec for less than six months, this option would also require enumerators to operate extra-territorially in a province for which no federal referendum writ was issued. The second choice would be to attempt to enumerate the persons who had recently moved to Quebec in the polling division they left behind. Besides involving similar issues of time, difficulty and expense, this option leaves unanswered the question of how these people would even be located. It goes without saying that both of these options expressly conflict with the requirements of section 53(1), by allowing for the enumeration of people who are **not** ordinarily resident in an established polling division. In addition to the difficulties involved in the mechanics of enumeration, there would also have been difficulties related to the mechanics of **how** these non-residents would be able to vote. It is clear that the interpretation proposed by the appellants would require a highly-crafted administrative system, a system that is notably absent from the legislation. In my view, the interpretation of section 55(5) proposed by the appellants would simply be unworkable, and it cannot be presumed that such an interpretation or result could have been foreseen, let alone intended, by Parliament.

Finally, I must add that the interpretative approach proposed by the appellants is one which would do violence to all cannons of interpretation as well as to legislative integrity. The appellants are asking the Court to conclude that ordinary residence under the *Referendum Act* (Canada) cannot be lost until one is entitled to vote under the *Referendum Act* (Quebec). To arrive at such a conclusion, the Court would be required to alter the clear meaning of provisions drafted by the federal government in order to accommodation exigencies arising from provisions drafted by a completely different legislative body, one over which the federal legislator has no authority whatsoever. To do this would be to cut away at the authority of legislative bodies to draft statutory instruments that they feel best reflect their specific purposes and goals. Such a conclusion would strike a blow at the autonomy and independence of legislative bodies in a federal system. It is clear that, carried in different settings, such an interpretative approach would have incredible and untenable consequences.

I conclude that the *Referendum Act* (Canada) and the *Canada Elections Act* could not properly be interpreted to extend an entitlement to vote to those Canadian citizens who, on the enumeration day, were not ordinarily resident in one of the jurisdictions where, pursuant to the Order-in-Council, the federal government held its referendum.

Powers of the Chief Electoral Officer

It was argued that it is the minority's view that, notwithstanding the clear and unambiguous terms of the legislation, the Chief Electoral Officer had, pursuant to section 7(3) of the *Referendum Act* (Canada) and section 9(1) of the *Canada Elections Act,* the discretion to adapt or interpret the *Canada Elections Act* so as to assist the appellants. Do these sections, then, confer upon the Chief Electoral Officer the authority to treat residents of Quebec as if they were residents of another province in order to enable them to vote in the federal referendum? In my view, they do not.

According to section 7(3) of the *Referendum Act* (Canada), the Chief Electoral Officer may "adapt the *Canada Elections Act* in such a manner as [he] considers necessary for the purposes of applying that Act in respect of a referendum". Clearly, the discretion accorded the Chief Electoral Officer may be exercised only where adaptations of the *Canada Elections Act* are deemed necessary to facilitate the holding of a specific referendum. Though the Chief Electoral Officer is given a discretionary power to adapt the legislation, this power does not extend to authorise a fundamental departure from the scheme of the *Referendum Act* (Canada). In exercising his discretion, he must remain within the parameters of the legislative scheme.

As noted above, residence is a pivotal feature of the referendum scheme as captured in both pieces of federal legislation. The Order-in-Council directed that a referendum be held in a number of clearly specified jurisdictions. Where electors were not ordinarily resident in those jurisdictions, they had no entitlement to vote in that referendum. The discretionary power of the Chief Electoral Officer cannot be exercised to extend the entitlement to vote beyond the parameters established in the Order-in-Council. Were he to adapt the legislation in a manner that extended the reach of the underlying Order-in-Council, the Chief Electoral Officer would exceed the boundaries of his jurisdiction and, in my view, he would be exposed to having his decision quashed upon judicial review.

It was suggested that section 9(1) of the *Canada Elections Act* referred to earlier, provides more expansive remedial powers. This section bears repetition here:

> 9.(1) *Where,* during the course of a referendum, it appears to the Chief Electoral Officer that, *by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstance, any of the provisions of this Act do not accord with the exigencies of the situation, the Chief Electoral Officer may,* by particular or general instructions extend the time for doing any act, increase the number of referendum officers or polling stations or otherwise *adapt any of the provisions of this Act to the execution of its intent,* to such extent as he considers necessary to meet the exigencies of the situation. (Emphasis added.)

Although the text of this section seems very broad, it only contemplates situations where the provisions of the legislation do not accord with particular needs arising out of any "mistake, miscalculation, emergency or unusual or unforseen circumstance". The appellants argue that their situation, falling in the gap between the provisions of a provincial and a federal referendum, was just such an *unusual* and *unforseen* occurrence. Clearly, it could not fall within the terms "mistake, miscalculation [or] emergency". In my view, Mr. Haig's situation is neither an unusual nor an unforeseen circumstance. The *Referendum Act* (Canada) expressly states that a referendum may be directed at the electors of specific provinces. The exclusion of electors not resident in those provinces on the enumeration date is the clear and unambiguous consequence of the legislative scheme adopted. It is entirely foreseeable and in no way unusual that those people who do not meet the minimal requirements set out in the legislation will not be entitled to vote, whether in a referendum or in an election.

Section 9(1) of the *Canada Elections Act* is also restricted to adaptations designed to facilitate the "execution of its intent". The object of the *Canada Elections Act,* as adapted for the referendum, is to ensure that those who are entitled to vote are given an opportunity to do so. The object is *not* to enfranchise those who are not entitled to vote. To invoke section 9(1) in aid of the appellants would distort the fundamental voting scheme, in a manner contrary to the intent of both the *Canada Elections Act* and the *Referendum Act* (Canada). In my opinion, the conditions necessary for the exercise of the remedial discretion accorded the Chief Electoral Officer in section 9(1) of the *Canada Elections Act* were simply not present in this case.

However, even if I were to conclude that the Chief Electoral Officer had the statutory authority to make arrangements to allow for the enumeration of the appellants, he was not *required* to make such arrangements. The power given the Chief Electoral Officer in section 9(1) of the *Canada Elections Act* is a discretionary power. In the absence of a *Charter* violation, this discretion remained to be exercised by the Chief Electoral Officer as he saw fit, and he cannot be compelled by a court to exercise it in a specific fashion, unless, of course, such discretion was not exercised judicially, which is not the case here.

In short, I find that the Chief Electoral Officer could not, without acting outside his jurisdiction under the Order-in-Council, accommodate Mr. Haig's circumstances and in no way was he remiss in his duty on the basis that he neglected to use the discretionary and remedial powers accorded to him by section 7(3) of the *Referendum Act* (Canada) and section 9(1) of the *Canada Elections Act.* These provisions did not entitle nor require him to supersede or extend the purpose and intent, expressed in clear and unambiguous terms, of the legislation. The appellants' argument in this connection must fail.

After writing these reasons, I have had the opportunity to read the reasons of my colleague Cory J and must emphasise that I find myself in total agreement with the principles he advances, particularly as to the importance to Canadians of the right to vote, in elections as well as

referenda. I also agree that the *Referendum Act* (Canada) "encourages very broad view of residence."

Since, however, Mr. Haig, in this case, never alleged nor even argued before us that he had an Ontario residence or any connection whatsoever to the province of Ontario on the enumeration date in Ontario, the question of the discretionary power of the Chief Electoral Officer to allow him to vote in the federal referendum on that basis was never raised. The only question raised in this appeal, as far as the Chief Electoral Officer is concerned, was his power to extend the federal referendum residing requirements to persons who were *not* residents on the enumeration date in a province or territory where the federal referendum was held. This, in my view, the Chief Electoral Officer has no power to do.

As my colleague suggests, however, had Mr Haig, and others in the same position, applied to the Chief Electoral Officer for a determination of his right to vote in Ontario on the basis of a substantial connection with Ontario on the enumeration date, it would have been up to the Chief Electoral Officer to exercise his discretionary power. This, of course, would be different case.

Constitutionality

It should be emphasised at this point that,although the Quebec referendum legislation did not allow the appellants to vote in the Quebec referendum, the Quebec legislation was never challenged by the appellants. This is hardly surprising since, in Canada's constitutional system, the provinces have and retain authority to establish rules governing voting within the province. Territorial exigencies, such as those present in the northern territories, may justify a host of rules particular to a given province, and the possibility of such divergence is woven into the very fabric of Canadian federalism itself. No one has challenged the residency requirements established in the Quebec legislation, nor argued that they are in any way unconstitutional.

The only enactments challenged are the *Referendum Act* (Canada), the *Canada Election Act* and the Order-in-Council as infringing upon the *Charter* rights of the appellants. The appellants submit that, to the extent that they were unable to participate in the federal referendum, they were deprived of their constitutional right to vote (section 3), of their freedom of expression (section 2(b)), and of their right to equal benefit of the law (section 15(1)). They set out two alternative sources of this *Charter* violation: first, they challenge the provisions of the *Referendum Act* (Canada) and the *Canada Elections Act* as constitutionally under-inclusive to the extent that they failed to make provision for the enumeration of the appellants in a "national" referendum; alternatively, they submit that the Order-in-Council itself violated the *Charter* by failing to include the province of Quebec.

Leaving aside for the moment the *Charter* issues, I am of the view that neither of these alternative arguments has any merit. I would make only the following two comments at this juncture. First,

the argument that the legislation is constitutionally under-inclusive received some support in the dissenting reasons of Dècary J A. However, the argument rests upon the flawed fundamental assumption that there was a "national" referendum. There was, in fact, no such "national" federal referendum. There were *two* referenda held on October 26, 1992, both, it is true, concerning the Charlottetown Accord, but pursuant to separate and distinct legislative schemes. Though the federal government may well have taken note of the results of the Quebec referendum, it would be unfounded in law to suggest that the federal government "allowed" Quebec to administer part of what was really a "national" referendum. Quebec did not need the authorisation of the federal government to hold its referendum, and the Quebec referendum legislation was not within federal control or authority. Had the federal government wished to hold a "national" referendum, it could have included Quebec in the proclamation. Though it had every right to do so, it chose not to, as it also had the right to do.

Second, the appellants challenge the constitutionality of the federal Order-in-Council itself. In this regard, I fully agree with Hugessen J A that "there is no constitutional impropriety in a federal order in council requiring a referendum to be held in some but not all of the provinces". In fact, there is nothing in the Canadian Constitution which relates to referenda, let alone anything that mandates or prevents this type of consultation by either the federal or provincial governments. The propositions of the appellants to the contrary simply cannot be sustained. The decision to hold a federal referendum in nine provinces and two territories was a constitutionally permissible one. It was a political choice, a choice open under the legislation, and a choice consistent with principles of federalism. What is left to consider, then, is whether his choice was also consistent with the obligations of the federal government under the Charter. It is to that issue that I now turn.

Section 3: The Right to Vote

Does section 3 of the *Charter* guarantee to every citizen of Canada the right to participate in a federal referendum, independently of the terms of the federal referendum legislation? Section 3 of the *Charter* reads as follows:

> 3. Every 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 wording of the section, as in immediately apparent, is quite narrow, guaranteeing only the right to vote in elections of representatives of the federal and the provincial legislative assemblies. As Professor Peter Hogg notes in *Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 42, the right does not extend to municipal elections of referenda.

In *Reference re Provincial Electoral Boundaries (Sask.),*[1991] 2 S.C.R. 158, this Court had occasion to more fully consider the content of section 3 of the *Charter.* Writing in the context of a provincial election, Cory J, dissenting but not on this point, articulated at p.165 that "[t]he right to vote is synonymous with democracy". Clearly, in a democratic society, the right to vote as expressed in section 3 must be given a content commensurate with those values embodied in a democratic state. For the majority of the Court, McLachlin J concluded at p.183 that it is the Canadian system of effective representation that is at the centre of the guarantee:

> ... the purpose of the right to vote enshrined in s.3 of the *Charter* is not equality of voting power *per se,* but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative.

The purpose of section 3 of the *Charter* is, then, to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate.

The democratic rights contained in sections 3, 4 and 5 of the *Charter* are quite explicitly articulated. In his discussion in "Democratic Rights", in G.-A. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), 265, Professor Beaudoin summarises these rights at p.266 as:

> The right to choose the government, the right to seek public office, the right to vote periodically, freely and in secret and the right for those elected to sit regularly are the bases of democratic rights.

The democratic rights guaranteed in the *Charter* are also positive ones. Federal and provincial governments have a mandate to hold regular elections to allow citizens to select their representatives. The failure to hold such regular elections would violate the *Charter,* would open the government to account for such constitutional infringements, and would undoubtedly provoke a constitutional crisis. Since the results of an election are clearly binding upon citizens in a democratic society, failure to act upon such results would entail a serious constitutional breach.

A referendum, on the other hand, is basically a consultative process, advice for the fathering of opinions. Voting in a referendum differs significantly from voting in an election. First, unless it legislatively binds itself to do so, a government is under no obligation to consult its citizens through a mechanism of a referendum. It may, as did Quebec under Bill 150, bind itself to conduct a specific referendum but, in the absence of such legislation, there is no obligation to hold this type of consultation. Second, though a referendum may carry great political weight and a

government may choose to act on the basis of the results obtained, such results are non-binding in the absence of legislation requiring a government to act on the basis of the results obtained. In the absence of binding legislation, the citizens of this country would not be entitled to a legal remedy in the event of non-compliance with the results. Were a government to hold a referendum and then ignore the results, the remedy would be in the political and not the legal arena. These differences provide further evidence that the constitutionally guaranteed right to vote does not contemplate the right to vote in a referendum.

Section 3 of the *Charter* is clear and unambiguous as it 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 under section 3 of the *Charter*. Accordingly, Mr. Haig's section 3 *Charter* rights were not infringed because he could not cast his ballot in the federal referendum.

Section 2 (b): Freedom of Expression

Mr Haig also claims that the fact that he could not vote in the federal referendum infringed his freedom of expression. Expressing one's opinion on the Charlottetown Accord, according to Mr. Haig is an attempt to convey meaning, the content of which relates to political discourse, which is at the core of section 2(b) of the *Charter* and enjoys the highest degree of protection. The content of this expression, he says, cannot be meaningfully examined apart from its form namely, participation in the referendum itself. Consequently, he urges the Court to find that the actual *casting of a ballot* in a federal referendum is a protected form of expression, asserting that section 2(b) of the *Charter* mandates not only immunity from state interference, but also an affirmative role on the part of the state in providing this specific means of expression.

The Court has, on many occasions, considered the freedom of expression guaranteed in s.2(b) of the *Charter*. (See RWDSU v *Dolphin Delivery Ltd.*,[1986] 2 S.C.R.573; BCGEU v *British Colombia (Attorney General),* [1988] 2 S.C.R.712; *Devine* v *Quebec (Attorney General),* 2S.C.R 790; *Irwin Toy Ltd.* v *Quebec (Attorney General),* [1989] 1 S.C.R. 927; *Slaight Communications Inc.* v *Davidson,* [1989] 1 S.C.R. 1038; *Edmonton Journal* v *Alberta (Attorney General),* [1989] 2. S.C.R.1326; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.),[1990]* 2 S.C.R. 1123; *Rocket* v *Royal College of Dental Surgeons of Ontario,* [1990] 2 S.C.R. 232; *R.* v *Keegstra,* [1990] 3 S.C.R.697; *Canada (Human Rights Commission)* v *Taylor,* [1990] 3 S.C.R.982; *R.* v *Butler,* [1992] 1 S.C.R.452; *R.* v *Zundel,* [1992] 2 S.C.R.731). Both Canadian society and the courts have at all times recognised that freedom of expression is a fundamental value in Canada. This Court has abundantly discussed the values underlying freedom of expression, and since those values are not in dispute here, it is not necessary to delve into them at great length. Nor is it in dispute that the activity of casting a ballot is an expressive one. As Dickson DJ and Lamer and Wilson JJ noted in *Irwin Toy, supra,* at p. 968, "'Expression' has both a content and a form and the two can be inextricably connected". Referenda are, in fact, illustrations of this phenomenon

and in this context, it would be artificial to separate the form of expression from its content. The casting of a ballot in a referendum is undoubtedly a means of expression, but again, this is not in dispute here.

At issue is whether section 2 (b) of the *Charter* guarantees to all Canadians the right to vote in a referendum. In failing to ensure that each Canadian was provided with the opportunity to vote in the federal referendum, did the federal government infringe upon their freedom of expression guaranteed in section 2 (b) of the *Charter?* Does freedom of expression include a positive right to be provided with specific means of expression?

As a starting point, I would note that case law and doctrinal writings have generally conceptualised freedom of expression in terms of negative rather than positive entitlements. In *The System of Freedom of Expression (1970),* T.I. Emerson, speaking of the United States Bill of Rights whose First Amendment provision is even more stringent than its Canadian *Charter* counterpart, observes at p. 627:

> The traditional premises of the system [of freedom of expression] are essentially laissez-faire in character. They envisage an open marketplace of ideas, with all persons and points of view having equal access to the means of communications. In supporting this system, the First Amendment has played a largely negative role: it has operated to protect the system against interference from the government. Thus the issues have turned for the most part upon reconciling freedom of expression with other special interests that the government seeks to safeguard. *The development of legal doctrine has been primarily in the evolution of a series of negative commands.* (Emphasis added.)

Like its United States First Amendment counterpart, the Canadian section 2 (b) *Charter* jurisprudence has been shaped by these same foundational premises, focusing mainly on attempts by governments to place limitations on what can be expressed. The traditional question before courts has been: to what extent can freedom of expression be justifiably limited? The answer has been that individuals can expect to be free from government action the purpose of effect of which is to deny or abridge freedom of expression, unless the restraint is one that can be justified in a free and democratic society in accordance with section 1 of the *Charter.*

It has not yet been decided that, in circumstances such as the present ones, a government has a constitutional obligation under section 2 (b) of the *Charter* to provide *a particular platform* to facilitate the exercise of freedom of expression. The traditional view, in colloquial terms, is that the freedom of expression contained in section 2 (b) prohibits gags but does not compel the distribution of megaphones. A case on point is *Re Allman and Commissioner of the Northwest Territories* (1983), 144 D.L.R.(3rd) 467 (N.W.T.S.C.). aff'd (1983), 8 D.L.R.(4th) 230 (C.A.), leave to appeal to S.C.C. denied, [1984] 1 S.C.R. *v* Mr. Allman challenged the constitutionality of a three-year residency requirement contained in a territorial *Plebiscite Ordinance* that prevented

him from voting in an upcoming referendum. The trial judge made the following observation at p.479:

> The "freedom of thought, belief, opinion and expression" referred to in para. 2 (b) of the Charter, on which the applicants rely, is therefore to be understood as recognition of a claim which anyone may make against the state ... to non-interference in matters of thought, belief, opinion and expression...
>
> The applicant's complaint in these proceedings... falls instead into the class of a "demand for state intervention" to provide access to the means of expression available to those designated as voters by the Ordinance. ...

The trial judge concluded that no such entitlement existed, and that Mr. Allman did not have a right to be provided with access to a specific means of expression. The Court of Appeal agreed with that conclusion at p.236:

> ....*the expression of opinion sought* by a plebiscite under the *Plebiscite Ordinance has nothing at all to do with the fundamental freedom of expression guaranteed by the Canadian Charter.* It does not abridge or abrogate the fundamental freedom of expression previously enjoyed by the applicants as a guaranteed birthright. It is a supplementary forum created by the territorial government for its own information purposes. The fact that the applicants were denied the opportunity to participate in a public opinion poll did not detract from their fundamental right to speak out and express their views on the subject matter, whether individually or through the media. (Emphasis added.)

The approach followed in *Allman, supra,* rests firmly on the traditional foundational premises outlined above. However, it is these very premises that are being challenged by the appellants. While the basic theoretical framework underlying freedom of expression has remained unchanged over the past two hundred years, the appellants point out that the political, economic and social conditions under which the theory must be applied have changed significantly. The urge that true freedom of expression must be broader than simply the right to be free from interference, referring to Emerson's claim in *The System of Freedom of Expression, supra,* at p.4, that the state "has a more affirmative role to play in the maintenance of a system of free expression in modern society".

I would agree, and it is well understood, that a philosophy of non-interference may not in all circumstances guarantee the optimal functioning of the marketplace of ideas. Clare Beckton notes in "Freedom of Expression" in W.S. Tarnopolsky and G.A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (1982), 75, at p.76:

> Generally the fundamental freedoms are guaranteed by placing limitations on the state's ability to abrogate or abridge them. While this can ensure that the state will not erode these guarantees, it does not ensure that freedom of expression will be fostered.

Owen M. Fiss, for his part, in "Free Speech and Social Structure" in J. Lobel, ed., *A Less Than Perfect Union: Alternative Perspectives on the U.S. Constitution* (1988), 346 at p.352, writes that in modern society, freedom of expression "depends on the resources at one's disposal, and it reminds us that more is required these days than a soapbox, a good voice, and the talent to hold an audience". As he points out, speech often takes place under conditions of scarcity. Both the resources and the very opportunities for speech may tend to be limited, whether by time, lack of money, unavailability of space, or even by our capacity to digest and process information.

Does this inevitably lead to the conclusion that the constitutional guarantees of freedom of expression may import more than the absence of government interference? Some people have suggested that it might. Jean Jacques Blais, in "Freedom of Expression and Public Administration" in D. Schneiderman, ed., *Freedom of Expression and the Charter* (1991), 446, express as the view that, for example, the concentration of media ownership in Canada may not be in the public interest, and that there may be a more positive role for government to play in diffusing ownership to ensure a more vigorous exercise of freedom of expression amongst the mass media. Along the same lines, Allan C. Hutchinson, in "Money Talk: Against Constitutionalizing (Commercial) Speech" (1990), 17 *Can Bus. L.J. 1,* at pp 31 and 33, observes that literature produced by striking Molson workers could not gain wide dissemination due to restrictions set by the mass media. Yves de Montigny, in "The Difficult Relationship Between Freedom of Expression and Its Reasonable Limits" (1992), *55 Law & Contemp. Probs.* 35 expresses a similar view at p. 40:

> While it is accurate to claim that government interference is very often inconsistent with individual freedom, it is equally accurate to say that genuine autonomy presupposes the legislature's active intervention if necessary.

In *Reference re Public Service Employee Relations Act (Atla.)* [1987] I S.C.R.313, a case dealing with the boundaries of freedom of association, Dickson CJ (Dissenting) addressed this same concern at p. 361:

> Section 2 of the *Charter* protects fundamental "freedoms" at opposed to "rights". although these two terms are sometimes used interchangeably, a conceptual distinction between the two is often drawn. "Rights" are said to impose a corresponding duty or obligation on another party to ensure the protection of the right in question whereas "freedoms" are said to involve simply an absence of interference or constraint. *This conceptual approach to the nature of "freedoms" may be too narrow since it fails to acknowledge situations where the absence of*

> *government intervention may in effect substantially impede the enjoyment of fundamental freedoms* (e.g. regulations limiting the monopolization of the press may be required to ensure freedom of expression and freedom of the press). (Emphasis added.)

Although that case did not involve a request for government action, but dealt rather with legislative action alleged to interfere with a freedom, Dickson CJ seems to imply that fundamental freedoms might, in some situations, impose affirmative duties on a state.

At this point, it is important to emphasise that, in talking about freedom of expression, a variety of vocabularies have been employed. People have sometimes used the language of negative and positive entitlements, sometimes focusing on distinctions between rights and freedoms, other times on distinctions between "liberty to" and "liberty of". (For example, see I. Berlin, "Two Concepts of Liberty", in *Four Essays on Liberty* (1969), at pp.118–72; A. W. Mackay, Freedom of Expression: Is It All Just Talk?" (1989), 68 Can Bar Rev. 713; and W. R. Lederman, "Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms" (1985), 11 *Queen's L.J. 1).* There may be value to these conceptual distinctions as they provide frameworks which can assist in an analysis of the issues, interests and values that shape a conclusion that a right has or has not been violated.

However, as Dickson CJ rightly observed, this language cannot be used in a dogmatic fashion. The distinctions between "freedoms" and "rights", and between positive and negative entitlements, are not always clearly made, nor are they always helpful. One must not depart from the context of the purposive approach articulated by this Court in *R.* v *Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295. Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.

In the proper context, these may perhaps be relevant considerations leading a court to conclude that positive governmental action is required. However, these considerations do not arise in our case. The context here is a referendum whose legality and legitimacy have been recognised. First, the provisions of the *Referendum Act* (Canada) allow for a referendum to be held in some provinces and not others, and that is what was done here. Second, as discussed earlier, section 3 of the *Charter* does not guarantee Canadians a constitutional right to vote in a referendum. Third, the referendum itself, far from stifling expression, provided a particular forum for such expression.

The observations of Le Dain J (Beetz and La Forest JJ concurring) in *Referendum re Public Service Employee Relations Act (Alta.), supra*, provide some insight. In the context of section 2(d) of the *Charter*, he commented at p. 391:

> *What is in issue here is not the importance of freedom of association* in this sense, which is the one I ascribe to s.2(d) of the *Charter, but whether particular activity* of an association in pursuit of its objects *is to be constitutionally protected or left to be regulated by legislative policy.* The rights for which constitutional protection is sought – the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer – are not fundamental rights or freedoms. They are the creation of legislation ... (Emphasis added.)

These comments find application to the issue before us. As I stated at the outset, there is no dispute concerning the importance of freedom of expression. Nor is it disputed that voting is a form of expression. Further, in the context of legislative elections, it is clear that voting as a means of expression is constitutionally entrenched in section 3 of the *Charter.* However, there is just as clearly no constitutionally entrenched right to vote in a referendum.

A referendum is a creation of legislation. Independent of the legislation giving genesis to a referendum, there is no right of participation. The right to vote in a referendum is a right accorded by statute, and the statute governs the terms and conditions of participation. The Court is being asked to find that this statutorily created platform for expression has taken on constitutional status. In my view, though a referendum is undoubtedly a platform for expression, section 2 (b) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to **anyone**, let along to **everyone**. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law.

The following caveat is, however, in order here. While section 2 (b) of the *Charter* does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. The traditional rules of *Charter* scrutiny continue to apply. Thus, while the government may extend such a benefit to a limited number of persons, it may not do so in a discriminatory fashion, and particularly not on ground prohibited under section 15 of the *Charter.*

I would add that issues of expression may on occasion be strongly linked to issues of equality. In *Schachter* v *Canada,* [1992] 2 S.C.R. 679, the Court said that section 15 of the *Charter* is indeed a hybrid of positive and negative protection, and that a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15. It might well be that, in the context of a particular equality claim, those positive steps may involve the provision of means of expression to certain groups or individuals. However, despite obvious links between various provisions of the *Charter,* I believe that, should such

situations arise, it would be preferable to address them within the boundaries of section 15, without unduly blurring the distinctions between different *Charter* guarantees.

In short, I am of the view that, in the context of the federal referendum held in this case, freedom did not include a constitutional right for all Canadians to be provided with a specific means of expression. Accordingly, the federal government did not violate section 2(b) of the *Charter* either in holding its referendum or in holding it in less than **all** provinces and territories. The appellants were unable to cast their ballot simply because, on the enumeration date, they were not ordinarily resident in a province where the federal referendum was held, a limitation which does not infringe the appellants' freedom of expression as guaranteed in the *Charter*.

This leads us to the third alleged *Charter* violation. In providing a platform of expression to less than **all** Canadians, did the government infringe the appellant's section 15(1) guarantee to the equal benefit of the law?

Section 15(1): Equality

Section 15(1) of the *Charter* guarantees the right to equality in the following terms:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

To the extent that they were unable to vote in the federal referendum, the appellants allege that they were denied the equal benefit of the law. In their opinion, once the federal government decided to hold a "national" referendum on the Charlottetown Accord, it was compelled by section 15(1) of the *Charter* to afford **every** qualified Canadian citizen the opportunity to participate in that vote. Since the appellants were not given this opportunity, they forwarded the proposition that the differential treatment they received was based on a prohibited ground of discrimination. They advanced two arguments in this regard: first, that **they** were improperly denied equal benefit of the law **as new residents of a province**; alternatively, that **all residents of Quebec** were improperly denied equal benefit of the law as a result of the failure to include Quebec in the Order-in-Council.

At the outset, I would reiterate the earlier observation that there was in fact **no** "national" referendum. The appellants were not afforded an opportunity to vote in the federal referendum simply because they were not ordinarily resident in a polling division established under the *Referendum Act* (Canada). However, was this distinction, one made between the appellants and those Canadians who **were** ordinarily resident in one of those polling divisions, a distinction which was based on a prohibited ground of discrimination?

In *Andrews* v *Law Society of British Columbia,* [1989] 1 S.C.R. 143, McIntyre J. at p.174 defined prohibited discrimination under section 15 (1) as:

> ... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

He also noted that not all distinctions and differentiations are discriminatory. A complainant under section 15(1) must establish that he or she is a member of a discrete and insular minority group, that the group is defined by characteristics analogous to the enumerated grounds of discrimination set out in section 15(1), and that the law has a negative impact. In determining whether a group is analogous to those that are enumerated with section 15(1) of the *Charter*, Wilson J in *R.* v *Turpin,* [1989] 1 S.C.R. 1296, at p.1333, focused on the larger context by searching for indicia of discrimination such as "stereotyping, historical disadvantage or vulnerability to political and social prejudice".

Against this background, the appellants submit that a person's **place of residence** may be a personal characteristic which is analogous to those prohibited grounds listed in section 15(1). Though this may well be true in a proper case, this case is **not** such a case. It would require a serious stretch of the imagination to find that **persons moving to Quebec less than six months before a referendum date** are analogous to persons suffering discrimination on the basis of race, religion or gender. People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were unable to case a ballot in the Quebec referendum, the group is not one which has suffered historical disadvantage, or political prejudice. Nor does the group appear to be "discrete and insular". Membership in the group is highly fluid, with people constantly flowing in or out once they meet Quebec's residency requirements. As they do not exhibit any of the traditional indicia of discrimination, I cannot find that new residents of a province constitute the group which merits the creation of a new section 15(1) category.

The appellant's alternative argument was that not simply **new residents**, but rather **all** residents of Quebec suffered discrimination. This is, they state that the federal government discriminated against all residents of the province of Quebec by failing to include Quebec in the proclamation. It is clear that at the base of the appellant's complaint is the existence of a scheme which allows for one province to be exempted from the scope of federal legislation. Even had the appellants been entitled to vote in the Quebec referendum, the central question would remain: Does the exclusion of one province from a piece of federal legislation violate section 15(1) of the *Charter*?

The appellants contend that the differential application of federal law to the provinces can only be tolerated if it is "legitimate" and advances the values of a federal system. In their view, the

decision to hold a referendum in only nine provinces did not advance these values. The appellants thus ask the Court to assess the legitimacy of the political decision not to include Quebec in the federal referendum, and to find that this decision was based on the prohibited ground of province of residence, and that it thus violated the section 15(1) rights of all citizens of Quebec to the equal benefit of the law.

In *Turpin, supra,* the Court considered a provision in the *Criminal Code* which allowed for murder trials by judge alone only in the province of Alberta. An accused outside of Alberta who wanted a trial by judge along argued that his equality rights were violated. Wilson J, finding that province of residence did not form the basis of a claim in the case before her, clearly left open that possibility that in some situations it might. Residence based equality rights were more fully articulated by Dickson C J in *R.* v *S.* (S)., [1990] 2 S.C.R. 254. In that case, the *Young Offenders Act* permitted provinces to set up "alternative measures" programmes to deal with young offenders. The Attorney General for Ontario made the decision **not** to implement such a programme. The Court held that this was not a violation of section 15(1), emphasising at p.285 the discretion of the Attorney General to implement such federal programmes:

> *Once it is determined that there is no duty on the Attorney General for Ontario to implement a program* of alternative measures, *the non-exercise of discretion cannot be constitutionally attached simply because it crates differences as between provinces.* To find otherwise would potentially open to *Charter* scrutiny every jurisdictionally permissible exercise of power by a province, solely on the basis that it creates a distinction in how individuals are treated in different provinces. The Attorney General for Ontario was under no legal obligation to implement a program and, in my opinion, the decision is unimpeachable because, for the purposes of a constitutional challenge on the basis of s. 15(1) of the *Charter*, "the law" is s. 4, which grants the discretion.

Dickson C J added at p.286 his opinion that the result "would be no different had s. 4 of the *Young Offenders Act* been challenged directly".

These comments are apposite here. Section 3 (1) of the *Referendum Act* (Canada) confers upon the Governor in Council a discretionary power to direct that a referendum be held in any number of provinces. Nowhere in the Canadian Constitution is there mention of an obligation on the Governor in Council to hold a referendum, or to see that a referendum is held in **all** provinces in which a referendum will be held are policy decisions left entirely to governments and legislatures. They involve matters of political consideration. Besides, the Governor in Council is not required to justify the reasons for any particular exercise of his discretion. As Dickson J said in *Thorne's Hardware Ltd.* v *The Queen,* [1983] 1 S.C.R. 106, at pp.112–113:

> Governments do not publish reasons for their decisions, governments may be moved by any number of political, economic, social or partisan considerations.

Clearly, in a federal system, province-based distinctions do not automatically give rise to a presumption of discrimination. Section 15(1) of the *Charter,* while prohibiting discrimination, does not alter the division of powers between governments, nor does it require that all federal legislation must always have uniform application of all provinces. It is worth emphasising that, as Dickson C J commented in *R. V. S. (S.), supra,* at pp 289–92, differential application of federal law in different provinces can be legitimate means of promotion and advancing the values of a federal system. Differences between provinces are a rational part of the political reality in the federal process. Difference and discrimination are two different concepts and the presence of a difference will not automatically entail discrimination.

The motives which might have guided the decision of the Governor in Council to hold a referendum are not here in dispute, and it is not the task of courts to second-guess the legislature on its political judgement. The decision to hold a referendum in a specific number of provinces is a constitutionally permissible exercise of the discretion accorded to the government under section 3 (1) of the *Referendum Act* (Canada). The fact that the legislature decided not to hold a referendum in the province of Quebec did not violate the constitutional guarantees contained in section 15(1) of the *Charter.* The appellants had no constitutional right to an Order-in-Council directing that a federal referendum be held in all Canadian provinces and territories.

In conclusion, the provisions of the *Referendum Act* (Canada) and the *Canada Elections Act* are constitutionally valid and, properly interpreted, they did not grant the appellants an entitlement to vote in the federal referendum. In not enumerating the appellants, the Chief Electoral Officer did not err in the exercise of the discretionary and remedial powers accorded him by section 7 (3) of the *Referendum Act* (Canada) and section 9 (1) of the *Canada Elections Act.* Finally, the exclusion of the appellants from the federal referendum did not violate the appellants' constitutional rights under sections 3, 2(b) or 15(1) of the *Charter.* In light of these findings, I would dismiss the appeal and answer the constitutional questions articulated by the Chief Justice as follows:

1. No.
2. Not necessary to answer.
3. No.
4. Not necessary to answer.

As in the courts below, I will make no order as to costs.

SUPREME COURT OF CANADA

GRAHAM HAIG, JOHN DOE and JANE DOE

and

THE CHIEF ELECTORAL OFFICER

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF QUEBEC

CORAM: The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

McLACHLIN J: I have had the benefit of reading the reasons of L'Heureux-Dubè J., Cory J. and Iacobucci J. While I am in general agreement with L'Heureux-Dubè J.'s disposition of this appeal, I wish to add the following comments.

I agree with Iacobucci J that the debates of the House of Commons evince an intent that the referendum include all eligible Canadian voters. The problem, as I see it, is that the proclamation which resulted did not provide for a referendum including all Canadian voters. It provided a referendum for nine provinces and two territories, excluding Quebec. The province of Quebec was already committed to a provincial referendum on the same day, posing the same question. Doubtless it would have seemed over-zealous, for lack of a better word, for Parliament to overlap the federal referendum with the previously set Quebec referendum.

The appellants' case is that it is the legislative acts of Parliament which violated their rights under the *Canadian Charter of Rights and Freedoms.* Accordingly, it is to the acts of Parliament and not to the expressed intention of its members that we must look. The act impugned is the act of providing for a referendum in areas of Canada other than Quebec, without providing a means for persons recently resident in Quebec to vote in their referendum. It is not contrary to the *Charter* that Parliament should decide to hold a referendum in only some areas of Canada. Having chosen to do so, it is not contrary to the *Charter* that voters outside those areas be excluded. So the legal breach is not made out.

In order to carry though its expressed intention of holding a national referendum, Parliament should have made provision for persons such as Mr. Haig who, although Quebec residents, were ineligible to vote in Quebec because they had recently moved there. While, as discussed by L'Heureux-Dubé J, an enumeration of all such persons might have been difficult and costly, alternatives such as advertisements requesting such persons to step forward might have been attempted. But Parliament made no such provision. Instead, it confined the right to vote in the federal referendum to the residents of provinces and territories other than Quebec, and failed to provide for the registration in its referendum of recently-arrived Quebec residents. Had the law, as opposed to the speeches in Parliament, enacted a truly national referendum then I would agree with Iacobucci J. that the result here violated the appellants' freedom of expression. The problem is that the law did not do this. Even with a broad and liberal reading of residency requirements aimed at enfranchising as many Canadians as possible "in every situation where that result could be attained from infringing the law" (per Cory J, at p.5), there was simply no legal basis upon which the Chief Electoral Officer could have registered Mr. Haig, a Quebec resident, in a referendum which by its terms excluded Quebec.

In the result, while I see much force in the contentions of my colleagues Iacobucci J and Cory J, I would dismiss the appeal for essentially the reasons given by L'Heureux-Dubé J.

SUPREME COURT OF CANADA

GRAHAM HAIG, JOHN DOE, and JANE DOE

and

THE CHIEF ELECTORAL OFFICER

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF QUEBEC

CORAM: The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

CORY J: I have read with great interest the excellent reasons of Justice L'Heureux-Dubé. However, with respect to residency requirements, I differ from her with regard to the authority, the duties and the nature of the role of the Chief Electoral Officer.

In this appeal consideration must be given to the nature of the right to vote and how statutes which enact that right should be interpreted.

The Approach to the Interpretation of Statutory Franchise Provisions

All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the *Charter* guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.

The principle was captured by J.P. Boyer in *Election Law in Canada: The Law and Procedure of Federal, Provincial and Territorial Elections* (1987), vol. 1, at p. 383:

> Drawing two short lines to form an "x" is the simplest act imaginable. Yet the right to so mark a ballot is as profound as the act is simple. Such marks, systematically compiled, are transformed by our beliefs and our laws into the most eloquent voice that people have.
>
> The right to cast a vote for those seeking public office is encircled by procedures and laws designed not to make the exercise of this right difficult (although someone frustrated at not being able to vote for a technical reason may feel this is the case), but rather to ensure that it cannot be easily swept away.

The courts have always recognised the fundamental importance of the vote and the necessity to give a broad interpretation to the statutes which provide for it. This traditional approach is not only sound, it is essential for the preservation of democratic rights. The principle was well expressed in *Cawley* v *Branchflower* (1884), 1 B.C.R. (Pt.II) 35 (S.C.). There, Crease J wrote at p.37:

> The law is very jealous of the franchise, and will not take it away from a voter if the Act has been reasonably complied with ... *It looks to realities, not technicalities or mere formalities*, unless where forms are by law, especially criminal law, essential, or affect the subject matter under dispute. (Emphasis added).

To the same effect in *Re Lincoln Election* (1876), 2 O.A.R.316, Blake V.C. stated (at p.323):

> The Court is anxious to allow the person who claims it the right to exercise the franchise, in every case in which there has been a reasonable compliance with the statute which gives him the right he seeks to avail himself of. No merely formal or immaterial matter should be allowed to interfere with the voter exercising the franchise.

It can be seen that enfranchising statutes have been interpreted with the aim and object of providing citizens with the opportunity of exercising this basic democratic right. Conversely, restrictions on that right should be narrowly interpreted and strictly limited.

The Importance of the Right to Vote on the Referendum

During the course of the hearing an argument was advanced that a referendum was distinct from and less important than an election. It was argued that, as a result, the generous principles applicable to the right to vote in elections should not apply with the same force to a referendum. I cannot accept that contention. A vast amount of public study, effort and time was expended in drafting the terms of the Charlottetown Accord. Every effort was made to advise Canadians of the importance of the referendum pertaining to it and the significance of the vote of every citizen. The number of voters exercising their franchise in the referendum was comparable to the turn-out in federal elections. In the minds of most Canadians, the referendum was every bit as important as an election. If it was not, then Canadians would be clearly justified in wondering what all the fuss was about. The same principles applicable to the right to vote in elections should be applied in the same manner to the right to vote in referendum.

Residency Requirements and the Interpretation of "ordinarily resident"

It follows that it was the duty of the Chief Electoral Officer to insure that as many Canadian as possible were enfranchised in every situation where that result could be attained without infringing the law.

Let us review the legislation governing the referendum and the right to vote in that referendum.

> Section 7 of the *Referendum Act*, S. C. 1992, c. 30, provides in part:
>
> 7. (1) Subject to this Act, the *Canada Elections Act,* as adapted pursuant to subsection (3), applies in respect of a referendum, and, for the purposes of that application, the issue of writs of referendum shall be deemed to be the issue of writs for a general election.

.....

(3) Subject to this Act, the Chief Electoral Officer may, by regulation, adapt the *Canada Elections Act* in such manner as the Chief Electoral Officer considers necessary for the purposes of applying that Act in respect of a referendum.

.....

Section 50(1), 53(1) and 55(1) to (5) of the *Canada Elections Act,* R. S. C., 1985, c. E-2 (as adapted for the purposes of a referendum by SOR/92-430) read:

> 50. (1) Every person who
> (a) has attained the age of eighteen years, and
> (b) is a Canadian citizen,
>
> is qualified as an elector.

53.(1) Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors for the polling division in which that person is ordinarily resident on the enumeration date for the referendum and to vote at the polling station established therein.

55.(1) The rules in this section and sections 56 to 59 and 62 apply to the interpretation of the expression "ordinarily resided" in any section of this Act in which those "ordinary resided" in any section of this Act in which those expressions are used with respect to the right of a voter to vote.

(2) Subject to this section and sections 56 to 59 and 62, the question as to where a person is or was ordinarily resident at any material time or during any material period shall be determined by reference to all the facts of the case.

(3) The place or ordinary residence of a person is, generally, the place that has always been, or that the person has adopted as, the place of his habitation or home, and to which he intends to return when he is away from it.

(4) Where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary residence is where the person sleeps.

(5) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

Haig deposed that he resided in Ottawa from June 18, 1989 until August 1992 when he moved to Hull, Quebec. Thus he did not qualify to vote in the Quebec referendum because he had not been a resident of that province for the requisite statutory period of six months. It must be

remembered that Haig did not seek to challenge the validity of the Quebec legislation. Rather he sought to be enfranchised pursuant to the provisions of the federal Act.

My colleague takes the position that Haig, when he moved to Hull, lost his Ontario residency for voting purposes. With respect, I think the Chief Electoral Officer could well have come to a different conclusion.

At the outset, it must be remembered that originally the right to vote was tied to ownership of property. A person owning property in several ridings could cast a vote in each of them. The provisions pertaining to residency were aimed at preventing "plural voting" by prohibiting property-owners from voting in more than one riding. The residency requirement was designed to facilitate the attainment of the principle of one person one vote. It should not be used too readily as a means of depriving a person of any right to vote.

The residential requirement was considered in *Re Provincial Elections Act* (1903), 10 B.C R. 114 (S.C. en banc). This case was concerned with persons who were temporarily outside the province but who nonetheless wished to be sworn as voters. Walkem J stated (at pp. 120–21):

> It is a rule that franchise Acts should be liberally construed. The object of the Elections Act is to enfranchise and not disfranchise, persons who possess the necessary qualifications for being placed on the Voters' List; and hence the Act should, if possible, be so construed as to forward that object.....

This approach had been earlier affirmed by the Ontario Court of Appeal in *Re Voters' List of the Township of Seymour* (1899), 2 Ont. Elec. 69 where, with respect to harvesters, MacLennan JA held: "...temporary absence, even of very considerable duration, is not inconsistent with continuous residence, where the franchise is concerned" (pp. 74–75).

This repetition of the principle of enfranchisement, coupled with a recollection of the historical object of the residency requirement, provides a useful point commencement for considering the key phrase "ordinarily resident". The *Canada Elections Acts* deals specifically with various specific aspects of residency as well as the general rule to be applied in determining a voter's residence. For example, the residence of summer residents is determined by section 57; that of students and migrant workers in section 58; those in charitable missions by section 59 and Members of Parliament by section 60. The general residency rule is expressed under section 55(2). It provides that the ordinary residence of a voter "shall be determined by reference of all the facts of the case". Sub-sections 3 and 4 of the same section provide:

> (3) The place of ordinary residence of a person is, generally, the place that has always been, or that the person has adopted as, the place of his habitation or home, and to which he intends to return when he is away from it.

> (4) Where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary residence is where the person sleeps.

Sub-section 3 uses the word "generally" and subsection 4 uses the word "usually". By the use of these words, it can be seen that the framers of the legislation expected that there would be exceptions to the usual residency rule. Human existence itself is transitory. The residence of human beings is even more so. It is seldom that a Canadian can now be referred to as "a lifetime resident of such and such a district". Ours is now a highly mobile society whose members will frequently move about the country. This mobility does not mean that the right to vote should be considered any less important than it was in earlier times. Indeed, if a modern democracy is to function effectively the right is even more precious than before. Our whole concept of residency must be more flexible than ever before. It follows that the term "ordinarily resident" in an enfranchising statute should be interpreted broadly in the context of today's mobile society and in the light of the right to vote.

The case which in my view demonstrates the proper approach that should be taken to residency as it pertains to the right to vote is *Hipperson* v *Newbury District Electoral Registration Officer, [1985]* Q.B. 1060 (C.A.). In that case, the English Court of Appeal determined that the nuclear protesters who were camped outside the Greenham Common air-base were residents of that district. The court came to this conclusion despite the obviously temporary nature of this town of tents. Sir John Donaldson M.R. found that the issue of the permanence of a settlement was a question of fact and degree. At page 1073 he wrote:

> Permanence, like most aspects of residence, is a question of fact and degree.... All human affairs have a degree of impermanence, the precise degree being best forecast in the light of experience.

Another example of the flexibility which must be given to the concept of residence is presented by the much older case of *Re Fitzmartin and Village of Newburgh* (1911), 24 O.L.R. 102 (Div. Ct.). Fitzmartin lived on a farm. The farm was located partly in one municipality while the farmhouse was in another. Middleton J sensibly held (at p.104):

> *"Residence" is a word of very elastic meaning...* the "residence" required by the statute is not governed by such narrow considerations, but is *such a residence as can be fairly regarded as giving the voter the right to be recognised as a citizen of the municipality in question* (Emphasis added.)

Turning to more recent Canadian cases, *Tenold* v *Chapman (1981),* 9 Sask. R. 278 (Q.B.), held that a person who had been living in Ottawa since 1974, first as an M.P. for a Saskatchewan riding and subsequently as a senatorial assistant was, for voting purposes, to be deemed ordinarily resident in Saskatchewan. The court balanced the facts presented. For example, although the applicant rented and maintained a small apartment in Ottawa, had a bank account in that city and

obtained and used a province of Ontario health card, his relationship to Saskatchewan was such that he could properly be found to be ordinarily resident in that province.

In the case of *Fells* v *Spence, [1984]* N. W. T.R. 123 (S.C.), the term "ordinarily resident" for electoral purposes was again considered. An application was brought to strike Spence as a candidate on the grounds that he did not meet the residency requirements. Spence had moved to the Territory with his family when he was ten years old. However, he left to attend university, travel and work. In 1976, he declared himself a resident of Kingston, Ontario, in order to run for mayor. Later he worked as an assistant to a cabinet minister in Ottawa for three years. However, he frequently travelled to Yellowknife and stayed with his parents on those occasions. He expressed the intention of returning to live permanently in Yellowknife. He held a territorial driver's licence and health insurance card. In those circumstances, it was held that he compiled with the residential requirement. Marshall J appropriately held (at p. 130):

> In my view, "ordinarily resident" under the Elections Ordinance of the Northwest Territories ought to be generously interpreted ... If a man or woman can reasonably, on all the facts, fit within the statute, then let that person run. Democracy wants candidates.

These cases demonstrate the appropriate approach that courts should take to the concept of residence as a requirement of exercising the right to vote.

I note as well that it has been very sagely written that in any scheme of enumeration voters should be drawn up with a view to insuring that the right to vote is given to the greatest possible number of eligible voters. T. H. Qualter in *Election Process (1970)*, at p. 21, observed that an ideal enumeration scheme is one administered so as to maximise eligibility. In Canada, the Chief Electoral Officer has been remarkably successful in this regard. In parliamentary elections approximately 98 per cent of the eligible voters are registered and there would appear to be very little if any administrative disenfranchisement (Boyer, *supra,* at p. 426). I can see no reason for departing from this approach and practice under the *Referendum Act.*

The very nature of the *Referendum Act* encourages a very broad view of residence. In a parliamentary election, the location of votes can make a substantial difference in the election of a candidate in each riding. That is not true of a federal referendum where the exact location of any ballot is much less important. Further, the argument made in favour of residential requirements as proving an indication that the voter is reasonably acquainted with local issues and candidates is obviously not present in a referendum where all Canadians are called upon to vote on a question that transcends riding boundaries.

In my view, it would be wrong to automatically hold that those who had moved to Quebec before the referendum enumeration date could, on that basis alone, be denied the right to vote in a federal polling division outside Quebec. They could still properly exercise this franchise if it

could possibly be said that they retained a substantial connection to a polling division within the federal referendum area. They could well be found to be "ordinarily resident" for the purpose of voting depending on the factual evidence placed before electoral officials. It can never be forgotten that the term "ordinary resident " **must** be given a broad and liberal interpretation with a view to enfranchising the voter. It would be completely contrary to the objects of the *Canadian Elections Act* and our concept of democratic government if rigid rules were applied too quickly and disenfranchised Canadians desirous of voting in a referendum without real justification. The connections of Haig to an Ottawa riding or any other riding within the federal referendum area should have been explored in this case. His move to Hull should not have had the automatic result of depriving him of his right to vote. However, it is impossible to determine the exact policy of the Chief Electoral Officer on this issue. The appellant chose to move directly before the courts without first seeking to be enumerated in a polling division within the federal referendum area where it could well have been found that he retained sufficient ties to enable him to vote.

The *Referendum Act,* though its incorporation of the provisions of the *Canada Elections Act,* provides that once an initial voter's list is drawn up citizens can then seek to have their names added to it. It is significant that this first list is referred to as "preliminary" (see section 65(1)). The revision of the list takes place before a "revising officer" acting as a justice of the peace. (section 68 and Sch.IV, r.42 *et seq.).* At this stage a person may apply to be included. The appellant did not avail himself of this procedure.

He undoubtedly took his course because of his intention to seek a ruling that would treat all persons who had moved to Quebec within six months of the referendum voting date as a class of voters entitled to enfranchisement. Unfortunately, this makes it impossible for the Court to determine whether, under the requisite flexible test of residency, the appellant was qualified to cast his vote in the federal referendum area. There is simply no evidence upon which a finding could be made that he retained the necessary connection to a federal polling division to enable him to vote. Had the referendum not been held it might have been appropriate to remit the matter to a revising officer for an examination of the facts. This no longer can be done.

Nor should declaratory relief be granted. It is true that often the judicial interpretation of a statute can lead to the granting of a declaratory order by the Court. Nonetheless, declaratory relief is a matter of discretion which should only be exercised in a clear case. The referendum is now long past and in the circumstances presented in this case declaratory relief should not be granted.

Summary

The following principles emerge from a consideration of the right to vote and the interpretation of the statutes providing that right, here the *Canada Elections Act* and the *Referendum Act:*

> The right to vote is of fundamental importance to Canadians and to our Canadian democracy.

In the interpretation of all enfranchising statutes the provisions granting the right to vote should be given a broad and liberal interpretation. Every effort should be made to interpret the statute to enfranchise the voter.

Conversely every effort should be made to limit the scope of provisions which tend to disenfranchise the voter.

The concept of residency must be interpreted broadly in our mobile society. The term must be given a particularly broad and flexible meaning in statutes granting the right to vote. These statutes must be interpreted with the aim of enfranchising as many voters as possible. Further support for this approach can be derived from the historical purpose of enacting residency requirements which was to prohibit land owners from voting in each riding where they owned property. They were not enacted to completely deprive a person of the right to vote.

It follows that the specific term "ordinarily resident" should be interpreted broadly with a view to enfranchising as many voters as possible and to disenfranchising as few as possible.

There is still a further basis for giving the words "ordinarily resident" a very wide meaning in a referendum. Voting on a national question diminishes the strength of any argument that establishing the residence of a voter will give some indication of a voter's knowledge of local issues and candidates. As well, the exact location of each vote is less important than in a riding-by-riding parliamentary election.

A consideration of these principles could very well have led and perhaps should have led to his enfranchisement had Haig applied to be added to the list of voters in his former riding. Unfortunately, he did not seek to make such an application and it is impossible to determine on the facts presented if there was a sufficient connection to a riding to warrant his addition to the voter's list.

This is not a proper situation in which to grant declaratory relief.

Disposition

On the evidence presented, I find that I must come to the same result as Justice L'Heureux-Dubé but for different reasons. I would therefore dismiss the appeal and answer the constitutional questions in the manner suggested by my colleague.

SUPREME COURT OF CANADA

GRAHAM HAIG, JOHN DOE AND JANE DOE

V

THE CHIEF ELECTORAL OFFICER

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF QUEBEC

CORAM: The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

IACOBUCCI J: I have read the reasons of my colleague, L'Heureux-Dubé J and Cory J, and find myself in respectful disagreement with them although my colleagues make many points with which I fully agree. My principal disagreement is that, in my view, the appellant's rights under section 2 (b) of the *Canadian Charter of Rights and Freedoms* were violated by the effect of the *Referendum Act,* S. C. 1992, c.30 (*"Referendum Act"),* and such violation cannot, in the absence of evidence on the point, be saved under section 1 of the *Charter.* In the result, I would allow the appeal.

In a technical or formal sense, it is correct to observe, as L'Heureux-Dubé J does, that two referenda were held in the circumstances of this case: one by the province of Quebec and one by the federal government in the rest of Canada. Moreover, both British Columbia and Alberta require, under their legislation, that referenda be held in their respective provinces prior to the authorisation of amendments to the Constitution of Canada. See the *Referendum Act,* S.B.C 1990, c. 68, and the *Constitutional Amendment Approval Act, S.B.C.* 1991, c. 2; and the *Constitutional Referendum Act,* S. A. 1992, c. C-22.25 (as amended by S. A. 1992, c. 36). It appears that the federal referendum was to serve the purpose of a provincial referendum in those provinces. See the *Constitutional Referendum Amendment Act, 1992,* S. A. 1992, c 36, section 2. Technically, therefore, there were some four referenda being conducted: the federal referendum in nine provinces and two territories, the Quebec referendum, the federal referendum as applied to British Columbia, and the federal referendum as applied to Alberta.

In my opinion, focusing on the technicalities of separate referenda obscures the national character of the referendum. I agree with Dècary J A that the reality was that Parliament intended the country to have a national referendum which would be conducted by the holding of a federal referendum in conjunction with one or more provincial referenda, and in which the federal referendum could be treated as a provincial referendum in certain provinces, as apparently was the case in British Columbia and Alberta.

That a national referendum involving all Canadians was intended is shown by the statement of Mr. Jim Edwards, then Parliamentary Secretary to the Minister of State and Leader of the Government in the House of Commons, speaking on the second reading of Bill C-81 (the *Referendum Act* (Canada):

> "We would consult all Canadians in a national referendum. This referendum would be fair and give everyone an opportunity to express their opinion. It would be the culmination of the most extensive consultation exercise ever undertaken by a Canadian government."
>
> (*House of Commons Debate,* vol. 132, No. 144, 3rd sess., 34th Parl, May 19, 1992, at p. 10889.)

In addition, the then Prime Minister, the Right Honourable Brian Mulroney, P.C., in moving receipt of the *Consensus Report on the Constitution, Charlottetown, August 28, 1992,* stated:

> "This constitutional package provides a framework within which we are able to move ahead as a united nation, diverse and different it is true, yet one nation. And now the referendum ensures that every person of voting age in Canada will have an opportunity to express his or her preference."
>
> (*House of Commons Debates,* vol.132, No. 165, 3rd sess., 34th Parl., September 8, 1992, at p. 12732.)

It is also interesting to note that the Honourable Marcel Danis, then Minister of Labour, in describing the referendum, emphasised the importance of adopting a process that was fair, democratic and consonant with the Charter.

> "The government's purpose in tabling this bill is also to ensure that the rules of the game for any consultation that takes place will be fair, open and transparent, in accordance with our democratic traditions and the Canadian Charter of Rights and Freedoms.
>
> What are those rules, Mr. Speaker? Basically, they would be the same as for a general election. The referendum would be supervised by the Chief Electoral Officer and be subject to the provisions of the Canada Elections Act, already a guarantee of a fair process. Furthermore, the "yes" and "no" sides would have equal access to free air time, as determined by the arbitrator. The CRTC would also supervise the purchase of air time on radio and television networks for advertising purposes.
>
> However, there are some differences because of the very nature of this kind of consultation and the implications of the Charter. First of all, the bill does not make so-called umbrella committees mandatory. Any obligation to take part in the referendum campaign under the aegis of such committees would be contrary to the Charter of Rights, according to the legal opinions we have received so far. In fact, such an obligation would not only be likely to violate freedom of expression, it would also force groups that may be for or against the question for entirely different reasons to operate under the same umbrella."
>
> (*House of Commons Debates,* vol.132, No. 144, 3rd sess., 34th Parl., May 19, 1992, at p. 10854.)

I would therefore conclude that the federal referendum contemplated by the *Referendum Act* was aimed at all Canadians entitled to vote in a federal election.

The majority of the Federal Court of Appeal, [1992] 3 F.C. 611, was of the view that, when the appellant Haig moved from Ottawa to Hull, he exempted himself from the scope of the *Referendum Act* by virtue of being a non-resident of every province and territory to which the *Referendum Act* applied. Therefore, Haig could not challenge the *Referendum Act* because it did not apply to him. Consequently, the only legislation that Haig could attack was the Quebec legislation which lies outside the jurisdiction of the Federal Court of Canada.

The trouble with this approach is that it ignores the very purpose of the *Referendum Act* as stated above: to permit those Canadians entitled to vote in a federal election to accept or reject the Charlottetown Accord. The *Referendum Act* sought to co-ordinate a national referendum with the Quebec referendum, for which the underlying legislation had already been enacted. The aim of the *Referendum Act* was to include all Canadian citizens. If as a result of the requirements of the Quebec legislation, someone in the position of the appellant Haig was left out of the process he could, for the sake of argument, have launched a claim against two possible defendants: the province of Quebec and the federal government. I say no more about whatever rights he may have had against the province of Quebec because they are irrelevant to this appeal.

I agree with the appellant's submission that the federal legislation was aimed at a national referendum; to accomplish that end, it was co-ordinated with the Quebec referendum. As my colleague L'Heureux-Dubé J observes, the appellant unfortunately fell between the legislative cracks and was neither able to participate in the national referendum directly, nor was he able to participate indirectly through the Quebec referendum.

The question which then arises is whether his inability to participate in the referendum process amounts to a violation of his rights under the *Charter,* and it is to that question I now turn.

I agree with the view that the federal government is not legally obligated to hold referenda, nor is it legally bound by the results of any referenda it conducts. However, if the government chooses to conduct a referendum, it must do so in compliance with the *Charter. The Referendum Act* provided a legislative framework to allow Canadian citizens to express their political opinions. The referendum was an important expressive activity relating to constitutional change in this country.

The importance of the expressive activity in question was clearly evidenced by the statement of the Right Honourable Joe Clark, P.C., in moving the constitutional question to be put to Canadians in the referendum:

> Three major steps remain. The first is to invite the judgement of the Canadian people in a national referendum on October 26. *If Canadians vote yes, Parliament and legislatures would then act immediately to debate and, I expect, adopt the specific resolutions.* Then we would seek the unanimous agreement of the provinces to shorten the period of final ratification, in a way that could have these

> major constitutional changes approved and ratified and effective in law within a matter of months. (Emphasis added.)
>
> (*House of Commons Debates,* vol. 132, No. 166A, 3rd sess., 34th Parl., September 9, 1992, at p. 12786.)

Although Parliament was under no *legal* obligation to follow the results of the referendum, apparently a *political* obligation to do so had been assumed. Despite the absence of such a legal obligation, nevertheless, the referendum was an exceedingly important expressive activity that is worthy of *Charter* protection, as was acknowledged by Minister Danis in his comments quoted above.

The right to express opinions in social and political decision-making clearly attracts the protection of section 2 (b) (*R.* v *Zundel, [1992]* 2 S.C.R.731; *Irwin Toy Ltd.* v Quebec (Attorney General), [1989] 1. S. C. R. 927, at p.927). In *Native Women's Assn.* v Canada, [1992] 3 F.C. 192, Mahoney J A succinctly stated: "[c]ommunicating one's constitutional views to the public and to governments is unquestionably an expressive activity protected by paragraph 2(b)" (p. 211). I would agree. Casting a referendum ballot is an important form of expression which is worthy of constitutional protection. In my view, the appellant Haig's right to express his political views by participating in the referendum was guaranteed by section 2 (b) of the *Charter.* He was denied the right to participate and thus his section 2 (b) rights were violated.

Although the appellant Haig was free to express his views as he wished on the Charlottetown Accord prior to the vote, he was denied the ability to participate in the most important expressive activity, that of voting in the referendum. While the purpose of the *Referendum Act* was to include all voters, the effect was to deprive those residents of Quebec who were ordinarily resident in another province in the six-month period prior to the referendum of the ability to participate in expressive activity which is clearly protected under the *Charter.*

As the respondent Attorney General of Canada did not introduce any evidence on section 1, the violation of the appellant's 2 (b) rights has not been justified under section 1.

Under the circumstances, as the referendum has already taken place, any remedy is more theoretical than real. However, like Dècary J A, I would have sought to expand the definition of "elector" in section 3(1) of the *Referendum Act.* Relying on section 7(3) of the *Referendum Act,* which states that the *Canada Elections Act,* R.S.C., 1985, c. E-2, may be adapted "in such manner as the Chief Electoral Officer considers necessary for the purpose of applying that Act in respect of a referendum", the Chief Electoral Officer could have used section 9(1) of the *Canada Elections Act* to permit the appellant Haig to vote as Dècary J A outlined. Hopefully, the *Canada Elections Act* or the *Referendum Act* provisions will be clarified if Parliament decides to hold a referendum in the future.

In sum, I would allow the appeal with costs here and in the courts below, set aside the order of the Federal Court of Appeal, and substitute therefore an order declaring that the appellant was entitled to vote in the October 26, 1992 federal referendum as outlined by Dècary J A in the Court below.

SUPREME COURT OF CANADA

GRAHAM HAIG, JOHN DOE and JANE DOE

V

THE CHIEF ELECTORAL OFFICER

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF QUEBEC

CORAM: The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

THE CHIEF JUSTICE: I agree with Cory J with respect to the proper approach to the definition of residency for voting purposes. I also agree with Iacobucci J concerning section 2(b) of the *Canadian Charter of Rights and Freedoms* and with respect to his proposed disposition of this appeal. I would, therefore, dispose of the appeal as proposed by Iacobucci J.

FEDERAL COURT OF CANADA

TRIAL DIVISION

between

RICHARD SAUVE, Plaintiff,

and

THE CHIEF ELECTORAL OFFICER OF CANADA
THE SOLICITOR GENERAL OF CANADA
THE ATTORNEY GENERAL OF CANADA,
Defendants

and

between

T-1084-94

SHELDON, McCORRISTER, Chairman, LLOYD KNEZACEK, Vice-Chairman on their own behalf and on behalf of the Stony Mountain Institution Inmate Welfare Committee, and CLAIR WOODHOUSE, Chairman, AARON SPENCE, Vice-Chairman on their own behalf and on behalf of the Native Brotherhood Organisation of Stony Mountain Institution, and SERGE BELANGER, EMILE A. BEAR and RANDY OPOONECHAW.

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Elections *– Right to Vote – Whether inmates of Correctional Institutions have right to vote – Whether section 51(e) of the Canada Election Act is valid – Violation of the Canadian Charter of Rights and Freedoms.*

Background facts: *The plaintiffs who were inmates or former inmates of correctional institutions brought an action challenging the constitutionality of section 51(e) of the Canada Elections Act which purported to disqualify from voting at an election persons imprisoned in a correctional institution, serving a sentence of two years or more. The plaintiffs alleged that section 51(e) of Act contravenes both sections 3 and section 15 of the Canadian Charter of Rights and Freedoms.*

Held: *The section 51 (e) did not infringe section 15 of the Charter. However, section 51(e) did infringe section 3 of the Charter and was not saved by section 1.*

Case cited in the Judgement:

Sauvè v *Canada (Attorney General) (1988), 66 OR (2d) 234 (H.C); reversed (1992), 7 O.R. (3d)* 481 (C.A.) ("Sauvè No.1"); *affirmed [1993] 2 S.C.R. 438*
RJR – MacDonald The v *Canada (Attorney-General), September 21, 1995, unreported*
R. v *Oakes, [1986] 1 S. C. R. 103*
Irwin Toy v *Quebec (A.G.) [1989] 1 S. C. R. 927*
Rodriguez v *A.G. of Canada [1993] 3 S. C. R. 528*
R. v *Big M. Drug Mart Ltd., [1985] 1 S. C. R. 295*
Belczowski v *Canada [1992] 2 F.C.440, affirming [1991] 3 F.C.151 (T.D.)*
Reference Re Prov. Electoral Boundaries (Sask), [1991] 2 S. C. R. 158
R. v *Lyons [1984] S. C. R. 309*
R. v *Goltz [1991] 3 S. C. R. 485*
R. v *Butler [1992] 1 S .C. R. 462*
R. v *Laba [1994] 3 S. C. R. 965*
R. v *Edwards Books and Art Ltd [1986] 2 S. C. R. 713*
McKinney v *University of Guelph [1990] 3 S. C. R. 229*
Dagenais v *Canadian Broadcasting Corpn. [1994] 3 S. C. R. 835*
Thibaudeau v *Canada [1995] 2 S. C. R. 627*
Jackson v *Joyceville Penitentiary Disciplinary Tribunal [1990], 32 F.T.R. 96*
Symes v *Canada [1993] 4 S. C. R. 695*
Egan and Nesbit v *Canada [1995] 2 S. C. R. 513*

REASONS FOR JUDGEMENT

WETSTON J: The plaintiffs, who are inmates or former inmates of correctional institutions, are challenging the constitutionality of section 51(e) of the *Canada Elections Act* (the "CEA""), R.S.C. 1985, c. E-2, as amended by S.C. 1993, c. 19, section 23. The provisions, which came into force on May 6, 1993, states:

> 51. The following persons are not qualified to vote at an election and shall not vote at an election:
>
> .....
>
> (e) every person who is imprisoned in a correctional institution serving a sentence of two years or more.

This provision replaces a previous disqualification, which was struck down by the Supreme Court of Canada in 1993.

The plaintiffs allege that section 51(e) of the CEA contravenes both section 3 and section 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). The defendants admit that the impugned provision constitutes a *prima facie* breach of section 3 of the Charter; however, they maintain that the disqualification of prisoners, as set out in section 51(e) of the CEA, is justified under section 1 of the Charter, and does not discriminate within the meaning of section 15.

The present action comprises two separate actions that were joined and heard together. The plaintiffs are, or recently have been, inmates in Canadian correctional institutions. The plaintiff in the first case in Richard Sauvé. He is now on parole. There are a number of plaintiffs in the second case. Sheldon McCorrister, an Aboriginal, is the Chairman of the Stony Mountain Institution Inmate Welfare Committee. Lloyd Knezacek is the Vice-Chairman of that Committee. Aaron Spence, who is also an Aboriginal, is the President of the Native Brotherhood Organization. The Native Brotherhood Organization represents Aboriginal inmates at the Stony Mountain Institution, primarily on matters relating to Aboriginal culture and spirituality.

THE NATURE OF THE EVIDENCE

There were few adjudicative facts presented in this trial. Where evidence of such facts exists, it will be considered at the appropriate place in these reasons. Other than the relevant adjudicative and legislative facts to which I shall refer, the evidence consists almost entirely of expert opinions.

The Expert Witness

The experts, on behalf of both the plaintiffs and defendants, were almost exclusively academics who advanced opinions in the areas of political theory, moral philosophy, political philosophy,

philosophy of law, criminology, correctional policy, and penal theory. Given the issues in this case, the type of expert evidence adduced represents a most reasonable approach to assisting the Court in its determination as to whether the disenfranchisement of prisoners is justified.

Almost all of the defendants' witnesses are American citizens, American scholars, or American residents, or they have been primarily educated and trained in the United States. In contrast, most of the plaintiffs' experts are Canadian citizens, Canadian scholars, and Canadian residents. Given the international nature of academia, it is clear that all of the experts have multifaceted backgrounds and experiences. Dr. Pangle, for example, has even recently taken out Canadian citizenship.

None of the defendants' witnesses, despite their impressive academic backgrounds and contributions to scholarship, has ever considered the issue of prisoner disenfranchisement, before being retained by the Attorney General of Canada in this proceeding. Indeed, other than John Stuart Mill in a brief footnote reference, no well-known political theorist or moral philosopher, including de Tocqueville, Kant, Locke, Rousseau, or Hobbes, has ever considered this question. More recent political and moral philosophers, such as Rawls, Hart, Murphy, and Morris, has also not specifically considered this issue.

For the most part, with the exception of a report submitted by Dr. Colin Meredith, the evidence of the defendants may be characterised as academic and theoretical. While the plaintiffs also adduced considerable academic and theoretical evidence, on balance, their evidence is less lofty and is more tangible, particularly in relation to Canadian penology, social justice, and prisons. However, the evidence consists of virtually no observable phenomena. Indeed, the plaintiffs described the defendants' case as highly theoretical and abstract. While it is possible that some areas of social science theory may be confirmed by empirical observation, there was little in this case that could be assigned to that category. The evidence of the defendants was provided principally as part of an *ex post facto* analysis.

In weighing the evidence, I have considered each expert witness' skill, knowledge, training, experience, and the degree of attention which he or she gave to the matter in issue. Given the imprecise nature of the testimony, reason and common sense are even more important considerations in assessing the evidence. Furthermore, knowledge of Canadian society, laws, and institutions, and Canada's liberal democratic traditions, is also significant. I was also struck by the fact that three of the defendants' five expert witnesses are generally considered to represent non-mainstream positions in their respective theoretical disciplines. Although each expert, in this trial, has a well-established reputation, it is still necessary for the Court to analyse the evidence and to prefer to accept the testimony of one witness over that of another.

Plaintiffs Richard Sauvé and Aaron Spence

Two of the individual plaintiffs, Richard Sauvé and Aaron Spence, also provided testimony in the present matter. Mr Sauvé was convicted of aiding and abetting in the murder of a rival bike-gang member. He was sentenced to twenty-five years of incarceration, and was released in May of 1994. Since his release, Mr. Sauvé has been living in a half-way house, and currently works as a furniture-maker. He has worked with young offenders in a programme known as Youths at Risk, and is now a candidate for a Master of Arts degree in Criminology from the University of Ottawa. An agreed transcript of his evidence from a previous trial involving prisoner voting rights was introduced in this case: See *Sauvé* v *Canada (Attorney General)* (1988), 66 O.R. (2d) 234 (H.C.); reversed (1992), 7 O.R. (3d) 481 (C.A.) (*"Sauvé No.1");* affirmed [1993] 2 S C R 438.

Mr. Sauvé believes that offenders are not born as criminals, but become criminals as a result of circumstances. He asserted that inmates would feel more linked to society if they were granted the right to vote. Furthermore, Mr Sauvé testified that he had not lost his right of citizenship, nor his concern for society and his country, when he was sent to prison. He implied that prisoners eventually must return to society, and indicated that prisons are hostile environments containing many hurt individuals. He talked about various voluntary efforts within the Collins Bay penal institution which were organised by prisoners, including the sponsorship of camps for disadvantaged kids, foster parents, and a special olympiad for the "developmentally handicapped".

Mr. Spence has a very different criminal record from that of Mr. Sauvé. Mr Spence is an Aboriginal who is presently serving four years of incarceration for a combination of offences, including break and enter, theft, breach of a recognisance, and assault against another Aboriginal person. His record is extensive, and dates back to 1984. Mr Spence now considers himself on the road to rehabilitation. He agreed that he has been acting dysfunctionally, selfishly, and irresponsibly. He also agreed that the right to vote is valuable, and that he does feel a deprivation as a result of this loss. He also feels that being inside a penal institution does not mean that his family on the outside are not being affected by government actions. Mr Spence knows that he will return to society. In his words, "at one time or another, we are going to be part of that society, whether we like it or not."

ANALYSIS

Section 3 of the Charter: The Democratic Right to Vote

The defendants concede that section 51 (e) of the CEA constitutes a *prima facie* breach of section 3 of the Charter. In my view, that is the appropriate position to take. Accordingly, the burden is on the defendants to prove that the impugned provision is a reasonable limit that is demonstrably justified in a free and democratic society, pursuant to section 1 of the Charter.

In *RJR-MacDonald Inc.* v *Canada (Attorney General),* September 21, 1995, unreported, the Supreme Court of Canada recently considered section 1 of the Charter, and explicitly adopted the approach to that section, as first set out in *R.* v *Oakes*, [1986] 1 S. C. R. 103. In further elaborating upon the Oakes analysis, McLachlin J noted the following, at pages 4–5:

> The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason.
>
> The process is not one of mere institution, nor is it one of deference of Parliament's choice. It is a process of *demonstration.* This reinforces the notion, inherent in the word "reasonable", of rational inference from evidence or established truths. (Emphasis in original.)

In short, the section 1 analysis is an exercise based not on abstractions, but on the facts of the case and the proof offered to justify the law. As stated by McLachlin J, at page 8:

> Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as unique socio-economic phenomenon, of which Parliament is deemed the best judge. This would undercut the obligation on Parliament to justify the limitations which it places on *Charter* rights.

Depending upon the situation which the law is attempting to address, the degree of deference which the Court should accord to Parliament's choice will vary. In this regard, McLachlin J stated the following, at page 9:

> As with context, care must be taken not to extend the notion of deference too far .... Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the constitution. But the Courts also have an important role: to determine, objectively and impartially, whether Parliament's choice falls within this limiting framework of the constitution.

The discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view: *per* Iacobucci J, in *RJR-MacDonald Inc., supra,* at page 3.

A previous version of section 51(e) of the CEA was struck down by the Supreme Court of Canada in May 1993: *Sauvé* v *Canada (Attorney General),* [1993] 2 S C R 438. In the present case, the defendants argue that the Court should defer to Parliament's choice when it decided to re-enact a provision which would disenfranchise offenders who are imprisoned for a period of two or more

years. In this regard, I am guided by the principles as outlined in *RJR-MacDonald Inc., supra.* In that case, a majority of the Supreme Court of Canada agreed that some deference may be shown to legislators, and recognition should be given to the difficulties inherent in the process of drafting rules of general application. However, the Court did caution that deference should not be taken too far: *per* McLachlin J in *RJR-MacDonald Inc., supra,* at page 9.

According to McLachlin J, in *RJR-MacDonald Inc., supra,* it is always difficult to determine when Parliament should be shown a greater degree of deference. It has been suggested that greater deference may be more appropriate in situations where the law is concerned with the competing rights of different sectors of society, rather than in cases which involve a contest between the individual and the State as the singular antagonist: *Irwin Toy* v *Quebec (A.G.), [1989]* 1 S.C.R. 927, at pp. 993–994; *Rodriguez* v *A.G. of Canada, [1993]* 3 S.C.R. 528, at p 563. Despite some submissions to the contrary which the defendants did not vigorously pursue, I find that this case is, on balance, one in which the State performs the role of singular antagonist. In any event, my examination of the evidence in this matter is made in relation to the civil standard of proof on a balance of probabilities, as required by *RJR-MacDonald Inc., supra,* at p. 10.

1. What are the Defendants' objectives, and are these pressing and substantial?

At this stage, the Court must determine whether the objectives of the infringing measure are sufficiently important to be capable, in principle, or justifying the limitation. To meet this test, the objectives must be of pressing and substantial importance.

(a) Objectives

The defendants submit that section 51(e) of the CEA advances two principal objectives:

(i) the enhancement of civic responsibility and respect for the rule of law; and,
(ii) the enhancement of the general purposes of the criminal sanction.

In the defendants' view, prisoners serving sentences of two years or more do so for reasons relating to long criminal records and/or particularly serious criminal convictions. It is this bad conduct which attracts the important objectives.

With respect to the first objective, the defendants argue that the provision is designed to cultivate, among Canadian citizens, an appreciation for, and an understanding of, the relationship between individuals' rights and societal responsibilities, i.e. good citizenship. In addition, the defendants argue that the provision seeks to denounce citizens who have, through their serious criminal conduct, acted in a grossly disrespectful manner toward the lives, property, or dignity of their fellow citizens. This denunciatory message aims to affirm the connection between participation in the voting process and commitment to the rule of law.

The defendants submit that the second objective of the legislation is the enhancement of the general purposes of the criminal sanction. In their view, the suspension of an inmate's right to vote until he has been released from prison sends a message which has a retributive, denunciatory, and morally-educative function.

The plaintiffs do not fundamentally disagree with the objectives of good citizenship, respect for the rule of law, and punishment of the guilty, upon which the defendants' case is based. However, they contend that the defendants' case is abstract, generalised, symbolic, and unrealistic, and that the objectives of the impugned legislation remain ambiguous. The plaintiffs also submit that the two-year cut-off is arbitrary, and was chosen for administrative convenience. Furthermore, the plaintiffs submit that the inmate disqualification operates simply as a form of additional gratuitous punishment, so as to provide comfort to those outside of prison by further stigmatising inmates as social outcasts disconnected from society.

In *R.* v *Big M Drug Mart Ltd., [1985] 1 S. C. R. 295,* at p. 335, Dickson C J noted that the purpose of legislation "is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable". Accordingly, in order to determine the objectives of section 51(e) of the CEA", it is necessary to examine, in the context of the broad social and political factors, the impact which the provision has on constitutional rights. In this regard, a number of factors may provide important insight into the defendants' objectives. Such factors include the jurisprudence surrounding the impugned provision's predecessor legislation, and the legislative history and legislative text of the present impugned provision.

Prior State of the Law

The previous version of section 51(e) of the CEA provided as follows:

> 51. The following persons are not qualified to vote at an election and shall not vote at and election:
> .....
> (e) every person undergoing punishment as an inmate in any penal institution for the commission of any offence.

This provision was found to contravene section 3 of the Charter in a judgment pronounced by the Supreme Court of Canada on May 27, 1993: *Sauvé* v *Canada (Attorney General), supra.* In that case, an appeal from a judgement of the Federal Court of Appeal in *Belczowski* v *Canada, [1992] 2 F.C. 440,* affirming *[1991] 3 F.C. 151 (T.D.),* was heard concomitantly with an appeal from a judgement on the Ontario Court of Appeal in *Sauvé No. 1, supra.*

In *Belczowski, supra,* the defendants argued that there were three objectives associated with the former version of section 51(e) of the CEC; to affirm and maintain the sanctity of the franchise

in our democracy; to preserve the integrity of the voting process; and to sanction offenders. In that case, Hugessen J A stated the following, at p 456:

> [T]he most striking point about the alleged objectives of paragraph 51(e) is that they are all symbolic and abstract. The appellant admits as much, but maintains that this fact does not prevent them from being legitimate objectives of legislation...For my part, I must say that I have very serious doubts whether a wholly symbolic objective can ever be sufficiently important to justify the taking away of rights which are themselves so important and fundamental as to have been enshrined in our Constitution.

In refusing to accept the alleged objectives, Hugessen J A held that there was no evidence to prove that the alleged purposes of section 51(e) of the CEA was the objectives which Parliament had in mind when it adopted the legislation. Moreover, upon a textual analysis, he could not, with confidence, assign any legislative purpose to the provision: *Belczowski, supra,* at p. 454.

In *Sauvé No. 1, supra,* the Ontario Court of Appeal more or less fully agreed with the reasons contained in *Belczowski, supra.* Arbour J A believed that the most plausible objective for the disenfranchisement of inmates was the sanctioning of offenders. In her view, if the former version of section 51(e) was meant to levy a sanction, the punishment was imposed as a result of imprisonment, and not as a result of the commission of any particular offence. The Ontario Court of Appeal also struck down the provision.

In *Sauvé* v *Canada (Attorney General), supra,* Iacobucci J, speaking for the majority of the Supreme Court of Canada, stated as follows, at pp. 439–440:

> We are all of the view that these appeals should be dismissed.
>
> The Attorney General of Canada has properly conceded that section 51(e) of the *Canada Elections Act, R.S.C. 1985,* c. E-2, contravenes section 3 of the *Canadian Charter of Rights and Freedoms* but submits that section 51(e) is saved under section 1 of the *Charter.* We do not agree. In our view, section 51(e) is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the section 1 jurisprudence of the Court.

This is the entire decision of the Court. In expressing its view that the previous legislation was drawn too broadly and failed to meet the proportionality test, the Supreme Court of Canada made no comments regarding Parliament's alleged objectives in denying prisoners the right to vote.

The first objective of section 51(e) of the CEA is the enhancement of civic responsibility and respect for the rule of law. Unlike in *Belczowski, supra,* the defendants no longer assert that the

integrity of the voting process is affected by the provision; rather, as part of their contention, they now assert that one of the effects of the legislation is the removal of untrustworthy votes from the electoral process. This, then, is slightly different from the allegations advanced in *Belczowski, supra.* In addition, the evidence adduced by the defendants is different from, and considerably more extensive than, that in *Belczowski, supra.*

The defendants assert that the Federal Court of Appeal in *Belczowski, supra,* was in error when it held that the predecessor provision failed the first stage of the *Oakes test.* The defendants claim that the Federal Court of Appeal ignored the broader philosophic and historical development of the right to vote when it considered the legislative objectives: *Reference Re Prov. Electoral Boundaries (Sask.),* [1991] 2 S.C.R. 158 (*"Saskatchewan Boundaries"*). In that case, the Supreme Court of Canada, at p. 181, determined that the "broader philosophy underlying the historical development of the right to vote – a philosophy which is capable of explaining the past and animating the future" must be considered. The Court noted that both the ideal of a free and democratic society, as well as the scope of the right to vote, must be considered when determining whether current qualifications or limitations on that right can be demonstrably justified.

The defendants argue that the Federal Court of Appeal erred when it did not consider *Saskatchewan Boundaries, supra.* The defendants further assert that the objectives in the previous case were implicity adopted by the Supreme Court of Canada in *Sauvé* v *Canada (Attorney General), supra*, as the Supreme Court made no adverse comments regarding the objectives; therefore, while stated differently in this case, the objectives should be accepted by this Court. I do not accept this argument since it would be a bold step on my part to infer that the brief reasons of the Supreme Court would support this assertion.

The plaintiffs submit that the defendants' arguments in the present case do not differ in substance from those in the previous case, wherein the objectives of civic virtue and punishment were rejected. They therefore contend that the Court is bound by the previous decision in *Belczowski, supra.* In that case, Hugessen J A stated the following at p. 459: "[i]t would appear to me that the true objective of [the former] paragraph 51(e) may be to satisfy a widely held stereotype of the prisoner as a no-good, almost sub-human form of life to which all rights should be discriminately denied." I am also of the opinion that I am not bound by *Belczowski, supra,* as the impugned provision is tailored differently. That is not to say, however, that the approach and rationale of the Federal Court of Appeal are not instructive.

The Legislative History

The plaintiffs argue that, from an historical perspective, Canada's record on voting rights is not exemplary. Indeed, it could be argued that extensions of the franchise have been motivated by essentially moral principles. In Canada, it is not just prisoners who have experienced a denial of the right to vote. For example, Aboriginal people living on reserves were denied the vote until

1960. While there are other examples of disqualifications of marginalised or disadvantaged people in the past, my review of the legislative history will only deal with the debates and proceedings that gave rise to the enactment of the present version of section 51(e) of the CEA, which deals with prisoners.

In 1993, the CEA was substantially amended by Bill C-114. However, prior to the enactment of the amended CEA", a Royal Commission on Electoral Reform and Party Financing (the "Lortie Commission") was established, in November of 1989, for the purpose of inquiring into the appropriate principles and processes that should govern, *inter alia,* the election of members of the House of Commons. The Lortie Commission's Final Report was submitted to Cabinet in November 1991. The report was comprehensive and covered numerous topics, including the disqualification of certain groups of voters, among whom were prison inmates.

As is typical of Royal Commissions, numerous research studies accompanied the Lortie Commission's recommendations. The prisoner disqualification, in particular, was addressed in a research study entitled "Voting Rights for Prisoner Inmates" in which the authors recommended that all prisoners be granted the right to vote. The Lortie Commission did not accept that recommendation; rather, it concluded that persons who had been convicted of an offence punishable by a maximum of life imprisonment, and who had been sentenced to a prison term of ten years or more, should be disqualified from voting during the period of incarceration (Recommendation 1.2.7.). Obviously, parliamentarians had full access to the research studies as well as the Final Report of the Royal Commission.

As part of the consideration of Bill C-114, there was also an intensive review by a Special Committee on Electoral Reform. Considerable discussion of the prisoner voting rights issue also took place during the Debates of the House of Commons and the Senate.

The Minutes of the Proceedings of the Special Committee on Electoral Reform reveal Parliament's concern that the courts should defer to Parliament on the issue of the prisoner disqualification. The Special Committee spent a great deal of time trying to determine whether a two-year limit for the disqualification was appropriate, or whether a cut-off of five years, or seven years, or ten years (as recommended by the Lortie Commission) was more justifiable. Eventually, the Special Committee recommended a two-year cut-off since, in their view, serious offenders may be considered to be those individuals who have been sentenced to a term of two years or more in a correctional institution. Generally, that means a federal penitentiary, but not exclusively.

It is evident from the Minutes that members of the Special Committee expressed anxiety over the fact that the most serious offenders could be given the right to vote. In this respect, the objective of enhancing punishment through the disenfranchisement of prisoners was clearly considered by the Committee. For instance, during the discussions of the Committee, it was expressed that there must be some limits on the right to vote, and that punishment encompassed the disenfranchisement

of all incarcerated offenders: *Minutes of Proceedings and Evidence of the Special Committee on Electoral Reform,* Issue No.12, at pp. 12: 18–12: 19.

The House of Commons Debates reveal the differences of opinion expected when Parliamentarians are dealing with a knotty social policy question. A number of legislators were opposed to any type of disqualifications; others were clearly in favour of a disqualification on the basis of the two year cut-off; others favoured something in between. While the objective of the enhancement of civic responsibility was not expressly addressed in the House of Commons Debates, it was asserted that all Canadians should be made aware of the existence of the inmate voting disqualification, and its imposition as a consequence of a sentence of imprisonment: *House of Commons Debates ("HOC Debates"),* Vol. 132, No. 233, at pp. 18015–18107. These comments imply that the government intended the prisoner disenfranchisement provision to have an educative effect. Similarly, it was expressed that persons who choose to act against society must suffer the consequences, including the denial of freedom and the loss of privileges which free and responsible citizens enjoy – one of which is the right to vote: HOC *Debates,* vol. 132, No. 233, at pp. 10817–18019. This suggests that one purpose of the impugned provision relates to civic responsibility and respect for the rule of law.

The Senate Debates also reveal the considerable ambivalence which many Senators exhibited toward the continuation of any prisoner disenfranchisement. In addition, the Senate Debates reflect the difficulty which Senators experienced in attempting to determine the appropriate line to be drawn. As might be expected, the Debates do not illuminate the objectives clearly although, as indicated above, there is some glimmer of light.

The Legislative Text

The defendants argue that the stipulated two-year cut-off contained in section 51(e) of the CEA indicates Parliament's desire to address a category of persons whose conduct was sufficiently offensive that it resulted in a serious period of imprisonment. A report file by Dr. Colin Meredith provided a statistical breakdown of serious crimes for which federal inmates are imprisoned, as well as the significant cumulative record of most of those federal inmates. As of April 1995, there were 14,179 inmates in federal penitentiaries. The Meredith statistics demonstrated that each of these offenders had committed, on average, 29.5 offences. Indeed, in the present case, an examination of the criminal records of two of the plaintiffs, Richard Sauvé and Aaron Spence, confirms Dr. Meredith's findings. Mr. Sauvé, for example, was convicted of murder as an aider and abettor. While he committed only one significant offence, he was sentenced to a period of twenty-five years in prison. In contrast, Mr. Spence's criminal record reveals a history of repeated crimes which eventually led to a four-year term of imprisonment for armed robbery and related offence. Clearly, both individuals engaged in serious criminal conduct, which the courts punished by way of prison sentences of more than two years. Thus, the records of Mr. Sauvé and

Mr. Spence also lend support to the defendants' assertion that prison sentences of two years or more target serious criminals and repeat offenders.

The legislative text of section 51(e) of the CEA makes it clear that the disenfranchisement of offenders relates in obvious ways to the commission of serious criminal acts. At this stage, I am not commenting upon the causes of crime, nor am I reflecting upon the circumstances underpinning particular crimes; rather, consideration is merely being given to the conspicuous relationship between the denial of the right to vote and serious criminal conduct.

The application of section 51(e) is not offender-specific. It does not take into account the particular circumstances of the inmate before and after incarceration. It is sentence-specific. I am satisfied that sentences of two years or more involve serious crimes that reflect conduct which a court has determined to be sufficiently distasteful to have warranted such a sentence.

In the context of the considerable amount of study and discussion surrounding prisoner disenfranchisement before Bill C-114 was passed, I find a clear concern by Parliament regarding the characteristics of civic responsibility and respect for the rule of law in Canadian society. Furthermore, there is evidence of an intent to punish individuals who commit serious anti-social acts.

Specifically, the legislative text, in conjunction with the proceedings of the Special Committee of Electoral Reform, reveal that the provision is clearly directed at imposing the sanction of disenfranchisement as a further punishment for serious crime. Moral education also appears to be a rationale for this additional sanction. The objective of enhancing civic responsibility through the operation of section 51(e) of the CEA is more elusive. Nevertheless, the Debates of the House of Commons do reveal that some consideration was given to the fact that the impugned provision is capable of sending a message to offenders, and to the general public, about the importance, in a democracy, of the right to vote.

The plaintiffs contend that the message sent by section 51(e) is merely symbolic. In their view, a symbolic message is unable to support objectives which underpin a provision that is violative of a Charter right. Does this mean that a law cannot have a legitimate symbolic function?

In *The Sociology of Law* (London: Butterworths, 1984), the author, R. Cotterrell, states, at page 108:

> In a thoughtful and stimulating book, *The Symbols of Government,* published in 1935, Thurman Arnold argued that the idea of law as a mechanism of social integration based on the interpretation of societal values can be maintained despite the diversity of individuals' beliefs and aspirations. In Arnold's view the proclamation and maintenance of symbols – values, ideals, and ways of thinking about government and society – to which individuals can adhere, is a fundamental

> task of law by which it contributes to social integration. The special function of development and application of legal doctrine is to create the illusion of unity, coherence and system in thought and belief out of the reality of the irreconcilable diversity, contradiction and opposition of individual and group interests and desires. Thus, for Arnold, law is primarily a way of thinking about government, a reservoir of emotionally important social symbols – of freedom of contract, equality before the law, personal and political liberty, sanctify of property, 'law and order', equity and fairness, moral responsibility – many of them mutually inconsistent if applied in practice with the meaning that they possess as symbolic ideals.

At p. 110, the author further states:

> The ideal that law has symbolic functions suggests that the effectiveness of a law does not necessarily depend on whether it can be invoked or enforced.

Of course, at this stage, the Court must examine the objectives of section 51(e) of the CEA; hence, Parliament's rhetoric is more significant than any prospective evidence relating to the operation of the law or the effectiveness of the law. That discussion will be left to the proportionality analysis.

Accordingly, I find that section 51(e) has, as its twin objectives, those submitted by the defendants.

(b) Pressing and Substantial Objectives

In support of its assertion that the two objectives which section 51(e) of the CEA was designed to achieve are sufficiently pressing and substantial, the defendants rely upon the underlying historical values and principles of traditional liberal democracy, of which respect for the rule of law plays a momentous part. In fact, the defendants submit that the enactment of section 51(e) represents Parliament's intention to reaffirm Canada's links with the philosophical and political values which underlie the western liberal democratic tradition, and the penological aims which help to reserve it. A considerable portion of the defendants' evidence related to the philosophical, political, and penological values and goals which liberal democracies, in theory, generally foster.

The defendants argue that the disenfranchisement of prisoners is a well-accepted practice in many liberal democratic societies. However, it is not a universal democratic practice. In Denmark, Sweden, Ireland, Israel and Switzerland, for example, prisoners vote. In Australia, inmates serving sentences of five years or more are disqualified from voting in federal elections. In Greece, prisoners serving life sentences or indefinite sentences are disqualified; otherwise, the matter is left to the discretion of the courts. In France and Spain, disqualification depends on the sentence of the court. In England and Japan, the disqualification is total. In the United States,

most states disqualify inmates from the voting process. Some states disenfranchise offenders permanently, while only two states do not disqualify at all.

A similar argument relating to prisoner voting rights in other jurisdictions was raised in *Belczowski, supra,* before Mr. Justice Strayer. In that case, however, Strayer J was not persuaded that the existence of corresponding legislation in other jurisdictions could meaningfully assist the Court in its determination. I agree with that position. After surveying examples of foreign law which deal with the issue of voting rights for prisoners, it is difficult to draw any meaningful conclusions as to the reasons why prisoners are disenfranchised in some free and democratic societies but not in others.

The plaintiffs argue that there is no single, generally-accepted theoretical basis for contemporary democracy, and no unified western tradition of political theory. Consequently, the enhancement of civic responsibility should not be a significant objective of public policy. The plaintiffs also assert that a retributive philosophy of punishment invoked by the defendants does not correspond to the empirical realities of present-day Canadian society.

At this stage, attention must be focused on the democratic ideals which Canada, as a free and democratic society, fosters. There may well be no unified western tradition of political theory, but it is clear from the evidence in this trial that civic and moral responsibility are key components of our liberal democratic traditions. In fact, the Preamble to the Charter declares that Canada is founded upon principles that recognise "the rule of law". The rule of law may be the subject of a number of interpretations, such as a call to law and order, or a legal ordering of social life; S. Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), at pp. 235–243. The ideals of the rule of law express the requirements of legal rules formulated in such a manner as to secure voluntary compliance with the standard of conduct which they set. Of course, while no legal system can expect that all of its laws will be known by the public, it is nevertheless important, as part of the shaping of the voluntary social order, for persons to know in advance what the consequences of their actions might be; E. Colvin, "Criminal Law and The Rule of Law" in *Crime, Justice & Codification* (Toronto: Carswell, 1986), at p. 125.

Section 51(e) of the CEA" has a punitive aspect. There is little doubt that retribution is a concept that is not alien to criminal sanctions. Indeed, sentences, are invariably partly punitive in nature. As stated by La Forest J in *R.* v *Lyons, [1984]* S.C.R 309, at p. 329: "In a relative system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender." See also *R.* v *Goltz, [1991]* 3 S.C.R. 485, at p. 503.

Accordingly, I find the objectives of section 51(e) of the CEA to be pressing and substantial.

II Are the means embodied in section 51(e) of the CEA proportional to the Objectives and to the effects of the provision?

(a) Rational Connection

The first stage of the proportionality test requires that the means chosen to fulfill the legislative objectives bear a rational connection to those objectives. In *RJR-MacDonald Inc., supra,* at p. 3, Iacobucci J stated that rational connection "is to be established upon a civil standard through reason, logic or simply common sense. The existence of scientific proof is simply of probative value in demonstrating this reason, logic or commons sense. However, it is not dispositive or determinative of the issue." Similarly, Sopinka J, in *R.* v *Butler, [1992]* 1 S.C.R. 462, at p. 502, indicated that "[i] in the face of inconclusive social science evidence ... in choosing its mode of intervention, it is sufficient that Parliament had a *reasonable basis"* (Emphasis in original). Sopinka J also recognised that the government must be afforded a margin of appreciation to form legitimate objectives based upon somewhat inconclusive social science evidence.

In the present case, the casual relationship between the infringement of the right to vote and the legislation's objectives are not in any way observable, demonstrable, or empirically measurable. The Court must determine, then, whether the evidence establishes that it is reasonable or logical to conclude that there is a rational link between the disqualification and the objectives.

For the most part, the evidence before the Court consisted of expert opinions of non-empirical nature. However, there was some evidence, provided by Mr. Spence, Mr. Sauvé, and the Meredith report, which suggests that a nexus exists between the impugned provision and criminal conduct. The totality of this evidence when viewed from the standpoint of reason or common sense, must be sufficient to establish, on the balance of probabilities, a link between disenfranchisement and the objectives advanced by the defendants.

Can it be said, on the basis of logic and common sense, that prisoner disenfranchisement for serious conduct is rationally connected to the goal of enhancing civic responsibility and respect for the rule of law? Regarding civic responsibility, there is no evidence of a nexus other than political and philosophical theory. Regarding respect for the rule of law, it is clear that the members of the federal inmate population have manifestly acted contrary to, and in defiance of, the social order.

The defendants contend that section 51(e) of the CEA deprives certain persons of the right to participate in political decision-making by virtue of having demonstrated disdain for civic responsibility and the rule of law through the commission of serious crimes. By so denouncing this bad conduct, it is contended, Parliament has attempted to connect the right to vote in a federal elections with the objective of establishing a minimal standard of civic responsibility.

The defendants urge the Court to adopt an approach as outlined in *Saskatchewan Boundaries, supra,* which suggests that an analysis under section 3 of the Charter must be animated by a consideration of the scope, including qualifications, of the right to vote in a free and democratic society. Consequently, many of the defendants' expert witnesses have advanced political, philosophical, and penological arguments explaining why many western liberal democracies have qualified, and continue to constrain, in one manner or another, the prisoner's right to vote.

Dr. Thomas Pangle, for the defendants, is a political theorist. He is a well-published author and a highly-respected academic. He is American by birth, and recently became a naturalised Canadian citizen. Dr. Pangle examined the elements of a free society and a democratic society in order to determine if section 51(e) of the CEA is consistent with the theoretical precepts. He relied upon the theories of "the great thinkers" of the past who have provided the framework of discourse concerning human rights, constitutions, republicanism, and liberal democratic theory. He is supportive of disenfranchisement as one of the tools capable of promoting a minimal standard of civic responsibility.

Dr. Pangle indicated that the criminal conduct in which offenders have engaged merits their disenfranchisement for three reasons:

In the first place, the criminal behaviour, the serious criminal behaviours for which they have been sentenced indicates a clear and flagrant disrespect for the welfare of fellow members of the community and one of the most fundamental aspects of responsible voting is voting with a view to the welfare of the rest of the community. ... In the second place, these persons have been convicted of misconduct that indicates not only a disrespect for the law. Now, in a democracy, law means something quite different from what it means in other forms of government. In a democracy, disrespect for law is disrespect for the electoral process which is the original source of the legitimacy of law. The purpose of an election is to select those representatives who make our laws. Therefore, to disrespect the law is to disrespect the goal, and therefore the process, the electoral process that culminates in and finds its fruit in that goal, the law... and then finally in the third place... it also indicates a disrespect for or a failure to grasp the implicit commitment one makes as a member of the social contract to respect the process and the outcome of the process that creates the laws in a contractual society.

Dr. Pangle emphasised that a conduct-driven disqualification, as a minimum standard, is perfectly consistent with the generosity of spirit that pervades a pluralistic democracy, wherein all citizens are free and equal in the eyes of the State. It is not based on status or virtue.

Dr. Christopher Manfredi, for the defendants, is an expert in constitutional and political theory, and political philosophy. He is also a well-published author. He is Canadian, but did his graduate studies in the United States. Dr. Manfredi testified that every liberal democracy restricts access to the franchise in order to maintain a connection between the members of the electorate and their communities. In this regard, various restrictions are attached to the right to vote, including

citizenship restrictions and age restrictions. In Dr. Manfredi's opinion, as long as there are no positive prerequisites for voting (as with a literacy test, for example), and the application of disenfranchisement is universal (unlike with age restrictions), then it is not undemocratic to restrict access to the franchise.

Dr. Manfredi testified that there is a rational connection between the inmate voting disqualification and good citizenship which is necessary for the proper functioning of liberal democratic self-government. He contended that serious criminal behaviour is an appropriate indicator that individuals lack the character necessary to ensure that they will exercise their civic responsibility seriously and in a spirit of good citizenship. In this regard, Dr. Manfredi felt that civic virtue referred to the virtues of a liberal democratic citizenship, which relate to factors of empathy and self-control; he did not believe that civic virtue entailed a positive test wherein individuals have to prove, in some way or another, that they are decent and responsible. Moreover, in his opinion, the health of a liberal democracy requires and empathetic and self-controlled citizenry. In his view, it is reasonable to suspend an individual offender's right to participate in the electoral process until the offender has acquired the characteristic virtues of civic responsibility and good citizenship which are necessary for liberal democratic participation.

In addition, Dr. Manfredi expressed his view that a willingness on the part of individuals to participate in a collective action, such as voting, is determined, to a large extent, by the psychic and social benefits that arise from that activity. According to Dr. Manfredi there is a logical inference, based on empirical studies, that participation in the voting process can have beneficial effects on the electorate.

The plaintiffs argue that there is no rational connection between the denial of the right to vote in federal elections and the government's first objective, since no proof has been offered that the class affected under the impugned provision is co-extensive with indecent citizens. The plaintiffs point out that the provisions catches many citizens who still deserve the vote because they do not, in fact, lack civic virtue. They argue that many individuals who are disqualified under section 51(e) of the CEA are not manifestly indecent or evil; rather, they are, themselves, the victims of social impoverishment, abusive upbringing, alcoholism, other addictions and diseases, or other social causes of crime, including poverty and illiteracy. For example, as recognised repeatedly by judicial inquiries and other studies, much of the crime committed by Aboriginal people falls into his category.

With respect to this argument, the plaintiffs contend that the Constitution cannot be interpreted in isolation from the society in which it is rooted. In their view, socio-economic background and a lack of opportunities can lead individuals to commit criminal offences. If this fact is denied, according to the plaintiffs, then the reality of the composition of the prison population is ignored.

Additionally, the plaintiffs contend that the impugned provision fails the rational connection test because the disenfranchisement of a minority of sane, adult citizens merely promotes intolerance

and stereotyping within society generally, and aggravates the alienation of those who are capable of dealing with it.

Dr. Grant Amyot, for the plaintiffs, is an academic specialising in comparative politics and political theory. Dr. Amyot rejected the view that section 51(e) of the CEA fosters civic virtue in the population as a whole by educating citizens about the standards of civic responsibility. He contended that there was no evidence of any nexus between the disenfranchisement of prisoners and any moral education effects of the law. In fact, he indicated that there was no empirical evidence of any such morally-educative effects. Moreover, Dr. Amyot asserted that there was no evidence to demonstrate any connection between responsible citizenry and the disenfranchisement of prisoners. In contrast, he suggested that theorists of participatory democracy, as well as many communitarians in general, would argue that the enfranchisement of prisoners, and not the converse, would contribute to civic virtue and good citizenship by educating the prisoners themselves about these qualities.

Dr Arthur Schafer, for the plaintiffs, is an academic with expertise in biomedical ethics, jurisprudence, and moral and political philosophy. Professor Schafer strongly disagreed with the prisoner disqualification, suggesting that no rational connection can exist between the legislation and its first objective. In his view, most Canadians are not even aware of the inmate disqualification; accordingly, it can serve no useful purpose.

The plaintiffs are quite correct in asserting a complete lack of empirical evidence to support the defendants' case regarding the enhancement of civic responsibility. However, this is not determinative of the matter. Rather, the real question is whether or not there exists a rational or common sense basis, as indicated in *RJR-MacDonald Inc., supra,* upon which it can be said that the disqualification is clearly intended for a person who engaged in a particular type of disagreeable anti-social conduct. In my view, after considering the evidence, I find that there exists a rational connection between disenfranchisement and enhancement of civic responsibility and respect for the rule of law.

While most laws are symbolic and carry messages to society, not all laws seek to alter human behaviour. The criminal law is one example of a law that does attempt to shape a voluntary social order. In the same sense, I think it can be said that section 51(e) of the CEA was intended to have a similar effect. It is reasonable to suggest that the provision sends a very strong message that certain forms of criminal behaviour are not acceptable in a society that is both free and democratic. I find the morally-educative function of the law to be compelling. While this education may have little or no effect on the offender, it nevertheless sends a powerful message to society that good citizenship and serious crimes are inconsistent with liberal democratic principles.

No doubt it is true that many individuals who have committed crimes are not prosecuted, and are therefore not sentenced to prison. There are cruel anti-social offenders who slip through the

system; however, the fact that the "few pay for the many" is not a basis for failing to recognise the nexus between the legislation and its first objective. Accordingly, section 51(e) of the CEA is rationally connected to the defendants objective of enhancing civic responsibility and respect for the rule of law.

The defendants argue that the disenfranchisement of prisoners is also connected to, and supportive of, the general purposes of the criminal sanction, in so far as such a deprivation has a potentially retributive, denunciatory, and morally-educative role. The defendants argued that retribution is not the same as vengeance or revenge; rather, it operates as a proportionate response to wrong-doers who have committed crimes against individuals, and against society generally. Indeed, an examination of the evidence of Mr. Sauvé and Mr. Spence clearly indicates that they both perceive the deprivation as a loss of something valuable.

According to Dr. Manfredi, the principle of just deserts or proportionate punishments is imposed primarily to express society's moral condemnation of criminals acts. Dr. Manfredi contrasted the retrospective nature of the just deserts approach with the prospective nature of other sanctions, including incapacitation, deterrents (both general and specific), and rehabilitative sanctions which seek to change the character and behaviour of criminal offenders. In his opinion, the disqualification is a means of expressing society's abhorrence of a breach of the social contract.

Dr Jean Hampton, for the defendants, is an American citizen who was educated in the United States. As an academic, she has published numerous articles on subjects relating to moral, political, and legal philosophy. Dr. Hampton addressed the relationships among the expressive aspects of retribution, denunciation, and the moral education theory of punishment. She is a firm proponent of the theory of punishment. In her opinion, the health and well-being of any free and democratic state must be preserved, in part, by punishment, which, due to moral indignation, requires a suspension, or perhaps a revocation, of rights. In Dr. Hampton's view, the most important aspect of a retributive punishment is its victim-based response to wrong-doing. She submitted that punishment must attempt to provide individuals with moral reasons for choosing not to commit crimes. This forms part of the moral education theory of punishment.

Dr. Ernest Van den Haag, for the defendants, has a multifaceted background and may simply be described as an "intellectual". He specialises in law, sociology, and psychology. Dr. Van den Haag focused on the various purposes of punishment. He opined that "to give the vote to incarcerated criminals is inconsistent with the moral, denunciatory, and educational purposes of punishment – perhaps its most important purpose". In this regard, he felt that the disqualification aims to have an educative effect upon the general public by symbolling the moral wrongness of the criminal act, and by symbolically excluding the offenders from the community's affairs.

Dr. Seymour Lipset, for the defendants, is a respected American academic who is well known in Canada, and who has published extensively. Dr. Lipset compared the political and legal cultures of Canada and the United States. He concluded that section 51(e) of the CEA denounces a

violation of the social contract and reflects a communitarian ethos whereby communal rights can temper individual liberties. Dr Lipset described Canada as being statist and communitarian, but claimed that the United States is anti-statist and laissez faire. In his view, however, the Charter is beginning to change the balance between rights and responsibilities in Canada.

Professor Schafer, for the plaintiffs, was of the view that there are practical difficulties in applying the doctrine of retributivism to a society in which there exist substantial inequalities of opportunity, both socially and economically. With respect to the defendants' assertion of a moral education theory of punishment, Professor Schafer argued that it is not charitable or reasonable to resort to retributive punishment in the face of society's failure to provide a healthy, nurturing environment for so many of its minority and/or disadvantaged citizens.

The plaintiffs advanced a number of arguments under rational connection which, I believe, are more relevant to the proportionate effects analysis which appears later in these reasons.

While there is no empirical evidence to suggest that the disenfranchisement of prisoners reduces crime (either generally or specifically), or serves a morally-educative function, or could operate as an effective punitive sanction, I find that a rational connection exists between the impugned provision and the stated objective of enhancing the criminal sanction. As an aid to punishment, the provision clearly imposes a sanction, and denounces bad conduct. In the present case, the sanction takes the form of a disenfranchisement, in addition to the loss of liberty. A fundamental democratic right has been removed for crimes committed, and its removal is clearly felt as a deprivation by Mr. Sauvé and Mr. Spence. It is also reasonable to conclude that a morally-educative message is sent to offenders, and possibly to the general population, by the imposition of a sanction. Of course, the message may not be heard or understood, but that does not diminish the connection between the means and the second objective.

(b) Minimal Impairment

The government must demonstrate that the impairment of rights is minimal, i.e. that the law was carefully tailored so that Charter rights are impaired no more than necessary. As McLachlin J stated, in *RJR-MacDonald Inc., supra,* at p. 20:

> [T]he tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range or reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement... On the other hand, if the government fails to explain why a *significantly* less intrusive and *equally effective* measure was not chosen, the law may fail." (Emphasis added.)

Thus, Parliament need not adopt the absolutely least-intrusive means of attaining its objectives; R. v. Laba, [1994] 3 S.C.R. 965, at p. 1009.

In *Sauvé* v *Canada (Attorney General), supra*, the Supreme Court of Canada held that the previous version of section 51(e) of the CEA "was overbroad and failed the minimal impairment part of the proportionality test. In light of the amendments to section 51(e), has Parliament succeeded in enacting a provision which is justified under section 1 of the Charter?

The defendants assert that the impugned provision impairs the right to vote as little as possible. The defendants argue that there are inherent safeguards in the present legislation, as the two-year cut-off will ensure that only serious members will be disqualified from voting. Moreover, the defendants submit that the right to vote remains intact and that it is only suspended temporarily, i.e. during the period of incarceration. The defendants further note that the suspension applies only to those citizens who have been sentenced to a term of imprisonment of two years or more; it is therefore not an all-encompassing, over-reaching prohibition or denial. It is also restored automatically, without process, upon release from the correctional institution.

The defendants observe that only 37 per cent of offenders who had been committed to federal institutions between 1989 and 1990 would have been disenfranchised in the 1993 federal election. Moreover, almost half of those inmates will be released from their current sentence before the next federal election. Hence, the defendants submit that the legislation is sufficiently tailored to ensure that the legislation is sufficiently tailored to ensure that the right to vote is minimally impaired.

The defendants argue that the disqualification satisfies the two conditions of a positive test and universal application required to justify a limitation in a liberal and democratic society. Of course, that may be a condition precedent to legislative action, but it does not necessarily satisfy the need to examine further whether the right to vote is only minimally impaired. In this regard, it is contended that section 51(e) of the CEA is not arbitrary, as the denial relates directly to the sentence imposed, which flows directly from the commission of criminal offences, i.e. the bad conduct. The defendants therefore submit that this is a pristine policy choice to which the Court should defer. In their view, the provision is not overbroad because longer prison terms are imposed upon persons with negative character traits. Since the legislation relates to the nature of their crimes, it is precise in its application. The defendants contend that imprisonment, in and of itself, is not the reason for the disqualification, rather, the sentence of imprisonment is an indication of the gravity and extent of the harmful criminal conduct.

As a final matter, the defendants also note that, while there is temporary loss of the vote, it does not mean a loss of the right to representation. The defendants rely upon certain comments of McLachlin J. in *Saskatchewan Boundaries, supra,* wherein she said, at p. 183, that "[r]epresentation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative." The defendants contend that this stands for the proposition that offenders who lose the right to vote do not necessarily lose the right to representation. I do not accept this reference as authority for such as argument. In my view, Justice McLachlin is

discussing the concept of a representative democracy in which persons are elected in a representative capacity through direct participation of the electorate in the electoral process.

The plaintiffs argue that section 51(e) of the CEA fails the minimal impairment test because it is arbitrary in its application. It flows, it is contended, from the sentence rather than from the facts and circumstances which give rise to a particular criminal offence. It is further submitted that only two types of disqualification could survive the minimal impairment test: case-by-case disqualification at the time of sentencing, or a disqualification based on conviction for treason or high treason, as set out in sections 46–48 of the *Criminal Code.*

Similarly, the plaintiffs contend that the impugned provision fails the minimal impairment test because there are less intrusive means by which the government could attain its stated objectives. These include the denial of the right to vote at the discretion of the sentencing Judge; the Lortie Commission's recommendation which targeted the most serious offences (those punishable by ten years' life imprisonment) and the most serious sentences (those punishable by ten years or more); an offence-oriented approach which would define the specific types of crimes which could be seen as bearing a rational connection to the franchise; and a low which allows for restoration of the right to vote as a result of good behaviour while in prison.

The plaintiffs further assert that a prisoner who has been sentenced to a period of imprisonment of two years or more is completely denied the right to vote if a federal election is held during a term of imprisonment. In this regard, they contend that the denial may be seen as a complete ban during the period of a prisoner's incarceration. The defendants view the disqualification as a temporary suspension of the Charter-protected right, while the plaintiffs see the denial as a permanent loss of the right to vote. However, what must be considered is the impact of the disqualification on individual offenders. It is clear that, for any particular federal election, those inmates who fit within section 51(e) of the CEA are completely denied the right to vote.

As I indicated above, the Lortie Commission recommended that disenfranchisement occur where an offender has been convicted of a crime for which he could potentially receive a punishment of life imprisonment, and for which he did receive a sentence of ten years or more in prison. It is clear that Parliament considered this recommendation and rejected it. Parliament also considered a five-year cut-off and a seven-year cut-off, and rejected both. Furthermore, Parliament considered the voting rights of prisoners in other democratic countries. Eventually, Parliament settled on a two-year cut-off for disqualification. According to the defendants, this limitation allows Parliament to ensure that only those who have committed serious crimes are denied the right to vote.

In this context, the statistics filed by Dr. Colin Meredith demonstrate that, of 654 inmates sampled, who represented 4.5% of the total federal inmate population, there was an average number of 29.5 convictions per inmate. Moreover, 75.3 per cent of the inmates sampled had more than ten convictions during their criminal careers. The Meredith analysis did not find any

statistically-significant difference between Aboriginal and non-Aboriginal inmates. The statistics do verify that the federal inmate population consists of individuals with long histories of involvement in serious criminal activities. Thus, these statistics appear to support Parliament's choice for selecting two years as the cut-off for the disqualification of individual offenders who have exhibited bad criminal conduct.

Parliament must have some latitude to choose alternatives. It is for this reason that I reject the plaintiffs' argument regarding the other alternatives. There is one exception. In this respect, it must be recognised that a final option was available to Parliament: the disenfranchisement of each offender could be imposed on a case-by-case basis, by the sentencing Judge. In this way, the disenfranchisement would not be automatic; rather, the right to vote would only be removed by a Judge who, as part of the sentencing process, has determined that, in the personal circumstances of the accused, disenfranchisement should occur: *R.* v *Goltz, supra.*

The legislative history of section 51(e) of the CEA displays virtually no consideration of a court-based process where disqualification is considered as part of sentencing. What the legislative history does reveal, in somewhat vague terms, is an apparent desire to keep the matter out of the courts. In the House of Commons Debates, some reference was made to the issue of whether or not a criminal like Clifford Olsen should be permitted to vote. With disqualification on a case-by-case basis, a clearly indecent and immoral offender like Clifford Olsen could, as a consequence, be disenfranchised by sentence of the court.

At trial, Dr. Pangle was asked whether the removal of the right to vote by the courts, as in a number of countries, would satisfy his requirements in terms of liberal democratic theory. While he did not vigorously disagree that it would, he preferred the legislative ban over a court-imposed disqualification. In his opinion, if the courts become involved in the disenfranchisement of prisoners, no clear minimum standard would exist or be applied. He was also concerned with the fact of judicial knowledge regarding political theory, and questioned whether Judges could perform the task satisfactorily. Dr. Pangle also expressed the view that the educational message would be less clear. Of course, an analysis of minimal impairment involves a consideration of the legislation's application, not the clarity of its objectives. On the other hand, Dr. Pangle, in another comment, indicated his view that an independent judiciary is the guardian of the rule of law against majority oppression or factionalism.

Dr. Pangle is quite correct in his concerns regarding sentencing discretion and the fact that sentences – including the nature, type, or quantity of sanctions – could vary considerably from Judge to Judge. Needless to say, appellate review has an important role to play in determining the "fitness of a sentence". Any possible and unwarranted disparity in sentencing with respect to disenfranchisement, however, could be lessened by providing legislative criteria.

The courts now play a pivotal role in sentencing. The Canadian Sentencing Commission, in *Sentencing Reform: A Canadian Approach,*(Ottawa, On., 1987), did contemplate a comprehensive

reform, of sentencing laws and practices in Canada. The Commission defined sentencing as the "judicial determination of a legal sanction to be imposed on a person found guilty of an offence." This definition is not particularly controversial. The disqualification at issue in this trial currently involves no sentencing process whatsoever.

As I shall discuss later, prisoner disenfranchisement is not well known or visible in Canada. Certainly, any contemplated reform of the law, if pursued, could take this obvious consideration into account. The communication of sanctions to be public is the only obvious way for them to be effective. No doubt, minimising disparity is an important goal, and perhaps only legal specialists can find their way through the maze of judge-made law; nevertheless, the public has a greater chance of being informed of the prisoner disenfranchisement through a court-imposed disqualification, rather than under the current scheme.

The defendants' experts have provided a number of thoughtful and compelling arguments supporting disenfranchisement. If Parliament decides to pass another law, there is no reason why these arguments could not inform the criteria that could be selected. A sentencing Judge could take into account the nature of the crime and the personal circumstances of the accused in conjunction with the principles of sentencing: *R.* v *Goltz, supra.* This process would, in my opinion, be a significantly less intrusive, and equally effective, means of infringing a citizen's democratic right to vote. If a judge is entrusted with the responsibility of taking away a person's liberty, should he or she not also be charged with the responsibility of determining if disenfranchisement is warranted?

Indecency exists in society generally, and is not only found in correctional institutions. The law as it now stands cannot distinguish the type of offender whose indecency is so profound as to threaten the principles of our free and democratic society. As such, I find that section 51(e) of the CEA fails the minimal impairment component of the *Oakes* test.

(c) Proportionate Effects

Despite finding that section 51(e) of the CEA fails the minimal impairment test, I believe it is also important to consider the provision's proportionate effects. The effects of the limiting measure must not so severely trench on Charter rights that the legislative objective, albeit important, is outweighed by the infringement of rights. Essentially, then, the proportionate effects test requires that the deleterious effects of the measure be proportionate to the attainment of its legislative objectives: *R.* v *Oakes, supra,* at pp. 138–140; *R. v. Edwards Books and Art Ltd.,* [1986] 2 S.C.R. 713; and *McKinney* v *University of Guelph, [1990]* 3 S.C.R. 229, at pp. 281–286. In the rational connection analysis, the Court must compare the means to the objectives, in order to assess if Parliament acted reasonably. In contrast, when considering proportionate effects, the Court balances the objectives with the actual effects of the impugned provision.

The proportionate effects test has recently been restated and modified by the Supreme Court of Canada in *Dagenais* v *Canadian Broadcasting Corporation,* [1994] 3 S. C. R. 835. In that case, Lamer C J held that the conventional *Oakes* analysis is appropriate where a measure fully, or nearly fully, realises its legislative objective. However, according to Lamer C J, at p. 889, where a measure only partially achieves its legislative objective, the proportionality requirements are as follows:

> [T]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, *and there must be a proportionality between the deleterious and the salutary effects of the measures.* (Emphasis in original.)

At p. 887, the Chief Justice explained the rationale behind this reformulation of the proportionate effect test:

> In may instances, the imposition of a measure will result in the full, or nearly full, realization of the legislative objective. In these situations, the third step of the proportionality test calls for an examination of the balance that has been struck between the objective in question and the deleterious effects on constitutionally protected rights arising from the means that have been employed to achieve this objective. At other times, however, the measure at issue, while rationally connected to an important objective, will result in only the partial achievement of this object. In such cases, I believe that the third step of the second branch of the *Oakes* test requires both that the underlying objective of a measure and the *salutary effects that actually result* from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms. A legislative objective may be pressing and substantial, the means chosen may be rationally connected to that objective, and less rights-impairing alternatives may not be available. Nonetheless, even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual salutary effects of the legislation will not be sufficient to justify these negative effects. (Emphasis added.)

The Supreme Court of Canada appears to have applied this reformulated test in *RJR-MacDonald In., supra, and Thibaudeau* v *Canada*, [1995] 2 S.C.R. 627.

The reformulation of the proportionate effects test appears to necessitate a consideration of the *actual* salutary effects when assessing proportionality. In certain cases then, if there is a lack of proportionality between the deleterious effects and the actual salutary effects of the impugned law, the law cannot be justified under section 1 of the Charter. As such, in a case where partial achievement of the objective is found, the proportionate effects assessment becomes vital and is

no way redundant with respect to the first step, i.e. whether pressing and substantial objectives exist.

It appears, then, that the Chief Justice in *Dagenaise, supra,* was suggesting that a legislative provision which infringes a Charter right or freedom, and yet does not fully accomplish the objectives it was designed to achieve, may be less likely to produce salutary effects which are proportionate to the deleterious effects generated by the measure. It is not sufficient in such a case to merely balance the legislation's desired objectives against the deleterious effects produced by the provision, as the legislation's salutary effects do not fully correspond to the results which were expected to be produced.

In the present case, the defendants agree that I must examine proportionate effects in light of the reformulation in *Dagenais, supra.* I must look beyond the theoretical objectives of the impugned measure, and consider what salutary effects, if any, have been produced by the provision. The defendants admit that the actual salutary effects of the measure are unascertainable. In fact, there is no evidence, other than theory, to suggest that section 51(e) of the CEA has even partially attained the objectives which it was designed to achieve.

The defendants contend that a prison sentence of two years or more is indicative of bad conduct. They also assert that the principal negative effects of the impugned provision are merely two-fold: a democratic right is infringed, and a disenfranchised inmate is left feeling isolated from his community.

Most of the defendants' experts appeared to agree that section 51(e) of the CEA would have little or no effect on the prisoner. Dr. Pangle seemed to think it might have a weak rehabilitative effect; Dr. Manfredi felt there might be a general deterrent effect. While Dr. Van den Haag, as a conservative criminologist, supported general deference, he suggested that greater punishment is necessary even if the effects are not measurable.

According to Dr. Pangle, one function of the prisoner voting suspension is the regulation of potentially untrustworthy votes. However, he noted that the principle long-term benefit to society is that the disqualification can provide an important morally-educative function. In this regard, he focused on the electorate as a whole, rather than the individual offender. Dr. Pangle asserted that the disqualification de-emphasised the tendency to promote and advance individual rights. While he viewed these as noble and worthwhile endeavours, he asserted that they neglect or obscure the responsibilities and duties which attend those rights in a free and democratic society.

Dr. Pangle is an eminent scholar who presented his evidence in an extremely thoughtful and credible manner. Nevertheless, it is clear that he only recently began consideration of the relationship between prisoners and the franchise. In addition, his thorough research on the matter only led to one footnote reference by John Stuart Mill. Furthermore, despite being an eminent political theorist, and , until recently, an American citizen, Dr. Pangle was unaware of the status

of prisoner voting rights in the United States. He thought that most prisoners vote in the United States, and claimed that this is one factor that has led to social disintegration and loss of a sense of community. In fact, the opposite is true. Most American prisoners do not vote; thus, if there is moral and social deterioration, disenfranchisement cannot be a cause. Dr. Pangle was also concerned with untrustworthy votes, and submitted that individuals should not vote if they lack the requisite capacity. However, he was unaware of the fact that the 1993 amendments to the *Canadian Elections Act* removed the disqualification for those who are mentally challenged.

Dr. Manfredi addressed the costs of disenfranchisement, and found them to be small. He indicated that, in most cases, prisoners will only be excluded from voting in one federal election. He also minimised the prisoner's loss of the vote by asserting that prisoners are otherwise represented in political matters by advocacy groups, and retain access counsel and the judicial system.

Dr. Manfredi emphasised at least two benefits associated with the prisoner disqualification. Firstly, the disqualification serves the collective goal of promoting lawful behaviour, i.e. the sanction performs a moral norm-setting function for the public in general. Secondly, prisoner disenfranchisement encourages political participation. In Dr. Manfredi's opinion, the collective-action problem could be solved by compulsory voting, and could reinforce a view that participation in the electoral process is, indeed, a mark of good citizenship. The disenfranchisement of prisoners can therefore make voting less irrational and less threatening to the viability of a liberal democracy.

The plaintiffs argue that there can be no proportionality between the deleterious effects of section 51(e) of the CEA and its objectives and salutary effects, given the absence of any proof whatsoever that there are any salutary effects. It is submitted that the objectives identified by the defendants are abstract, whereas the effects of the impugned provision are concreted and fundamental to the individuals involved. The loss of voting rights is particularly grave, in the plaintiffs' view, because the disenfranchised class is a group which lacks power in society, and therefore has difficulty making itself heard in the political and social arenas. The plaintiffs also emphasise that all inmates were allowed to vote in the 1992 federal Referendum, and can presently vote in provincial elections in four provinces; yet, no negative effects have been shown to arise from the participation of inmates in these elections.

The plaintiffs contend that other deleterious effects of section 51(e) of the CEA include stigmatisation, loss of rehabilitative opportunity, promotion of a message of inequality, and the characterisation of our society as being intolerant and fearful of the less advantaged. It is also argued that there is no evidence that knowledge of the disqualification is widespread; thus, the plaintiffs question the alleged denunciatory, morally-educative, and potentially-rehabilitative effects of the legislation. In contrast, it is submitted that there is absolutely no cost to society as a whole, nor to any specific group in society, if the right to vote is granted to prisoners.

Dr Amyot noted that the defendants could not refer to any direct effect on the outcome of the voting process which would be produced if prisoners were enfranchised. He further indicated that the impact on the overall quality of Canadian democracy would be trivial, as inmates comprise a relatively insignificant proportion of the overall voting population. Dr. Amyot disagreed that there was any evidence to support the theory of morally-educative effects, or that disqualification would produce a psychological incentive for others to vote. In contrast, he referred to a number of empirical studies on voter turn-out, and noted that none considered the disenfranchisement of prisoners to be a factor explaining levels of voter participation.

In Professor Schafer's view, the denial of the right to vote can be seen as a removal of one of the prisoner's links to the community. Professor Schafer referred to the principle, favoured by liberal criminologists, that prisoners are sent to jail as punishment, and not for punishment. In this regard, while noting Dr. Van den Haag's assertion that there was no evidence that the enfranchisement of prisoners would contribute to their rehabilitation, Professor Schafer contended that there was evidence to suggest that prison inmates who are given greater control over their lives during incarceration exhibit increased independence and self-control upon release. Thus, in Professor Schafer's opinion, the exercise of civic responsibilities, including participation in the electoral process, has a potentially educative effect in the area of civic virtue, and should represent one of the main reasons why prisoners should **not** be disenfranchised. While Professor Schafer advocated punishment, he fundamentally believes in a person's capacity to change his own behaviour.

Applying a common sense approach, Professor Schafer asserted that it was unlikely that a potential serious offender, who has not deterred from committing an offence by the knowledge that he could spend two or more years in prison, would be deterred by the knowledge that he would also temporarily lose the right to vote. Moreover, Professor Schafer disagreed with Dr. Van den Haag's claim that incarceration is insufficient, in itself, to stigmatise the offender and denounce his criminal conduct, but that the disenfranchisement, as an additional stigma, will better ensure the safety of the social order. According to Professor Schafer, this claim is even less plausible in the face of the general lack of awareness of the disenfranchising provision.

Professor Neil Boyd, a witness for the plaintiffs, is Director of the School of Criminology at Simon Fraser University in British Columbia. He is also a lawyer, and has published extensively. Professor Boyd rejected the argument that the deprivation of the prisoner's right to vote will have a salutary effect by deterring the commission of crimes, as there was no evidence that retention of the right to vote will adversely affect the extent and nature of crime in the community. Indeed, Professor Boyd suggested that there is evidence that federal prisoners who become involved in political processes, such as inquiries, often benefit substantially from their participation. Thus, Professor Boyd concluded that the disqualification provides neither specific nor general deterrence. Moreover, there appears to be a greater possibility of a morally-educative benefit flowing from the enfranchisement of prisoners. Professor Boyd described the disenfranchisement of prisoners as a "kind of knee jerk reaction that might fall within the retributive sphere", and claimed that it

is consistent with the public's attitude that prisoners should have fewer rights. He also agreed that social denunciation my be valid, but not by the denial of a democratic right.

Mr. Eric Anderson was also called by the plaintiffs. He is a citizen of Denmark, and has been employed in the prison system there for thirty-seven years. For many of those years, he was a prison warden. Mr. Andersen indicated that prisoners have voted in Denmark since 1970 without any negative effects in that society. In his view, it is enormously beneficial to them and allows prisoners to keep their civil rights, including the right to vote. Similarly, he indicated that a denial of such liberties would make the rehabilitation of offenders much more difficult.

Professor Michael Jackson, a witness for the plaintiffs, is a well-known Canadian law professor. He has written extensively about the criminal justice system, with a particular emphasis on Aboriginal people and prison issues. In this testimony, Professor Jackson was concerned with the over-representation of Aboriginal people in Canada's correctional facilities. He attributed the problem of Aboriginal over-representation to systemic discrimination, in both the criminal justice system and society in general. He highlighted the disproportionately high rates of Aboriginal poverty, unemployment, and other social and economic disadvantages as being contributors to the over-representation of Aboriginals people in Canadian prisons.

Professor Jackson considered the deleterious of section 51(e) of the CEA in the historical and political context of both the franchise and Aboriginal people. He noted that the franchise in federal elections was only returned to the Aboriginal people in 1960, after seventy-five years of disenfranchisement. Similarly, the Inuit people were disenfranchised in 1935; their voting rights were not restored until 1950. Professor Jackson concluded that, for Aboriginal people in federal penitentiaries, the right to vote is still being denied today as a result of systemic discrimination on the basis of race.

The over-representation of Aboriginal people in prisons was seen by Professor Jackson to be the clearest example of the relationship between socio-economic status and imprisonment. In this regard, Professor Jackson also noted a similar connection between crime and class for other disadvantaged groups in society, including the unemployed, the illiterate, the poor, the homeless, and those from broken homes or unstable families. He contended that the exercise of the prisoner's right to vote in a federal election would promote citizenship skills and encourage responsible behaviour. He indicated that prisons do contain some evil people, but stated that not all inmates are evil. Nevertheless, Professor Jackson strongly suggested that the inmate disqualification cannot distinguish between the two types of prisoners.

In Canada, prisoners in both provincial and federal institutions may vote in provincial general elections in Manitoba, Ontario, Quebec, and Newfoundland. In Quebec, all prisoners have been eligible to vote in provincial elections since 1981. In British Columbia, a new *Election Act,* which came into force on September 1, 1995, parallels the federal law. Based on the figure of 14,955 federal prisoners in Canada on April 30, 1995, provided at trial, approximately 56% of

these were entitled to vote in provincial elections. Interestingly, in Quebec, the participation rate for inmates in the three recent provincial elections has been approximately 74 per cent.

The defendants were unable to adduce any evidence of harm flowing from the exercise of prisoner voting rights in provincial elections or in the 1992 Referendum. Indeed, the defendants could not advance any meaningful arguments to justify the mixed messages which Canadian society is receiving from the conflicting federal and provincial policies relating to prisoner voting rights. The defendants did suggest, however, that the federal government has a national norm-setting function.

The defendants were also unable to demonstrate any negative impact upon other democratic societies where prisoner voting is freely or partially allowed. While it may not be possible for the defendants to adduce such evidence, it is striking that Mr. Anderson did not allude to any costs, to offenders or to society in general, resulting from the enfranchisement of prisoners. Indeed, Mr. Andersen was generally of the opinion that it is better to hold individuals to a higher standard, rather than a lower standard, of responsibility.

Democracies have struggled for many years to achieve a truly universal franchise. In Canada, we have almost attained that goal. With the reform of the *Canada Elections Act,* in 1993, several groups, including Judges, persons restrained by reason of mental disease, and inmates serving sentences of less than two years, have been enfranchised. What remains is the disqualification of approximately 14,955 inmates, almost 2,000 of whom are Aboriginal.

While this case is not about the causes of crime, the plaintiffs argue that the defendants' approach to disenfranchisement ignores the entire socio-economic dimension of crime. The defendants, as well as the defendants' witnesses, recognise, in minimal terms, the relationship between society and crime; however, the defendants submit that the role which society plays in influencing criminal behaviour is secondary to the voluntary choice to engage in crime, made by an individual who displays a bad character, a lack of empathy, and/or a lack of self-control. The defendants have chosen to focus on a sentence of the court as being the marker which attracts the disqualification. In the defendant's view, the more complex problems of criminal behaviour that may be associated with abuse, despair, poverty, illiteracy, learning disabilities, or drug/alcohol addiction, are not, in any way, relevant.

As I have already found at almost every step in these reasons, the evidence clearly indicates that prisoner disqualification is not well-known in Canadian society. Indeed, in the Government of Canada's publication, *The Charter of Rights and Freedoms: A Guide for Canadians* (Ottawa, Ont., 1982), the following is stated, at page 6, in regard to section 3 of the Charter:

> The tradition of democratic rights in Canada is specifically guaranteed by the Charter. Citizens will have a constitutionally enshrined right to vote in elections

> for members of the House of Commons or a legislative assembly and to seek election to either of those houses.
>
> *The only restrictions that may be placed on your right to vote* or run in an election will be those that are considered to be reasonable and justified, such as the age restriction for minors, mental incompetence, and certain restrictions on some election of officials, such as returning officers, who may have to cast a deciding ballot. In the case of seeking elective office there may be some restrictions on judges because of the non-partisan nature of their office. (Emphasis added.)

At the time of this publication, no prisoner could vote federally; nevertheless, conspicuously, there is no reference whatsoever to the disenfranchisement of prisoners. Section 51(e) of the CEA has a very low visibility. Despite the litigation in this area throughout the past decade, Dr. Pangle was unaware of the decisions involving prisoner voting rights.

In the present case, the parties could not refer to any Canadian source, other than the case law, in which the issue of prisoner disenfranchisement has been discussed. I have reviewed two recent texts on criminal law and sentencing: *C Ruby, Sentencing,* 4th ed (Toronto: Butterworths, 1994), and D. Stuart, *Canadian Criminal Law,* 3rd ed. (Toronto: Carswell, 1995). Not surprisingly, neither author considers the issue of the disenfranchisement of inmates. I mention this not to criticise their excellent contributions; rather, I believe that this is typical of the attention that Canadians, including legal scholars, have given to the question of prisoner disenfranchisement.

In *Sentencing, supra,* at page 1, Professor Ruby considers the causes of crime in the following manner:

> It is evident to all thinking practitioners of law that the causes of crime and their solutions lie in the legal system but in a society itself.

Professor Stuart states the issue somewhat differently, at pp. 54–55 of *Canadian Criminal Law, supra:*

> Even if an acceptable typology of conduct is arrived at, most researchers now agree that any attempt to seek a mono-casual theory is doomed to failure and that the best we can do is to suggest that there are a host of predisposing factors – biological, psychological and sociological.
>
> .....
>
> Yet even the most sophisticated research has produced very pessimistic results, particularly if we are concerned with the acid test: the rate of recidivism(re-conviction). Different forms of punishment or treatment seem equally ineffective, even if we compare such markedly different punishments as long-term and short-term prison sentences, probation and institutional punishments, and authoritarian

> institutions and therapeutic communities. The greatest hope is with the first offenders, but it does not seem to matter what the disposition is.

Professor Stuart goes on to state, at p. 58:

> However we live in law and order times. There are widespread calls for toughening the criminal law, especially as it relates to violence, and voices favouring restraint have been drowned out. Instead there are pleas for "Zero Tolerance" and concern that criminals have too many rights at the expense of victims... There are no votes in being soft on crime.

Professor Stuart then suggests that the truths of criminology are limited and that there are no clear explanations, definitions, or answers.

The intellectual debate among moral philosophers over the nature and purposes of punishment normally does not enter into the practical business of sentencing; *Ruby, supra*, at page 1; rather, sentencing aims and principles seem to have a somewhat more pragmatic focus. Indeed, there may be strong philosophic and political reasons to support the disenfranchisement of prisoners; however, there appear to be few practical reasons for doing so. Undoubtedly, the various purposes of sentencing are generally considered to be general deterrence, specific deterrence, protection of the public (incapacitation), rehabilitation, and retribution. Professor Stuart, *supra,* at p. 60, describes the first four of these aims as being "utilitarian in the sense that they seek to provide a benefit to society which outweighs its disadvantage". In contrast, at p. 60, retribution is said to have a moral basis, which justifies punishment, irrespective of its benefits, solely by relating the punishment to the crime:

> Most would distinguish the retributive aim from vengence (sic) and would distinguish as straddling the moral and utilitarian classifications, the denunciatory theory which sees punishment as an emphatic denunciation by the community of particular offence.

Thus, retribution is a more offender-specific aim of sentencing.

While an all-embracing characterisation of the defendants' case might be presumptuous, the defendants have advanced, as part of the goal of enhancement of the criminal sanction, the view that retribution should play a greater role in the sentencing process. In particular, from Dr. Van den Haag's perspective, retribution should be given greater prominence, given the fact that deterrence and rehabilitation appear futile. Dr. Van den Haag did admit, though, that he has little knowledge of criminal justice policy in Canada.

Retribution is, in fact, one of the defendants' main justifications for the disenfranchisement of prisoners. In this context, however, the Canadian Sentencing Commission, in *Sentencing Reform: A Canadian Approach, supra,* noted as follows, at p. 114:

> More directly, the rediscovery of retributivism is essentially the outcome of a thorough study of incarceration in the United States and it has resulted in a narrow theory of criminal justice which links the sentencing process to the imposition of custodial sentences and to punishment. In fact, all three reports cited in section 3.3 of this chapter were studies of incarceration. These studies of imprisonment were as profound as their focus was limited. When we are urged to collapse sentencing and punishing, one into the other, the type of sentence on which the whole argument implicitly rests is a jail term, which, save for capital punishment, is the most punitive sentence in use.

Thus, the Canadian Sentencing Commission down-plays the role of retribution in the Canadian justice system. Furthermore, the debate on crime in the United States is different from that in Canada.

Sentencing policy and corrections policy, while they represent different stages of the criminal justice system, must have a number of common goals. Sentencing is by its nature coercive and involuntary. However, sections 3 and 4 of the *Corrections and Conditional Release Act* (the "CCRA"), S.C. 1992, c. 20, as amended by S.C. 1993, c. 34, states follows:

> Purpose
>
> 3. The principles of the federal correctional system to contribute to the maintenance of a just, peaceful and safe society by
>
> ...
>
> (b) assisting the *rehabilitation* of offenders and their *reintegration into the community* as law-abiding citizens through the provision of programs in penitentiaries and in the community.
>
> Principles
>
> 4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are
>
> ...
>
> (h) that correctional policies, programmes and practices respect gender, ethnic, cultural and linguistic differences and be responsible to the special needs of women and *aboriginal peoples*, as well as the needs of other groups of offenders with special requirements; (Emphasis added.)

Also, sections 5 and 76 state:

> 5. There shall continue to be a correctional service in and for Canada, to be known as the Correctional Service of Canada, which shall be responsible for
>
> ...
>
> (b) the provision of programs that contribute to the *rehabilitation* of offenders and to their successful *reintegration* into the community;
>
> 76. The Service shall provide a range of programs designed to address the needs of offenders and contribute to their successful *reintegration* into the community. (Emphasis added.)

Cleary, corrections policy emphasises the rehabilitation of the offender, and his integration into the community. While the defendants argue that disenfranchisement can contribute to rehabilitation, I prefer the plaintiffs' evidence which suggests that section 51(e) of the CEA hinders the rehabilitation of offenders and their successful reintegration into the community. The provision only serves to further alienate prisoners from the community to which they must return, and in which their families live. Accordingly, the retributive effects of section 51(e) are deleterious in that they are contrary to the purpose and principles contained in the CCRA.

At page 141 of *Sentencing Reform, supra,* the Canadian Sentencing Commission notes as follows:

> Since it stresses the obligation to punish persons guilty of a crime, retributivism is oriented more towards past blameworthy behaviour than towards the consequences of punishment in the future. Thus, as was stressed in section 1.1, retributivism provides a moral ground for imposing sanctions rather than a purpose which they can strive to achieve (although it can be violated, a moral ground is not, properly speaking, something that can be "achieved" with various degrees of success). *It is therefore problematic to treat retribution as a goal and to estimate to what extent it is achieved.* However, such an appraisal would require us to note that, strictly understood, retributivism implies that a sanction ought to be imposed upon *all* offenders. *As we know that only a small percentage of offenders is brought to justice, it follows immediately that the criminal justice system fails to a very large extent to achieve what is implied by retributivism.* (Emphasis added.)

Nevertheless, while the retributive aim of punishment is likely to be increasingly stressed in the courts, the principles of sentencing in Canada include more than just retribution: *R.* v *Goltz, supra.*

Of course, in this context, the complexity is great, and a sentencing Judge is given the enormous responsibility of knowing when to impose a sentence which not only has a retributive effect, but which also emphasises rehabilitation. According to Professor Ruby, *supra,* at p. 4, sentencing in Canada entails a strange liaison between both the moral and utilitarian views of democracy.

However, this is not surprising since the courts must determine whether the sanctions will be effective for the purposes claimed, and for each specific offender. In other words, there is an important difference between theory and reality.

Interestingly, both Professor Ruby and Professor Stuart emphasise that the criminal law is concerned with the protection of property and its abhorrence of physical violence; yet, our criminal law does not appear to emphasise other serious kinds of harm that are prevalent in Canadian society. Indeed, both authors, as well as the plaintiffs, reflect upon certain types of white-collar crime, including price fixing and misleading advertising under the *Competition Act,* income tax evasion, and other corporate crimes. In essence, Professor Ruby, *supra,* at p. 1, notes that these crimes are "lightly penalized". In that regard, I believe the author to mean that serious prison terms are rare for these types of white-collar crimes. Similarly, the plaintiffs assert that a class bias is created against the poor and illiterate who are marginalised, and who are more likely to be given a sentence of imprisonment.

As indicated previously, the potential salutary effects which could be generated through the operation of section 51(e) of the CEA are not ascertainable. However, I must, nevertheless, determine, on a common sense basis, whether any salutary effects could be produced by the disqualification, even if the actual effects which are produced are not conducive to measurement.

It is clear that section 51(e) of the CEA produces a number of deleterious effects through its operation. I accept the plaintiffs' evidence that the provision generates in some, if not all, prisoners a feeling of isolation from the community. In losing one more link to society, through the denial of the right to vote, their subsequent reintegration into the community is likely to be impeded. After all, most offenders will return to society. The disqualification also prevents them from experiencing any form of rehabilitative influence which could otherwise be felt through participation in the democratic process.

As well, there is evidence to suggest that there have been no negative costs to society if prisoners are granted the right to vote. The four provinces in which prisoners participate in provincial elections appear not to be adversely affected. It does not seem that any harmful impact on free and democratic principles has resulted. Similarly, the participation of inmates in the 1992 Referendum appears to have gone unnoticed.

It has been contended that the salutary effects of section 51(e) of the CEA include the promotion of law-abiding conduct, respect for the rule of law, and a sense of duty, as well as the facilitation of the inmates's re-integration into the community. However, the pervasive lack of awareness of the provision suggests that the disqualification is actually incapable of producing any such salutary effects.

It is not reasonable to suggest that a potential prisoner would be less likely to commit a crime in the face of knowledge that he would lose the right to vote if he were found guilty of an offence

and sentenced to a term of imprisonment of two years or more. Similarly, it does not make sense to suggest that crime in general will be curbed through a widespread awareness of the potential disenfranchisement of offenders. As Dr. Van den Haag indicated, the moral dimension of punishment is its main dimension; yet, in his view, individuals obey the law not because of a fear of punishment, but rather because it is wrong or immoral to do that which the law prohibits. It may be comforting to the value systems of law-abiding citizens to know that prisoners will receive greater punishment. However, the salutary effects upon which the defendants rely are tenuous in the face of the denial of the democratic right to vote, and are insufficient to meet the civil standard of proof.

In my opinion, the proportionality between the effects of the impugned legislation and its objectives, and the proportionality between its salutary effects and its deleterious effects, are not satisfied. Accordingly, section 51(e) of the CEA infringes section 3 of the Charter, and is not justified under section 1 of the Charter.

Section 15 of the Charter: Equality Rights

Having found that section 51(e) of the CEA infringes section 3 of the Charter, and is not saved by section 1, it is unnecessary for me to consider the section 15 case. However, I will, by way of *obiter,* make a few comments regarding section 15.

The plaintiffs argue that there is a clear *prima facie* breach of sub-section 15(1) of the Charter. They submit that section 51(e) of the CEA deprives a class of persons of a valuable legal right which amounts to a denial of equality and the equal benefit of the law. The plaintiffs assert that prisoners under the impugned provision are a disadvantaged class analogous to the groups enumerated in the Charter, because they are burdened and limited by a law based on the personal characteristic incarceration. It is argued that prisoners have been shown to be a disadvantaged group which is lacking in political power, and which is vulnerable to having its interests overlooked. It is further submitted that in light of the history of punishment in Canada, the racial and socio-economic composition of federal prison populations, and the obvious exclusion and powerlessness faced by prisoners, inmates in federal correctional institutions constitute a "discrete and insular minority" deserving of protection under sub-section 15(1) of the Charter.

The plaintiffs note, however, that they are confining their section 15 argument to electoral rights, and claim that federal prisoners are not necessarily an analogous group for all purposes. It is not contended that prisoners should be treated as a minority with regard to treatment that is directly relevant to prison management; rather, it is contended that, with respect to political rights irrelevant to prison management, prisoners should be considered as a minority group within the meaning of section 15 of the Charter.

Alternatively, the plaintiffs base their argument on systemic discrimination as a form of adverse impact discrimination. They assert that the impugned provision impacts upon disadvantaged and Aboriginal people disproportionately when compared with the general population, due to the over-representation of these two groups within the prison population. In particular, the plaintiffs submit that there is evidence of systemic discrimination against Aboriginal people in the Canadian justice system, and that this has led to an over-representation of Aboriginals in the prison population. They argue, therefore, that the proportion of Aboriginal people negatively affected by section 51(e) of the CEA is greater than is warranted in light of their numbers in the general Canadian population. On this basis, it is argued that the impact of the inmate voting disqualification falls disproportionately upon Aboriginal people. Thus, the plaintiffs argue that the disqualification causes discrimination on the basis of social condition – an analogous ground under sub-section 15(1) of the Charter – and on the basis of race – an enumerated category under sub-section 15(1).

In response, the defendants submit that prisoners, as a class, are not an analogous group for the purposes of section 15 of the Charter. The defendants rely upon the trial decisions in *Belczowski, supra* and *Jackson* v *Joyceville Penitentiary Disciplinary Tribunal* (1990), 32 F. T. R. 96, in support of this assertion. Furthermore, the defendants submit that the fact that Aboriginal people may be over-represented in the prison population is irrelevant for the purposes of the present section 15 analysis. The defendants reason that, if prisoners as a class are not an analogous group under section 15 of the Charter, then a sub-group of prisoner, such as Aboriginal inmates, cannot constitute an analogous group. According to the defendants, what distinguishes prisoners as a class from other groups in society is their serious criminal behaviour.

Regarding adverse impact discrimination, the defendants submit that the mere existence of a disparate impact of section 51(e) of the CEA, upon Aboriginal people, is not determinative for the purposes of section 15 of the Charter. Following the approach in *Symes* v *Canada*, (1993) 4 S.C.R. 695, the defendants argue that any adverse impact of the impugned provision upon Aboriginal people does not flow from the position itself. The defendants argue that the plaintiffs must do more than merely establish an adverse impact; they must demonstrate that the adverse effect is caused, or contributed to, by the impugned provision. However, the defendants submit that no such evidence exists in the present case.

The first step in a section 15 Charter analysis requires the Court to determine whether, due to a distinction created by the impugned law, there has been a denial of an equality right. At this stage, the Court should consider whether the challenged law has drawn a distinction between the claimant and others, based upon personal characteristics: *Egan and Nesbit* v *Canada,* (1995) 2 S.C.R. 513, at p. 584.

As stated by Iacobucci J in *Egan, supra,* at p. 584, "Not every distinction produced by legislation gives rise to discrimination". Therefore, the second step in the section 15 analysis requires the Court to determine whether the distinction results in discrimination. At this stage, the Court must

examine whether the impugned legislation imposes, on a group of persons to which the plaintiffs belong, burden, obligation, or disadvantage which is not imposed on others, or fails to provide them with a benefit which it grants to others. This also requires an assessment of whether or not the distinction is based on an irrelevant personal characteristic which is enumerated in subsection 15(1) of the Charter, or is analogous thereto.

As indicated by Iacobucci J in *Egan, supra,* at p. 586, "direct discrimination involves a law, rule or practice which on its face discriminates on a prohibited ground. Adverse effect discrimination occurs when a law, rule or practice is facially neutral, but has a disproportionate impact on a group because of a particular characteristic of that group". In an adverse effects analysis, the source of the disparate impact is critical. The Court must determine whether the impact flows from the impugned provision itself, or whether it relates to some pre-existing or independent condition. This point was addressed by Iacobucci J in *Symes, supra,* wherein he indicated that the Court must take care to distinguish between effect which are wholly caused, or contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.

In the present case, section 51(e) of the CEA clearly imposes a burden on certain prison inmates by disqualifying them from the federal electoral process. In this way, the law takes away from them a benefit which is granted to others. The group directly affected by this burden or disadvantage is that class of prison inmates who have been sentenced to a term of imprisonment of two years of more.

Prisoners, as a class, have generally not been viewed as an analogous group under section 15 of the Charter. In *Jackson* v *Joyceville Penitentiary Tribunal, supra,* at pp. 127–128, MacKay J held that prisoners were not an analogous group under section 15. In that case, the Court considered section 41 of the Penitentiary Service Regulations, which provided for differential treatment of prison inmates as compared with other individuals in Canada. Justice MacKay found that the impugned provision did not discriminate against prison inmates on the basis of any analogous grounds. In fact, he indicated that section 15 was not even engaged in that case, as the difference in treatment of prison inmates as a group arose not from their personal characteristics but from past course of conduct which amounted to crimes against society. Similarly, Strayer J, in *Belczowski, supra,* held that section 15 of the Charter was not engaged by the former version of section 51(e) of the CEA.

Consequently, a sub-population of all prison inmates – namely those who have been sentenced to a term of imprisonment of two years or more – does not constitute a group which is analogous to those enumerated in section 15 of the Charter. In fact, this group does not comprise a class of persons who may be distinguished from others on the basis of an irrelevant personal characteristic that is enumerated in sub-section 15(1) of the Charter, or is analogous thereto. Accordingly, there is no direct discrimination on the basis of an enumerated or analogous ground under section 15.

With respect to the possibility that section 51(e) of the CEA produces adverse effects which are discriminatory in nature, the focus must shift from a consideration of prisoners as being the targeted group, to one where poor or Aboriginal inmates comprise the disadvantaged group, to one where poor or Aboriginal inmates comprise the disadvantaged group. The plaintiffs argue that systemic discrimination has resulted in an over-representation of the poor and Aboriginal people in the Canadian inmate population. The evidence appears to support the fact of this over-representation. As a result, the plaintiffs contend that section 51(e) of the CEA impacts upon the poor and Aboriginal people disproportionately. It is therefore argued that the provision results in adverse effect discrimination on the basis of both social condition and race.

In the present case, section 51(e) of the CEA takes away the right to vote from all prisoners who have been sentenced to a term of imprisonment of two years or more. Every inmate to whom the provision applies is affected in the same manner; his right to vote is temporarily suspended. All disenfranchised inmates suffer from this burden to the same degree. Those inmates who are poor, or who are Aboriginal, are not in any way more greatly impacted than are other disenfranchised inmates.

The plaintiffs are correct that a disproportionate number of poor or Aboriginal inmates will lose the right to vote as a result of the operation of section 51(e) of the CEA. However, a finding of adverse effect discrimination does not depend upon the size of the group in question; rather, it depends upon the severity of a provision's impact on a particular group. For example, while more Aboriginal inmates may be losing the right to vote as a result of section 51(e) of the CEA, they are not suffering more greatly than are inmates from other groups in society.

Accordingly, although the impugned provision may operate in such a way that it targets more members from the poor and Aboriginal inmate groups, it does not operate more harshly in relation to these two groups. Consequently, it cannot be said that the provision treats those inmates who come from these backgrounds in a more burdensome manner than it does other prisoners. It is the effect of the impugned provision which must be considered in an adverse effects analysis, and not the extent of its application. Over-representation does not in any way result from the impugned provision.

I conclude that section 51(e) does not infringe section 15 of the Charter. However, section 51(e) does infringe section 3 of the Charter and is not saved by section 1.

I wish to thank all counsel for their efforts in this trial and to compliment them with respect to the quality and thoroughness of their submissions.

"Wetston J."

J. F. C. C.

Ottawa, Ontario, December 27, 1995

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS ON THE RECORD

COURT FILE Nos. and
STYLES OF CAUSE: T-2257-93

Richard Sauvé
Plaintiffs

and

The Chief Electoral Officer of Canada et al
Defendants

T-1084-94
Seldon M[c]Corrister et al
Plaintiffs

and

Attorney General of Canada
Defendants

PLACE OF HEARING: Winnipeg, Manitoba

DATES OF HEARING: May 24, 25, 26, 29, 30, and 31,1995;
June 1, 2, 5 and 6, 1995;
August 30 and 31, 1995; and
September 1, 1995.

REASONS FOR JUDGEMENT OF THE HONOURABLE MR. JUSTICE WETSTON

DATED: December 27, 1995

APPEARANCES:

Fergus J. O'Connor — FOR THE PLAINTIFF RICHARD SAUVE

Arne Peltz	FOR THE PLAINTIFFS SHELDON M[C]CORRISTER et al
Gerald Chartier and Glenn Joyal	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Fergus J. O'Connor Barrister and Solicitor Kingston, Ontario	FOR THE PLAINTIFF RICHARD SAUVE
Arne Peltz Legal Aid Manitoba Winnipeg, Manitoba	FOR THE PLAINTIFFS SHELDON M[C]CORRISTER et al
Deputy Attorney General of Canada	FOR THE DEFENDANTS

HIGH COURT OF AUSTRALIA

BRENNAN C J,
DAWSON, TOOHEY GAUDRON, McHUGH AND GUMMOW J J

ALBERT LANGER — PLAINTIFF

AND

THE COMMONWEALTH OF AUSTRALIA
& OTHERS — DEFENDANTS

ORDER

1 *Answer the question reserved as follows:*

Is section 329A of the Commonwealth Electoral Act 1918 a *valid enactment of the Parliament of the Commonwealth?*

Answer: Yes

2 *The plaintiff pay the defendants' costs of the question reserved.*

Date of Order: *7 February 1996*
Reasons for Judgement delivered: *20 February 1996*

Plaintiff in person

Solicitor for the Defendants: *Australian Government Solicitor*

Solicitor for the Interveners: *R. C. Beazley, Victorian Government Solicitor*

Notice: This copy of the Court's Reasons for Judgement is subject to formal revision prior to publication in the Commonwealth Law Reports.

Constitutional Law – Commonwealth Constitution – sections 24, 31, 51(xxxvi) – "directly chosen by the people" – compulsory preferential voting – whether this entitles voters to refuse to indicate a preference for all candidates – prohibiting the encouragement of informal voting – implied freedom of political discussion – Commonwealth Electoral Act 1918 sections 240, 268, 270 and 329A.

Background facts: *Deane J reserved the undermentioned question for the consideration of the Full Court:*

> *"Is section 329A of the Commonwealth Electoral Act 1918 a valid enactment of the Parliament of the Commonwealth?"*

This section provides as follows:

> *"(1) A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish, or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.*
>
> *Penalty: Imprisonment for 6 months.*
>
> *(2) In this section:*
> *"publish includes publish by radio or television."*

Section 240 of the Act provides:

> *"In a House of Representatives election a person shall mark his or her vote on a ballot paper by:*
> *(a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference;*
> *and*
> *(b) writing the numbers 2, 3, 4, (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference of them".*

Held: *Section 329A of the Commonwealth Electoral Act 1918 is valid.*

Cases cited in the Judgement:

Judd v *McKeon (1926) 38 CLR 380*
Faderson v *Bridger (1971) 126 CLR 271*
Smith v *Oldham (1912) 15 CLR 355*
Australian Capital Television Pty Ltd v *The Commonwealth (1992) 177 CLR 106*
Theophanous v *Herald & Weekly Times Ltd (1994) 182 CLR 104*
Cunliffe v *The Commonwealth (1994) 182 CLR 272*
Davis v *The Commonwealth (1988) 166 CLR 79*
Attorney-General (Cth); Ex rel McKinlay v *The Commonwealth (1975) 135 CLR 1*
Nationwide News Pty Ltd v *Wills (19920 177 CLR 1*
Cutler v *Wandsworth Stadium Ltd 91949) AC 398*
McGinty v *Western Australia, unreported, High Court of Australia, 1996.*

BRENNAN CJ: The following question was reserved by Deane J for consideration of the Full Court:

> "Is section 329A of the *Commonwealth Electoral Act* 1918 a valid enactment of the Parliament of the Commonwealth?"

Section 329[1] of the *Commonwealth Electoral Act 1918* (1918) ("the Act") provides as follows:

> " (1) A person must not, during the relevant period[2] in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.
>
> Penalty: Imprisonment for six months.
>
> (2) In this section:
> 'publish' includes publish by radio or television."

Section 240 of the Act provides:

> " In a House of Representatives election a person shall mark his or her vote on the ballot paper by:
>
> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and
>
> (b) writing the numbers 2, 3, 4 (and so on, as the case require) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them."

The method of voting prescribed by this section can be described as full preferential voting. To cast an effective vote, a voter must indicate an order of preference as among all the candidates whose names appear on the ballot paper. If the voter fails to indicate preferences in accordance with section 240, section 268(1)(c) applies:

> " (1) A ballot paper shall (except as otherwise provided by section 239, and by the regulations relating to voting by post) be informal if:

(c) subject to sub-section 270(2), in a House of Representatives election, it has no vote indicated on it, or it does not indicate the voter's first preference for 1 candidate and an order of preference for all the remaining candidates:

Provided that the voter has indicated a first preference for 1 candidate and an order of preference for all the remaining candidates except 1 and the square opposite the name of that candidate has been left blank, it shall be deemed that the voter's preference for that candidate is the voter's last and that accordingly the vote has indicated an order of preference for all the candidates:

Provided further that, where there are two candidates only and the voter has indicated his or her vote by placing the figure 1 in the square opposite the name of 1 candidate and has left the other square blank or placed figure other than 2 in it, the voter shall be deemed to have indicated an order of preference for all the candidates;

.....

(3) A ballot-paper shall not be informal for any reason other than the reasons specified in this section, but shall be given effect to according to the voter's intention so far as that intention is clear."

Thus, subject to section 270(2), a ballot paper that is not filled in in accordance with section 240 is excluded from the scrutiny as informal unless a preference is deemed to have been indicated by a single blank square in accordance with the provisos to section 268(1)(c).

Despite the provisions of sections 240 and 268(1)(c), section 270(2) provides for a remedial reading of a ballot paper that would otherwise be excluded from the scrutiny:

" (2) Where a ballot-paper in a House of Representatives election in which there are 3 or more candidates:

(a) has the number 1 in the square opposite to the name of a candidate;
(b) has other numbers in all the other squares opposite to the names of candidates or in all those other squares except one square that is left blank; and
(c) but for this sub-section, would be informal by virtue of paragraph 268(1)(c);
then;
(d) the ballot paper shall not be informal by virtue of that paragraph;
(e) the number 1 shall be taken to express the voter's first preference;

(f) where numbers in squares opposite to the names of candidates are in a sequence of consecutive numbers commencing with the number 1 – the voter shall be taken to have expressed a preference by other numbers, or to have expressed preferences by the other numbers, in that sequence; and

(g) the voter shall not be taken to have expressed any other preference."

Section 270(3) provides:

> "In considering, for the purposes of subsection (1) or (2), whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded."

The provisos to section 268(1)(c) and section 270(2) ("the saving provisions") save from informality ballot papers that are filled in otherwise than in accordance with section 240.

The plaintiff contends that he is constitutionally entitled to publish material encouraging persons to filling their ballot papers otherwise than in accordance with section 240 so that, if the encouragement is taken, their ballot papers would be informal or would be saved from informality by the saving provisions. This entitlement is said to be conferred by the requirements expressed in section 24 of the Constitution that the members of the House of Representatives be "chosen by the people". A voter, so the argument goes, must be free to indicate the candidates which the voter does not choose as well as the candidate or candidates which the voter does choose and, in some circumstances, that can be done only by the filling in of a ballot paper otherwise than in accordance with section 240. If I apprehend correctly the next step in the argument, it is said that section 329A cannot validly prohibit the encouragement of voters to exercise that right of choice which the Constitution allows. A secondary argument – raised but not pressed – is that section 329A is invalid because it infringes the freedom of communication about political matters which this Court has held to be implied in the Constitution[3].

Voters' choice in filling in ballot paper

The method of choosing members of the House of Representatives is governed by the Act. The Parliament is empowered to prescribe that method by sections 31 and 51(xxxvi) of the Constitution, just as it is empowered by section 9 to prescribe the method of choosing senators.

In *Judd* v *McKeon*[4], an elector was prosecuted for failing to vote in a Senate election without a valid and sufficient reason for that failure. (Under the Act as it now stands that offence is created by section 245(15)(a)). The elector's reason for not voting was political antipathy towards all the candidates. His argument that a law prescribing compulsory preferential voting was beyond the power conferred by section 9 of the Constitution was rejected. Isaacs J said[5]:

> "The community organized, being seized of the subject matter of parliamentary elections and finding no express restrictions in the Constitution, may properly do all it thinks necessary to make elections as expressive of the will of the community as they possibly can be ... A method of choosing which involves compulsory voting, so long as it preserves freedom of choice of possible candidates, does not offend against the freedom of elections, as established and recognised by the *Stature of Westminster I* (3 Edw I c 5)".

What the Constitution requires is that the law prescribe a method of voting which leaves the voter free to make a choice, not that the law leave the voter free to choose the method of voting by which a voter's choice is to be made. A method which requires full preferential voting satisfies the constitutional requirement. In *Judd* v *McKeon,* Knox C J, Gavan Duffy and Starke J J said[6]:

> "In common parlance 'to choose' means no more than to make a selection between different things or alternatives submitted, to take by preference out of all that are available. As an illustration of the meaning of the corresponding noun 'choice' the *Oxford Dictionary* quotes the phrase 'I have given thee thy choice of the manner in which thou wilt die,' and this use of the word seems to exclude the idea that a right of choice can only be said to be given when one or other of the alternatives submitted is desired by the person who is to exercise the right, or, in other words, to choose between them".

A refusal to vote on the ground that the elector would not wish to give a preference to any candidate would be an "open challenge to the very essence of the enactment" as Isaacs J said[7].

In *Faderson* v *Bridger*[8], an elector who did not have any preference among the candidates advanced that fact as a "valid and sufficient reason" for not voting at a Senate election in which voters were required to "'place the number 1 in the square opposite the name of the candidate for whom he votes as his first preference'" all the remaining squares to be marked with successive numbers as the voter determines as contingent votes"[9]. The elector's defence failed. Barwick C J, with whom McTiernan and Owen J J agreed, said[10]:

> "However much the elector may say he has no personal preference for any candidate, that none of them will suit him, he is not asked that question nor required to express by his vote that opinion. He is asked to express a preference amongst those who are available for election, that is, to state which of them he prefers if he must have one or more of them as Parliamentary representatives, as he must, and to mark down his vote in an order of preference of them. ... To face the voter with a list of names of persons, none of whom he may like or really want to represent him and ask him to indicate a preference amongst them does not present him with a task that he cannot perform."

The legislative power over elections for the House of Representatives conferred by sections 31 and 51(xxxvi) is a plenary power and, as Isaacs J said in *Smith* v *Oldham*[11] with reference to the power over federal elections:

> "The limits of plenary power end only with the subject matter in respect of which it may be exercised."

Provided the prescribed method of voting permits a free choice among the candidates for election, it is within the legislative power of the Parliament. Section 24 of the Constitution does not limit the Parliament's selection of the method of voting by which a voter's choice is made known so long as the method allows a free choice. Section 240 permits a voter to make a discriminating choice among the candidates for election to the House of Representatives. An election in which members of the House of Representatives are elected pursuant to such a method of voting achieves what section 24 requires, namely, a House of Representatives composed of members directly chosen by the people.

It follows that the Parliament is empowered to prescribe a method of voting in an election for the House of Representatives that requires a voter to fill in a ballot paper in accordance with section 240, although that method requires a voter to choose by allocating preferences among candidates for whom the voter does not wish to vote. It is not to the point that, if a ballot paper were filled in otherwise than in accordance with section 240, the vote would better express the voter's political opinion.

Since section 240 can reasonably be regarded as prescribing a method of freely choosing members of the House of Representatives, a law which is appropriate and adapted to prevent the subversion of that method is within power. Section 329A in such a law. The saving provisions do not affect its validity. They are designed to minimise the exclusion of ballot papers from the scrutiny provided the voter's intention clearly appears from the voter's partial compliance with the method prescribed by section 240. But the saving provisions do not detract from the power to enact section 329A in order to protect what the Parliament intends to be the primary method of choosing members of the House of Representatives.

Once the generality of the power to enact laws relating to elections is appreciated and the validity of section 240 is accepted, section 329A can be seen to be a provision appropriate and adapted to the protection of the method of electing members of the of the House of Representatives.

Freedom of communication

The powers of the Parliament are impliedly limited so as to preserve that freedom of political discussion which is essential to the maintenance of the Commonwealth system of representative government. But, as the judgements in the free speech cases have shown[12], the extent of the

limitation depends on the particular circumstances, including especially the subject matter of the law which impairs the freedom. In *Australian Capital Television Pty Ltd* v *The Commonwealth*[13], *Theophanous* v *Herald & Weekly Times Ltd.*[14] and *Cunliffe* v *The Commonwealth*[15], I sought to explain the approach to be taken in determining the validity of a law impugned on the ground that it impairs the freedom of political discussion. In my view, if the impairment of the freedom is reasonably capable of being regarded as appropriate the adapted??? to the achieving of a legitimate legislative purpose and the impairment is merely incidental to the achievement of that purpose, the law is within power. In *Cunliffe*[16], I observed:

> "The constitutional freedom of political discussion ensures freedom to engage in debate about the institutions of government and the exercise of any kind of governmental power but it does not impair, much less sterilize, the exercise of a power which might become the subject of political debate."

Section 329A does not prohibit discussion about the operation or desirability of the method of voting prescribed by section 240 nor does it prohibit advocacy of its amendment or repeal. Section 329A operates in the context of the method of voting prescribed by section 240 and prohibits intentional encouragement of the filling in of ballot papers in a way which, if not within the saving provisions, will result in the exclusion of the ballot paper from the scrutiny and which, if within the saving provisions of section 270(2), will result in a diminished expression of the elector's preferences. The prohibition contained in section 329A is thus a means of protecting the method which Parliament has selected for the choosing of members of the House of Representatives. The restriction on freedom of speech imposed by section 329A is not imposed with a view to repressing freedom of political discussion; it is imposed as an incident to the protection of the section 240 method of voting.

If the Act had prescribed methods of voting alternative to those prescribed by section 240, there would be much to be said for the view that no law could preclude a person from encouraging voters to vote by an alternative method. The saving provisions do not prescribe an alternative method, they merely save from invalidity some ballot papers which are not filled in in accordance with the method which the Act prescribes. Nor does section 329A prohibit a person from informing electors of the state of the law. It simply prohibits encouragement of voters to fill in their ballot papers otherwise than in accordance with the method of voting prescribed by the Act.

Section 329A is therefore valid.

I would answer the question reserved: Yes.

DAWSON J: By a question reserved by Deane J for its consideration, the Court is asked to determine the validity of section 329A of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"). That Section provides:

> "(1) A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.
>
> Penalty: Imprisonment of 6 months.
>
> (2) In this section:
>
> 'publish' includes publish by radio or television."

By section 322 "relevant period" means in relation to an election the period commencing on the issue of the writ for the election and expiring at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election.

It would appear that the "mischief" to which section 329A is directed is not the casting of an informal vote but rather the casting of a vote in a particular – and permissible – form. To appreciate that, it is necessary to refer to other sections of the Act which prescribe the preferential system of voting which is employed in the election of members of the House of Representatives.

Section 240 itself provides:

> "In a House of Representatives election a person shall mark his or her vote on the ballot paper by:
>
> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference;
>
> (b) writing the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them."

The purpose of requiring an elector to mark the ballot paper in the manner prescribed by section 240 is revealed by section 274(7)(d), which directs the divisional returning officer to count the votes as follows:

"(i) the candidate who has received the fewest first preference votes shall be excluded, and each ballot paper counted to the candidate shall be counted to the candidate next in the order of the voter's preference;

(ii) the process of excluding the candidate who has the fewest votes, and counting each of his or her ballot papers to the excluded candidate next in the order of the voter's preference, shall be repeated until only 2 candidates remain in the count; and

(iii) if, following the ascertainment of the first preference votes given for each candidate or the exclusion of candidates under this paragraph, a candidate has an absolute majority of votes, that candidate shall be elected".

Under section 274(8) a ballot paper is to be set aside as exhausted where on a count it is found that the ballot paper expresses no preference for any unexcluded candidate.

Section 268(1)[17] provides that a ballot paper may be informal for a number of reasons. Under par(c) it is informal if it has no vote indicated on it or it does not indicate the voter's first preference for one candidate and an order of preference for all the remaining candidates. But section 268(1) is subject to two provisos. The first is that where the voter has indicated a first preference for one candidate and an order of preference for all the remaining candidates except one and the square opposite the name of that candidate had been blank, it is deemed that the voter's preference for that candidate is the voter's last and that accordingly the voter has indicated an order of preference for all the candidates. The second proviso is that where there are two candidates only the voter has indicated his or her vote by placing the number 1 in the square opposite the name of one candidate and has left the other square blank or placed a number other than 2 in it, the voter is deemed to have indicated an order of preference for all the candidates.

Section 270(2)[18] and (3) provide:

"Where a ballot paper in a House of Representatives election in which there are 3 or more candidates:

(a) has the number 1 in the square opposite to the name of a candidate;

(b) has other numbers in all the other squares opposite to the names of candidates or in all those other squares except one square that is left blank; and

(c) but for this subsection, would be informal by virtue of paragraph 268(1)(c);

then:

(d) the ballot paper shall not be informal by virtue of that paragraph;

(e) the number 1 shall be taken to express the voter's first preference;

(f) where numbers in squares opposite to the names of candidates are in a sequence of consecutive numbers commencing with the number 1

– the voter shall be taken to have expressed a preference by the other number, or to have expressed preferences by the other numbers, in that sequence; and

(g) the voter shall not be taken to have expressed any other preference.

(3) In considering, for the purposes of subsection (1) or (2), whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded."

The effect of section 270, which appears under the heading "Certain votes with non-consecutive numbers to be formal", is to modify section 240, which requires numbers to be written in the squares opposite the names of all candidates so that, when the numbers are read consecutively, the voter's order of preference for all the candidates is indicated. Under section 270 a voter is not required to number each square so that these numbers may be read consecutively provided that he or she places the number 1 in one square and fills in all the other squares save the one which may be left blank under the provisos to section 268(1). This is made clear by section 270(3) which provides that a number which is repeated is to be disregarded. The result is, it would seem, that section 270 saves from informality votes such as the following:

A	B	C	D
1	1	1	1
2	2	2	2
2	2	3	3
2	2	3	3
2		3	

The ballot papers A and B would be exhausted after the first preference was counted. The ballot papers in C and D would be exhausted after the second preference was counted. Thus, a voter may by repeating a number avoid expressing a preference for a particular candidate or particular candidates and nevertheless have his or her vote counted. This result has been described as optional preferential voting or, perhaps more accurately, selective preferential voting as opposed to the full preferential system of voting which is envisaged by section 240 standing alone.

Whilst it was appreciated, indeed intended, that section 270 should have the effect of saving votes which, by reason of mistake on the part of the voter, could not be read consecutively, it may not have been appreciated that the effect of the section was to allow voters to avoid intentionally the

expression of any preference, and hence any vote, for a particular candidate or particular candidates.

When sections 240, 268 and 270 are read together – as they must be – it is clear that the Act allows more than one method of casting a formal vote. A ballot paper not completed in accordance with section 240 may nevertheless constitute a formal vote if the requirements of section 268 or section 270 are satisfied. In my view, it is an incorrect construction of the Act to say that section 240 alone prescribes the manner in which a formal vote may be cast. Although sections 268 and 270 in terms deal with the counting of votes so as to save votes unintentionally cast in a form different from that prescribed by section 240, it is plain that the effect of those provisions is to allow a voter to case a formal vote with a ballot paper which is not in accordance with section 240.

In the *1990 Federal Election Report*[19] from the Joint Standing Committee on Electoral Matters it was said:

> "The issue of encouraging electors to record their votes other than in accordance with the instructions on the ballot paper arose again during the 1990 election and received considerable media attention. In some instances electors were urged not to express their preferences fully – for example, by voting 1, 2, 2, 2, etc. This effectively allows optional preferential voting."

The preference in that passage to the recording of votes otherwise than in accordance with the instructions on the ballot paper appears not to be entirely accurate. The instruction on the ballot paper merely instructs voters: "Remember ... number *every* box to make your vote count."[20] That instruction is, in any event, at variance with the provisos to section 268.

The Report goes on to say that optional preferential voting was an unintended effect of section 270 which was designed "only to provide a safety net for people who make a genuine mistake in filling out their ballot papers". It continues:

> "This practice is of considerable concern because of the significant increase in the number of House of Representatives exhausted votes between the 1987 and 1990 elections – that is, an increase from 2,082 exhausted votes at the 1987 election to 18,765 in 1990. Given the small margins separating winning candidates at the 1990 election this figure is disturbing. The AEC [Australian Electoral Commission] suggested that the increase in exhausted votes would appear to indicate that the public attention given to the matter may have had an undesirable effect.
>
> The AEC commented that it is very difficult to see how section 270 of the Electoral Act could be amended to retain the safety net yet avoid *de facto* optional

> preferential voting. One avenue for dealing with the problem is in the area of penalties for those who induce people to fill out the ballot paper other than in accordance with the instructions under s 329(3) of the Act."

Section 329(3) of the Act creates an offence arising from the misrepresentation of a ballot paper in a manner likely to induce an elector to mark his or her ballot paper otherwise than in accordance with the directions on the ballot paper.

Section 329A, which was inserted in the Act in 1992[21], was plainly directed against the exercise of the right conferred by the Act to engage in optional or selective preferential voting in a House of Representatives election. It does not, however, deny the right but seeks to prevent voters becoming aware of its existence, at all events where the imparting of information concerning its existence is intended to encourage its use. If there is a line between imparting information with an intention to encourage its application and imparting information with an intention merely to inform it must (save where there is active discouragement) be a thin one. But I shall return to this.

Section 24 of the Constitution provides that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth. Although that section does not expressly require the choice to be made by election, other sections, in particular sections 30 and 31, make it clear that members are to be chosen by election. And it is clear from section 30 that not all of the people were intended to vote in elections so that the choice by the people is to be made through the casting of votes by those eligible to vote. The Constitution does not require the provision of any particular electoral system[22]. Thus, the provision in section 240 for a preferential voting system is clearly within power notwithstanding that it requires a choice to be made in a specified manner and, standing alone, requires a preference to be expressed in respect of each candidate[23]. Whatever the system, the Constitution requires that a choice must be made and, as I pointed out in *Australian Capital Television Pty Ltd* v *The Commonwealth*[24], the choice involved must obviously be a genuine or informed choice which requires access on the part of the voter to the available alternatives in the making of the choice. Other members of the Court adopted a different approach and found in the concept of representative government or representative democracy an implied freedom of communication which was to be read into the Constitution. The freedom was said to embrace the discussion of government and political matters[25].

I was unable to accept the line of reasoning adopted by the majority of the Court in finding a constitutionally-guaranteed freedom of communication because that guarantee was derived, in my view, from a notion of representative government which does not appear from any requirement contained in the Constitution itself[26]. The freedom of communication which I thought to be required by the Constitution was confined to what is necessary for the conduct of elections by direct popular vote as envisaged by sections 7 and 24 and related sections. Nevertheless, in my view, that requirement is sufficient to invalidate section 329A of the Act.

Section 31 of the Constitution provides that:

> "Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives."

Section 51(xxxvi) provides that the Parliament may make laws for those matters in respect of which the Constitution makes provision until the Parliament otherwise provides and, hence, Parliament has power to make laws with respect to the election of members of the House of Representatives. It is that power which was exercised in the enactment of the Act. But it is clearly not a power which is at large. The Constitution, having established in section 24 that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, the elections with respect to which Parliament is given power to make laws by sections 31 and 51(xxxvi) must necessarily be elections fulfilling the requirements of section 24. That is to say, the legislative power conferred by those provisions is a purposive power: a power to make laws for the purpose of implementing section 24.

Since, as I have said, the choice which is required by section 24 must be genuine choice[27], those eligible to vote must have available to them the information necessary to exercise such a choice. In *Cunnliffe* v *The Commonwealth*[28] I expressed the view, to which I adhere, that the usefulness of the doctrine of proportionality in determining the validity of laws under the Constitution is confined to those laws which are enacted pursuant to a purposive power. Otherwise, the test must be whether there is sufficient connection between the law and the subject matter of the power. But, for the reasons which I have given, the power conferred by sections 31 and 51(xxxvi) may properly be regarded as a purposive power and it is therefore open to test the validity of a law enacted in the purported exercise of that power by asking whether the law is reasonably and appropriately adapted to the achievement of an end which lies within power. To my mind, section 329A (or, more accurately, the law inserting it in the Act) is not such a law. It is a law which is designed to keep from voters information which is required by them to enable them to exercise an informed choice. It can hardly be said that a choice is an informed choice if it is made in ignorance of a means of making the choice which is available and which a voter, if he or she knows, for it, ??? may wish to use in order to achieve a particular result.

If section 240 stood alone, section 329A would be supportable as a protection of the preferential system of voting provided by the Act. Upon any view, some limitations upon freedom of communication are necessary to ensure the proper working of any electoral system[29]. However, the method of preferential voting which is established by the Act is that which may be discerned from sections 240, 268, 270 and 274 read together. Sections 268 and 270 qualify the method of voting prescribed by section 240 and section 270 makes available optional or selective preferential voting as opposed to full preferential voting. It is true that a voter cannot cast a formal vote by simply placing the number 1 in the square beside one candidate and leaving all the others blank.

But the fact remains that the Act permits voters intentionally to record a preference for only one or some of the candidate standing for election by completing their ballot paper in the manner which I have described above. To prohibit communication of this fact (or at any rate communication in the form of encouragement) is to restrict the access of voters to information essential to the formation of the choice required by section 24 of the Constitution. Thus, section 329A has the intended effect of keeping from voters an alternative method of casting a formal vote which they are entitled to choose under the Act.

It does not, to my mind, matter that the prohibition imposed by section 329A is confined to the conveying of information with the intention of encouraging persons voting at an election to fill in a ballot paper otherwise than in accordance with section 240. To impart information which can be used (and information about the availability of an optional or selective preferential vote is of that kind) is necessarily to encourage its use if the recipient of the information is so inclined. A person in making that information available to an eligible voter would, in the absence of active discouragement of its use, find it well nigh impossible to prove that it was made available without any intention that those to whom it was made available should make use of it. To put the matter briefly, to make available useful information is ordinarily to encourage its use. This is particularly so in the context of an election. The effect of section 329A in any practical sense must, in my view, be to discourage, if not prevent, persons from imparting to eligible voters knowledge that the electoral system permits optional or selective preferential voting. It cannot, therefore, be a law which is reasonably and appropriately adapted to the achievement of an end which lies within the ambit of the relevant legislative power. Indeed, the effect of the provision is such that it is possible to adopt the words of Mason C J, Dean and Gaudron J J in *Davis* v *The Commonwealth*[30]

> "This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power."

I have been able to reach my conclusion without reliance upon the reasoning of the majority with regard to freedom of communication in the previous cases[31]. With the greatest of respect, that reasoning does not, as I have indicated, commend itself to me. But upon that reasoning, the Constitution guarantees freedom of political discussion. I must confess that I am unable to see how political discussion can be confined to the mere imparting of information and why it should not extend to the furnishing of information with the intention that it should be used. Indeed, exhortation or encouragement of electors to adopt a particular course in an election is of the very essence of political discussion and it would seem to me that upon the view adopted by the majority in the earlier cases, section 329A must infringe the guarantee which they discern. It is true that the encouragement of voters to adopt a course which is inconsistent with the casting of a formal vote may not infringe that guarantee because the casting of a formal, and therefore, effective, vote is in the interests of representative government, as are the various other controls which may impede freedom of discussion but which are required to ensure that an electoral system

works properly. But section 329A goes beyond matters of that kind. It seeks to prevent the encouragement of voters to cast their votes in a form which is open to them. It must inevitably inhibit freedom of political discussion in a manner which does nothing to aid the proper conduct of elections in accordance with the Act.

For these reasons, I would answer no to the question whether section 329A of the *Commonwealth Electoral Act* 1918 is a valid enactment of the Parliament of the Commonwealth.

TOOHEY AND GAUDRON J J: The following question has been reserved for the consideration of the Full Court:

> "Is section 329A of the Commonwealth Electoral Act 1918 a valid enactment of the Parliament of the Commonwealth?"

Section 329A of the Commonwealth Electoral Act 1918 (Cth) ("the Act") relevantly provides:

> "(1) A person must not, during the relevant period in relation to a house of Representatives election under this Act, print, publish[32] or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240."

Section 322 defines "relevant period" to mean, "in relation to an election under [the] Act, ... the period commencing on the issue of the writ for the election and expiring at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election".

Section 240 provides that "[i]n a House of Representatives election a person shall mark his or her vote on the ballot paper by:

> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and
>
> (b) writing the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them".

Although couched in mandatory terms section 240 does not operate to require a voter to fill in a ballot paper in the manner described in that section or, indeed, at all. Rather, it is the foundation of a somewhat complicated legislative scheme directed to the question whether and, if so, how a ballot paper will be counted in an election for the House of Representatives. The preferences expressed in a ballot-paper which complies with section 240 will be distributed in accordance with section 274 of the Act until one candidate has an absolute majority of votes or until only two candidates remain[33].

The scheme is partially revealed by section 268(1)(c) which relevantly provides that, subject to section 270(2) of the Act, a ballot paper which does not comply with section 240 is informal unless it satisfies one or other of the provisos to section 268(1)(c)[34]. The effect of the provisos is that, if the number 1 is placed against the name of one candidate and consecutive numbers are placed against the names of all but one of the other candidates, the elector is deemed to have

given his or her last preference to that candidate and his or her ballot paper is counted in the ballot on the basis that it expresses a preference, from first to last, for each of the candidates whose names appear on the ballot paper.

The scheme is completed by section 270(2) which provides:

> "Where a ballot paper in a House of Representatives election in which there are 3 or more candidates:
>
> (a) has the number 1 in the square opposite to the name of a candidate;
> (b) has other numbers in all the other squares opposite to the names of candidates or in all those other squares except one square that is left blank; and
> (c) but for this subsection, would be informal by virtue of paragraph 268(1)(c);
>
> then:
>
> (d) the ballot paper shall not be informal by virtue of that paragraph;
> (e) the number 1 shall be taken to express the voter's first preference;
> (f) where numbers in squares opposite to the names of candidates are in a sequence of numbers commencing with the number 1 – the voter shall be taken to have expressed a preference by the other number, or to have expressed preferences by the other numbers, in that sequence; and
> (g) the voter shall not be taken to have expressed any other preference."

It is provided by section 270(3) that "[i]n considering, for the purposes of subsection ...(2), whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded". The effect section 270(2) and (3) is that, if there are three or more candidates, a ballot paper will be counted until it is exhausted[35] so long as the number 1 is placed against one candidate and there are numbers against all other candidates, or all other candidates but one. Thus, for example, if there are six candidates and the voter places numbers 1, 2, 3, 4 and 4 against the names of five candidates, the ballot paper will be exhausted after the third preference but, until then, it will be counted in the ballot.

The proscription effected by section 329A is not accurately described as a proscription of conduct intended to encourage electors to vote informally. A ballot paper may be informal for reasons other than non-compliance with section 240: it may not be authenticated by the initials of the presiding officer or by the presence of the official mark[36]; or it may be marked in such a way that, in the opinion of the Divisional Returning Officer, the voter can be identified[37]. And as already noted, ballot papers which do not comply with section 240 will, nonetheless, be formal and counted in the ballot if they satisfy one or other of the provisos to section 268(1)(c) or the

conditions specified in section 270(2): fully counted, if they satisfy one or other of the provisos; counted until exhausted, in the case of the ballot papers satisfying section 270(2) of the Act.

The proscription effected by section 329A is different in purpose and effect from a proscription on conduct intended to encourage electors to vote informally. Its effect is to proscribe conduct of the kind which the section describes and which is intended to encourage voters not to place consecutive numbers, starting with the number 1, against the names of all candidates on the ballot paper. And odd though it be, its purpose would seem to be to limit the possibility of voters deliberately taking advantage of the provisos to section 268(1)(c) or of the provisions of section 270(2) so as to express a preference for some only of the candidates. In any event, it operates that way and, in so doing, it assists in the maintenance of a system of full preferential voting, to the extent that that is possible in a context where effect is given to ballot papers that do not express a preference for all candidates by deeming them so to do, or by counting them to the extent that an order of preference is revealed.

It should be noted that section 329A is confined to conduct that is intended to encourage non-compliance with section 240 and is not concerned with conduct that is intended only to inform. Thus, it is not directed to conduct intended to provide information as to the circumstances in which a ballot-paper will be formal, notwithstanding non-compliance with section 240, or as to the manner in which it will be counted. Nor is it directed to conduct intended to inform voters as to the possible consequences of expressing a preference for each of the candidates whose names appear on the ballot paper.

It is asserted by the plaintiff, and not contested by the defendants, that one of the possible consequences or "paradoxes" of compliance with section 240 of the Act is that, although a last or final preference is popularly regarded as a vote against the candidate to whom it is given, a candidate may, in some circumstances, be "elected on final preferences"[38].

Strictly, this case is concerned only with section 329A of the Act. However, the plaintiff contends that section 240 is invalid to the extend that it requires a voter to express a preference for a person whom he or she would wish to vote against. And he contends that, consequently, section 329A is also invalid. The argument is that section 240 offends against the requirement in section 24 of the Constitution that members of the House of Representatives be "directly chosen by the people of the Commonwealth"[39] because, it is said, a voter is denied effective choice if he or she is required to express a preference for a candidate whom he or she wishes to vote against.

It is not strictly correct to say that section 240 obliges a voter to express a preference for a candidate whom he or she wishes to vote against. The section must be read in the context of the Act as a whole, including section 270(2). When so read, a voter is free, if there are three or more candidates, to vote against a candidate by ensuring that his or her ballot paper is exhausted before it is counted towards the candidate whom he or she wishes to vote against. Thus, for example, if there are three candidate whom he or she wishes to vote against two of them, he of she can do

so by voting 1, 2, 2. However, it is not possible to vote against one candidate only; if a voter votes 1, 2 and leaves the other box blank, for example, the ballot paper will be deemed to express a preference for all candidates pursuant to the first proviso to section 268(1)(c) and will be counted accordingly.

The circumstances in which the application of the provisos to section 268(1)(c) of the Act would have any practical effect on the outcome of an election were not explored in argument. However, it would seem that that is possible where there are two unexcluded candidates and the ballot papers counted to them are equal[40]. And on that basis, it may fairly be said that a voter cannot cast a formal vote and, at the same time, vote against one candidate only. The question then is whether this limited ability to vote against a candidate offends the requirement in section 24 of the Constitution that members of the House of Representatives be "directly chosen by the people".

The expression "directly chosen by the people of the Commonwealth" in section 24 has its counterpart, in relation to Senate elections section 7 which requires that the Senate "be composed of senators for each State, directly chosen by the people of the State". Two matters may be noted with respect to the expression in sections 7 and 24: as pointed out in *Attorney General (Cth); Ex rel McKinlay* v *The Commonwealth,* the phrase is concerned with "the people", not with "electors" who are referred to as such as sections 8, 30 and 128 of the Constitution[41]; and the word used is "chosen" rather than "elected", a distinction of some significance which is evident in section 15 following its substitution in 1977 to deal with casual Senate vacancies[42].

The words "choose", "choosing" and "chosen" are used in various other constitutional provisions relating to senators and members of the House of Representatives, including sections 8, 9, 13, 15, 26, 30, 43 and 44. It would be wrong to approach those words in sections 7, 24 or any of the other provisions to which reference has been made on the basis that they are to be equated with the words "elect", "electing", or "elected"[43]. At the very least, the word "chosen" is apt to describe accurately the situation where there is only one candidate and it is, thus, unnecessary to conduct a ballot. A further distinction can be discerned in the context of section 43 which provides that "[a] member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the House." Such a person may well be capable of being elected, in the sense of securing the necessary number of votes, although not capable of being chosen because of his or her disqualification.

When regard is had to the absence of any reference in sections 7 and 24 to electors, elections or persons being elected, the limited nature of the franchise which existed at the time of federation[44], the separate constitutional provisions concerned with the franchise[44], the separate constitutional provisions concerned with the franchise[45] and the numbers of senators[46] and members of the House of Representatives [47], the requirement that senators and members of the House of Representatives be "chosen by the people" must be taken as primarily mandating a democratic electoral system and as bearing on the features of that system only in the sense that it prohibits any feature that prevents it being said that the Senate or the House of Representatives is, or would, in the event

of any election, be composed of persons "chosen by the people". In this context, and no matter how broadly the words "chosen by the people" are construed, there is nothing to support the view that members who are elected pursuant to a full preferential voting system, or the modified preferential voting system effected by sections 240, 268 and 270 of the Act, are not properly described as "chosen by the people". The mere fact that a voter's ability to cast a formal vote and, at the same time, vote against a candidate is limited in the way earlier described does not have the effect that the House of Representatives is not properly described as composed of members "chosen by the people". Accordingly section 240 is valid and it follows that the plaintiff's argument with respect to section 329A of the Act must fail.

There is, perhaps, more force in an argument that an individual who is "elected on final preferences"[48] is not properly described as "chosen by the people". However, in our view, such a person is as much "chosen by the people" as a candidate who is unopposed and declared "duly elected" pursuant to section 179(3) of the Act and who, as already indicated, is properly encompassed in the expression "chosen by the people". This notwithstanding, it may be that the same could not be said if the outcome of an election were to depend on deemed preferences because of the operation of one or other of the provisos to s 268(1)(c) of the Act. If, in the event of a tied vote, for example, the candidate for whom fewer voters expressed a final preference were to be declared elected, it may be that he or she could not accurately be described as "chosen by the people"[49]. That, however, is a question that is separate and distinct from any question as to the validity of section 240 of the Act. Moreover, it is a question that may never arise.

Although the plaintiff did not argue that section 329A of the Act is invalid by reason that it infringes the implied freedom of political discussion recognised in *Nationwide News Pty Ltd* v *Wills*[50] and in *Australian Capital Television Pty Ltd* v *The Commonwealth*[51], it is, nonetheless, appropriate to indicate that, in our view, it does not. Freedom of political discussion is an indispensable concomitant of representative democracy which is embodied in the text, particularly sections 7 and 24, and in the structure of the Constitution. However, as was made clear in *Nationwide News and Australian Capital Television,* the freedom is not absolute[52]. The limits of the freedom were expressed in different ways by those justices who constituted the majority in those cases[53] but there is nothing in those cases to warrant a conclusion that the freedom operates to strike down laws which curtail freedom of communication, where that curtailment is reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic process. And the nature and the source of the freedom are such that, in our view, the freedom does not operate to strike down laws of that kind, although it will not often be the case that a law which curtails freedom of political discussion will be capable of being viewed as appropriate and adapted to furthering or enhancing the democratic system. Perhaps, it could only be said of laws that regulate the conduct of persons in connection with elections as, for example, laws to "prevent intimidation and undue influence"[54].

One matter that furthers the democratic process is full, equal and effective participation in the electoral process. If a voter's ballot paper is informal, as may be the case if it is not completed

in accordance with section 240, he or she does not effectively participate in the electoral process. And a voter does not participate either fully or equally with those who indicate an order of preference for all candidates if his or her ballot paper is filled in such a way that it is earlier exhausted. To the extent that section 329A operates to prevent conduct that is intended to encourage voters not to fill in a ballot paper in accordance with section 240 and, thus, either vote informally or to vote in such a way that their ballot papers are exhausted earlier than those of other voters, it is reasonably capable of being viewed as appropriate and adapted to furthering the democratic process.

So far as concerns ballot papers which are deemed by the provisos to section 268(1)(c) to express a preference for all candidates, different considerations apply. Although the provisos operate to give effect to a ballot paper which might otherwise be informal, the democratic process is enhanced if a voter's actual intention is capable of ascertainment from the ballot paper effect is given to that intention rather than an intention which he or she is deemed to have expressed. In relation to ballot papers which fall within the provisos to section 268(1)(c), section 329A operates to proscribe conduct which might encourage votes in filling their ballot papers in a way that does not make their intentions manifest. Because it operates in this way, it is reasonably capable of being viewed as appropriate and adapted to the enhancement of the democratic process.

The question reserved should be answered "yes".

McHUGH J: The question reserved for the decision of the Full Court of this Court in this suit is whether section 329A of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act") is a "valid enactment of the Parliament of the Commonwealth". Section 329A provides:

> "(1) A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to filling a ballot paper otherwise than in accordance with section 240.
>
> Penalty: Imprisonment for 6 months.
>
> (2) In this section:
> 'publish' includes publish by radio or television."

Section 322 defines "relevant period" to mean "the period commencing on the issue of the writ for the election and expiring at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election".

Section 240 provides:

> "In a House of Representatives election a person shall mark his or her vote on the ballot-paper by:
>
> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her preference; and
> (b) writing the numbers, 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them."

Section 240 is an essential element in the system of preferential voting, the system that the Act uses to determine which candidate is to be elected to the House of Representatives[55]. Failure to comply with section 240 does not mean that a vote is always informal. In some limited circumstances[56], a ballot paper may be admitted to the scrutiny and its preferences distributed, even though the paper does not fully comply with the directions contained in section 240. But the system of preferential voting, which the Act sets up, would break down if there was a widespread failure to comply with its terms. Section 329A is, therefore, a desirable, if not essential, protection of the preferential system of voting that the Act sets up for House of Representatives' elections. Its object is to prohibit persons from encouraging voters not to indicate their order of preference for each candidate.

The enactment of section 329A became necessary once the Parliament relaxed the circumstances in which a ballot paper, not marked in accordance with section 240, could be admitted to the scrutiny. But necessary or not, the plaintiff contends that section 329A does not prevent a person encouraging voters to leave blanks against the name of a candidate on a ballot paper if the voter does not wish to vote for that candidate. Nor, says the plaintiff, does the section prevent a person from encouraging a voter to indicate his order of preference for the candidates for whom he or she wishes to vote and then giving the next consecutive number to all the candidates that the voter does not wish to vote for. If section 329A does prevent a person from encouraging a voter to mark his or her ballot paper in those ways, says the plaintiff, it is beyond the constitutional power of the Commonwealth to enact such a provision.

The Construction of Section 240

During argument it emerged that, although the question reserved concerns the validity of section 329A, the plaintiff's real concern was the construction and validity of section 240 of the Act. The plaintiff alleges that section 329A is invalid if section 240 requires a voter to state a preference for a candidate for whom he or she does not wish to vote because, on that construction, section 240 is invalid. He contends that, because section 24 of the *Commonwealth of Australia Constitution Act* 1990 (UK) declares that the "House of Representatives shall be composed of members directly chosen by the people of the Commonwealth", a voter must be able to choose his or her candidate and cannot be forced to record a preference for a candidate whom he wishes to vote against. He submits therefore that, consistently with section 24 of the Constitution, section 240 should be given a construction that does not require a voter to record a preference vote for a candidate that the voter opposes. He contends that "implicit in 240 ... is that if you do not choose any of the candidates, leave it blank. Surely it could not be that you are required to pretend to vote for a candidate who you do not choose. How could that be an election?" The plaintiff argues that, if a voter wishes to vote for only one candidate he or she is entitled to fill in all the other squares with a "2". If there are six candidates and the voter only wishes to vote for three, the voter can "write the numbers 1, 2, 3, 4, 4, 4. Those are consecutive numbers." Somewhat inconsistently, the plaintiff does not object to a voter having to place a "4" against a candidate if he or she wishes to vote for only three of four candidates.

The plaintiff relies on the word "all" in section 240(b) to support his construction of the section. He argues that "all" in section 240 requires you to number all candidates. Now, I believe that does not require you to use unrepeated numbers, that you are perfectly entitled to give the candidates you reject your last choice." It follows according to the plaintiff's argument that section 329A does not prevent a person from encouraging voters to give preferences only to the candidates for whom they wish to vote and to give the remaining candidates the next consecutive number.

However, I can see nothing in the use of the word "all" or in section 240 as a whole that supports the construction that the plaintiff seeks to put on the section. The plain meaning of the section is that the voter must place a number in each square, commencing with the number 1 and rising consecutively, so as to indicate the voter's order of preference for each candidate. A complete expression of preferences for all candidates is required irrespective of the difficulty that a voter may have in deciding the order of preference. A ballot paper that gives the same number to more than one candidate is in breach of the directions that the section addresses to the voter, although that breach is not made punishable by fine or imprisonment.

Notwithstanding the use of the mandatory "shall", the better view is that section 240 does not impose a legally enforceable duty on the voter. It seems extremely unlikely that Parliament intended to impose such a duty on voters. The absence of any penalty for breach tells against such a conclusion although it is not conclusive. As Lord Normand pointed out in *Cutler* v *Wandsworth Stadium Ltd*[57]:

> "If there is no penalty and no other special means of enforcement provided by the statute, it may be presumed that those who have an interest to enforce one of the statutory duties have an individual right of action."

If section 240 imposes a legally enforceable duty, perhaps the Electoral Commissioner is a person who can enforce it. But the practical difficulties of enforcing such a duty are so great that, combined with the absence of any penalty for breach, it seems extremely unlikely that the section was intended to impose a legal duty on a voter. The section should be read, therefore, as giving directions to a voter as to how the voter is to discharge the statutory duty a vote in a federal election.

Nevertheless, it seems clear that it is the legislative intention that, when voters discharge their duty to vote, they will comply with the directions. The efficacy of the system is dependent upon the directions being obeyed. It is true that, if a ballot paper does not comply with section 240, it is not necessarily informal. Other sections of the Act enable a ballot paper that does not comply with section 240 to be admitted to the scrutiny in some cases[58]. But the words of section 240 direct each voter to express consecutive preferences for all candidates on the ballot paper; it is a breach of that direction to mark a ballot paper otherwise than in accordance with the section. The provisions of the Act which save the validity of a ballot paper that does not comply with section 240 do not affect the Act's intention that voters are to follow the directions contained in that section. The purpose of the saving provisions is to further the franchise by protecting certain ballot papers that do not comply with the directions, but the saving provisions provide no ground for concluding that the Act is indifferent as to whether or not voters comply with those directions. While failure to follow the directions contained in section 240 is not a breach of legal duty, the directions are obviously an essential part of the system of preferential voting established by Pt XVIII of the Act: if they are disobeyed, the preferential system of voting set up by Pt XVIII is undermined.

I cannot accept the plaintiffs argument that the voter would not be marking "his or her vote on the ballot paper" within the meaning of section 240 if the voter indicated a preference for a candidate for whom the voter did not wish to vote. The object of section 240 is to require the voter to indicate an order of preference for each candidate and the section plainly regards such an indication of preference as a vote. Whether or not the voter wishes to give a candidate a preference or a vote is irrelevant.

The plaintiff's argument concerning the construction of section 240 must be rejected.

The Constitutional Validity of Section 329A

The next question is whether, consistently with section 24 of the Constitution, the Parliament can enact section 329A for the purpose of preventing a person from encouraging voters from filling in their ballot papers otherwise than in accordance with the above construction of section 240. The plaintiff made it clear that he did not oppose compulsory voting in the sense of compelling a voter to attend a polling booth and place a ballot paper in the ballot box. His complaint is that section 24 of the Constitution prevents the Parliament from requiring an elector to record a preference for a candidate against whom the voter wished to vote and that section 240 is therefore invalid if it requires a voter to record a preference for a candidate against whom he or she wished to vote.

Even if, contrary to my view, section 240 does not always[59] requires a voter to express a preference for a candidate against whom he or she wishes to vote, it is clear that in some cases it does so. Thus, it plainly requires a voter to give a first preference vote to a candidate even if he or she does not wish to vote for any candidate. Further, if there are only two candidates and a voter wishes to place a "1" against one candidate and leave the other square blank, section 240 will deem the voter to have indicated an order of preference for each candidate even though that is not the voter's intention or preference[60]. If the plaintiffs's argument on the meaning of section 24 of the Constitution is correct, section 240 is invalid unless it can be read down.

If section 240 is valid, however, section 329A is valid. The Parliament has power under sections 51(xxxvi) and 31 of the Constitution to enact laws "relating to elections" for the House of Representatives and that power extends to preventing persons from interfering with or undermining the electoral system that Parliament has chosen for such and election[61] . If a ballot-paper is not completed in accordance with the system ordained by the Parliament, the effectiveness of an election under that system is undermined. The system is as effectively undermined by filling in a ballot paper in a way that does not indicate the voter's complete order of preferences as it is by a vote that is wholly informal. Because the object of section 329A is to prevent the preference system of voting from being undermined, it is a law with respect to elections for the purpose of section 51(xxxvi) and section 31 of the Constitution and within the Parliament's power to enact.

It is not to the point in considering the validity of section 329A that breach of section 240 is not an illegal act, that in some instances a ballot paper that does not comply with that section may be admitted to the scrutiny, or that in certain instances the operation of the Act will result in an order of preference for every candidate being indicated even if a square is left blank. What is to the point is that encouraging persons to fill in a ballot paper otherwise than in accordance with section 240 undermines the system of voting which Pt XVIII of the Act sets up. That system requires the voter to express his or her complete order of preferences in respect of the candidates. That is to say, the system requires the voter to place the number "1" in the square opposite his or her first choice, the number "2" in the square opposite his or her second choice and so on until every square is consecutively numbered. If a person is encouraged to place a "1" against one candidate and a "2" against other candidates, the voter does not indicate the complete order of preference required by section 240, and the policy of the Act is undermined. If the Parliament can validly enact a system of voting under which voters are to indicate their complete order of preferences for candidates by marking the ballot in a particular way to the exclusion of other ways, it can prohibit people from encouraging voters to disregard the system.

I should note that the plaintiff, correctly in my opinion, does not contend that section 329A breaches any right of freedom of discussion or communication necessarily implied by section 24 of the Constitution or, as other members of the Court have held[62], inherent in the principle of representative democracy implied by the Constitution. Section 329A penalises conduct done "with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise in accordance with section 240." If the Parliament can validly enact section 240, it is no breach of the implied freedom to punish those who seek to undermine the system of compulsory voting[63] laid down by the Act. Section 329A prevents political discussion or advocacy only when it is done with the intention of encouraging voters to disregard lawful directions that are fundamental to a system of compulsory preference voting. Those directions require the complete order of preferences of the voter to be stated in a particular way *and no other way.* There is a world of difference between prohibiting advocacy that is put forward with the intention of encouraging breaches of statutory directions and prohibiting advocacy that criticises or calls for the repeal of such directions. Nothing in section 329A prevents the plaintiff or anybody else from arguing that the system set up by Pt XVIII is unfair, undemocratic, an attack on conscience, or riddled with inconsistencies and absurdities. It is not inconsistent with the implied freedom for Parliament to prohibit a person from encouraging voters to disregard a system of voting validly set up under the Constitution. If the Parliament could not compel persons to vote, the matter might be different. But the plaintiff refused to challenge the compulsory voting system. Moreover, this Court has held that compulsory voting in federal elections is within the power of the Parliament[64].

It follows that, unless section 240 is invalid, section 329A is valid. Because the validity of section 240 was not a question that was reserved for the Court, strict adherence to the question reserved procedure would result in the conclusion that section 329A is valid. But I do not think that the plaintiff's case should be so technically confined.

In my opinion, section 240 does not breach section 24 of the Constitution by requiring a voter to record a preference for a candidate that he wishes to vote against. The plaintiff seeks to give a narrow meaning to the words "chosen by the people" in section 24 of the Constitution, a meaning which in their context they do not bear. Members of Parliament may be "chosen by the people" even though "the people" dislike voting for them. Section 24 of the Constitution is concerned with choices from the list of candidates who offer themselves for election not the wishes of individual electors. That was made clear in *Judd* v *McKeon*[65] where the Court held that legislation providing for compulsory voting in federal elections was valid. The Court rejected[66] an argument that "the choosing of a candidate implied a desire on the part of the elector that that candidate should be elected, and that consequently the power of Parliament was limited to prescribing the method by which electors desiring that a candidate should be elected should signify that desire". Knox C J, Gavan Duffy and Starke J J, in the course of discussing the meaning of the phrase "choosing the senators" in section 9 of the Constitution, said[67]:

> "In common parlance 'to choose' means no more than to make a selection between different things or alternatives submitted, to take by preference out of all that are available."

Thus, a member is "chosen by the people" even if he or she is elected unopposed or if the majority of voters under a preferential system of voting have refused to give their first preference vote to the person elected. Similarly, members are "chosen by the people" when they are elected by a system that requires each elector in an electorate to indicate his or her order of preference for each candidate in the election.

The purpose of the words "chosen by the people" in section 24 of the Constitution is to ensure that the members of the House of Representatives are elected by the direct vote of qualified electors in contrast to being appointed to office or being elected by electoral colleges or similar bodies. Those words were not intended to confer a personal right in each elector to vote for the candidate of his or her choice[68]. Indeed, section 24 of the Constitution is not concerned with the method of electing members, with the franchise or with any of the other matters that are relevant to the holding of federal elections except the computation of each State's representation in the House of Representatives. Section 24 leaves those matters to other sections of the Constitutions, sections 29, 30 and 31 in particular.

Section 24 does not say, for example, how or for how long the members of the House of Representatives are to be chosen. To answer those questions, recourse must be had to sections 25–34, 41–42 and 47 of the Constitution which make it clear that members are to be chosen by the holding of periodic elections[69].

Those sections also show that the words "the people" in section 24 of the Constitution are not intended to be read literally. Because the franchise was limited at the time of federation, it is plain that section 24 was enacted on the assumption that a member of the House of

Representatives could be "chosen by the people" even though women and many adult males were not eligible to vote in the election which returned that member. Even today, the term "the people" in section 24 does not mean every man, woman and child in the nation[70]. Ordinarily, "the people" will be identical with those electors who are entitled to vote in an election in accordance with the laws of the Parliament or, in the absence of such laws, with the laws of the States. Yet to read the words "the people" as always being equivalent to the eligible electors would be to miss the high purpose of section 24. That purpose is to ensure representative government by insisting that the Parliament be truly chosen in a democratic election by that vague but emotionally powerful abstraction known as "the people", a term whose content will change from time to time. In the light of the extension of the franchise during this century, for example, it would not be possible to find that the members of the House of Representatives were "chosen by the people" if women were excluded from voting or if electors had to have property qualifications before they could vote. As McTiernan and Jacobs J J said in *Attorney-General* (Cth); *Ex rel McKinlay* v *The Commonwealth*[71]:

> "The words 'chosen by the people of the Commonwealth' fall to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of these words in s 24. At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth."

The words "chosen by the people" are therefore words of inexact application, dependent upon matters of fact and degree and always involving a value judgement. They describe the result of a process that begins with the calling of an election for the House of Representatives and ends with the declaration of the poll[72]. They do not confer individual rights on electors. The "rights" conferred by the section are given to "the people of the Commonwealth"[73] not individuals, although by necessary implication a member of the public may bring an action to declare void legislation that is contrary to the terms of section 24 or what is necessarily implied by it. Whether or not a member has been "chosen by the people" depends on a judgement, based on the common understanding of the time, as to whether the people as a class have elected the member. It does not depend on the concrete wishes or desires of individual electors.

Because of the terms of sections 29 and 31 of the Constitution, the Parliament has a wide choice of electoral systems from which to choose the members of the House of Representatives. Not every system that enables "the people" to elect their members results in those members being "chosen by the people" within the meaning of section 24. Nevertheless, having regard to the wide powers conferred by section 29 and 31, it is impossible to suppose that legislation in the form set

out in section 240 of the Act was beyond the power of the States for the first federal election or is now beyond the power of the federal Parliament to enact.

Compulsory preferential voting does not appear to have been introduced into Australia until 1911 when it was introduced in Western Australia. But optional preferential voting was used in Queensland after 1892 and proportional representation was introduced in Tasmania for the Hobart and Launceston metropolitan electorates in 1896. Since federation, compulsory preferential voting has become a widely-used method for electing members of parliaments[74]. The directions in section 240 of the Act are not so far removed from what was, and what is presently regarded as, involved in members being "chosen by the people" that that section is in breach of section 24 of the Constitution. Nor are those directions in conflict with the principles of representative government in so far as section 24 of the Constitution gives effect to that institution. Section 240 is a valid enactment. It follows that section 329A is also a valid enactment.

The question reserved should be answered, Yes.

GUMMOW J: By order of a Justice of this Court, there is reserved for the consideration of the Full Court the following questions:

> "Is Section 329A of the *Commonwealth Electoral Act* 1918 a valid enactment of the Parliament of the Commonwealth?"

Section 27 of the *Electoral and Referendum Amendment Act* 1992 (Cth) inserted section 329A in the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"). Section 27 commenced on the day of the Royal Assent, 24 December 1992. Since the date one general election of members of the House of Representatives has been concluded.

Section 329A is in following terms:

> "(1) A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.
>
> Penalty: Imprisonment for 6 months.
>
> (2) In this section:
> 'publish' includes publish by radio or television."

The term "House of Representatives election" means an election of a member of the House of Representatives (section 4). The term "relevant period" is defined in section 322 as follows:

> "In this Part, 'relevant period', in relation to an election under this Act, means the period commencing on the issue of the writ for the election and expiring at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election."

Section 240 deals with the marking of votes in a House of Representatives election. It states:

> "In a House of Representatives election a person shall mark his or her vote on the ballot paper by:
>
> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference;
>
> and

(b) writing the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them."

The consequences for the ballot of a failure to mark the vote on the ballot paper in the manner specified in section 240 appear from sections 268 and 270.

A ballot paper shall not be informal for any reason other than those specified in section 268, but shall be given effect to according to the voter's intention so far as that intention is clear (section 268(3)).

So far as presently material, section 268(1)(c) renders a ballot paper in a House of Representatives election informal if it has no vote indicated on it, or it does not indicate the voter's first preference for one candidate and an order of preference for all the remaining candidates. This is subject to two provisos set out in section 268(1):

> "Provided that, where the voter has indicated a first preference for 1 candidate and an order of preference for the remaining candidates except 1 and the square opposite the name of that candidate has been left blank, it shall be deemed that the voter's preference for that candidate is the voter's last and that accordingly the voter has indicated an order of preference for all the candidates:
>
> Provided further that, where there are 2 candidates only and the voter has indicated his or her vote by placing the figure 1 in the square opposite the name of 1 candidate and has left the other square blank or placed a figure other than 2, the voter shall be deemed to have indicated an order of preference for all the candidates."

Paragraph (c) of section 268(1) is expressed as being subject to sub-section (2) of section 270. This sub-section applies where a ballot paper in a House of Representatives election in which there are three or more candidates has the number 1 in the square opposite the name of one candidate, has other numbers in all the other squares opposite to the names of candidates or in all those other squares except one square that is left blank and, but for the sub-section, the ballot paper would be informal by virtue of par (c) of section 268(1).

Where those circumstances apply, section 270(2) provides that the ballot paper shall not be informal by virtue of par (c) of section 268(1). Rather, the number 1 shall be taken to express the voter's first preference and, where numbers in squares opposite to the names of candidates are in the sequence of consecutive numbers commencing with the number 1, the voter shall be taken to have expressed any other preference (par (g) of section 270(2)). In considering for the purposes of section 270(2) whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded (section 270(3)).

Section 245(1) imposes upon every elector what it states to be a duty to vote at each election. Section 245(17) provides that, in section 245, the term "elector" does not include three specified categories of elector[75]. Any elector who fails to vote at an election "without a valid and sufficient reason for such failure" is guilty of an offence which attracts a penalty of $50 (section 245(15)). Section 245(14) deals with one class where "a valid and sufficient reason" exists. It states:

> "Without limiting the circumstances that may constitute a valid and sufficient reason for not voting, the fact that an elector believes it to be part of his or her religious duty to abstain from voting constitutes a valid and sufficient reason for the failure of the elector to vote."

That an elector did not approve of any candidate and all candidates met with the disapproval of the elector is not a "valid and sufficient reason" for failure to vote[76]. Proceedings for an offence against section 245 may be instituted only by the Electoral Commissioner or an officer authorised in writing for that purpose by the Electoral Commissioner (section 245(16)).

Section 274 provides for the scrutiny and counting of votes in a House of Representatives election. It deals (section 274(7)) with the ascertainment of the total number of first preference votes, the distribution of preferences, exclusion of candidates by that process and the ascertainment of a candidate with an absolute majority of votes. In this process, a ballot paper shall be set aside as "exhausted" where on a count it is found that the ballot paper expresses no preference for any unexcluded candidate (section 274(8)).

Sections 338 and 339 create various offences relating to ballot papers. Section 338 states:

> "Except where expressly authorized by this Act, a person (other than the elector to whom the ballot paper has been lawfully issued) shall not mark a vote or make any mark or writing on the ballot paper of any elector.
>
> Penalty: $1,000 or imprisonment for 6 months, or both."

So, as is presently relevant, section 339 provides:

> "(1) A person shall not:
>
> .....
>
> (c) fraudulently destroy or deface any nomination paper or ballot paper;
>
> (d) fraudulently put any ballot paper or other paper into the ballot-box;
>
> (e) fraudulently take any ballot paper out of any polling booth or counting centre;

(f) forge any nomination paper or ballot paper or utter any nomination paper or ballot paper knowing it to be forged;

.....

Penalty: Imprisonment for 6 months."

The question referred to the Full Court concerns the validity only of section 329A. There is no question referred to the Full Court which concerns the validity of section 240 or any of the other provisions of the Act which I have set out or described. Nevertheless, these provisions assist in construing section 329A, and, as regards section 240, some attention to its validity is required for assessment of the plaintiffs's submission that an elector has a constitutional entitlement to complete a ballot paper in a House of Representatives election otherwise than in accordance with section 240. This entitlement is said to be conferred by the operation of the phrase "directly chosen by the people of the Commonwealth" in section 24 of the Constitution.

The first task is the construction of section 329A. It will be appropriate then to consider the grounds upon which the plaintiff attacks the validity of section 329A.

Section 329A requires proof by the prosecution of various elements of the offence. The first is that during the relevant period, as defined, and in relation to a House of Representatives election under the Act, the accused printed, published or distributed (or caused, permitted or authorised to be printed, published or distributed) any matter or thing. The second is that the accused did so with the necessary intention. The intention is that of encouraging persons voting at the election "to fill in a ballot paper" in a particular manner.

That manner is to fill in the ballot paper (to pick up the terms of section 240) otherwise than by writing the number 1 in the square opposite to the name of the candidate selected as the first preference, and otherwise than by writing the numbers 2, 3 and 4 (and so on as required) in the squares opposite the names of the remaining candidates so as to indicate the order of preference for them.

Section 329A uses the expression "to fill in a ballot paper" whilst section 240 speaks of a person "mark[ing]" his or her vote on the ballot paper. However, the final phrase in section 329(1), "otherwise than in accordance with section 240", indicates section 329A treats as filling in a ballot paper the marking of the ballot paper by writing the numbers 1, 2, 3 and so on in the squares opposite the names of the candidates so as to indicate the order of preference.

The prosecution must prove an intention to encourage voters to mark their ballot papers otherwise, that is to say differently or in some other manner whereby the ballot paper does not indicate the voter's first preference for one candidate and an order or preference for the remaining candidates.

A ballot paper which is not marked with this indication and which therefore does not comply with section 240 is to be treated as informal. That follows from part (c) of section 268(1). The treatment of the vote as informal is subject to the provisos contained in section 268(1) which I have set out earlier in these reasons. It is also subject to the provisions of section 270(2). These qualifications operate in aid of the principles that the ballot, being a means of protecting the franchise, should not be made an instrument to defeat it, and that, in particular, doubtful questions of form should be resolved in favour of the franchise where there is not doubt as to the real intention of the voter[77].

However, section 329A brings in the criminal law to assist achievement of the primary objective of the legislation as evinced in section 240 and in part (c) of section 268(1). This is that ballot papers shall be marked in the particular fashion identified in section 240 so as to indicate the first preference of a voter for one candidate and an order of preference for all the remaining candidates.

Section 329A presupposes that the persons who wrongly are encouraged to fill in their ballot paper otherwise than in accordance with section 240 will be "persons voting at the election". That is to say, section 329A operates on the footing that the persons in question will be discharging the duty imposed by section 245 to vote at the election unless they have a valid and sufficient reason for failing to do so. Put another way, section 329A is not concerned to proscribe the printing, publication or distribution of material with the intention of encouraging persons not to vote at all at a House of Representatives election under the Act.

Nor, as was conceded by the Solicitor-General for the Commonwealth in argument, does section 329A proscribe conduct with the intention of encouraging persons who do fill in a ballot paper in accordance with section 240 also to write on the ballot paper additional words or other graphic representations.

Other provisions of the Act create offences with respect to conduct which relates to the ballot. Section 329(1) makes it an offence to publish (including publication by radio or television), print or distribute any matter or thing "that is likely to mislead or deceive an elector in relation to the casting of a vote". The offence extends to causing, permitting or authorising those activities. I have referred to sections 338 and 339 which create various offences relating to ballot papers.

As I understand the submissions for the plaintiff, it is accepted (and rightly) that (subject to such limitations as properly apply by reason of any express provision of the Constitution or are properly implied from the system of representative government which is established and maintained by the Constitution) the Parliament has power under sections 31 and 51(xxxvi) of the Constitution to make laws which relate to elections for the House of Representatives.

Section 31 of the Constitution states:

> "Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives."

Paragraph (xxxvi) of section 51 is a conferral of legislative power with respect to:

> "Matters in respect of which this Constitution makes provision until the Parliament otherwise provides."

The head of federal legislative power thus is the making of laws relating to elections for members of the House of Representatives. Section 240 plainly is such a law and it states that electors "shall mark" their vote on the ballot paper in a particular fashion so as to cast a fully-exercised preferential vote. The other provisions of sections 268 and 270 are ancillary (in the manner I have described) to the primary objective of the legislation, and do not evince any legislative intent to make optional or selective preferential voting available as an alternative to full preferential voting.

The legislative power of the Commonwealth I have identified above includes the making of laws which regulate the conduct of persons in relation to such elections[78]. Section 329A is a law which prohibits conduct, of the nature and quality identified in it by reference to section 240, which has the tendency to undermine the efficacy of the system in accordance with which the vote of an elector is to be recorded and counted. That system does not include optional or selective preferential voting. The key to that system is provided by the expression "shall mark" in section 240 and it is in aid of this that section 329A operates.

The plaintiff submits, in effect, that section 24 of the Constitution requires that members of the House of Representatives be elected in accordance with the desires or intentions of the electorate. In *McGinty* v *Western Australia*[79] I expressed the view that this phrase in section 24 was included in the Constitution to perform a function which is quite different. In my view, section 24 does not confer upon each elector a personal right to vote for the candidate of that elector's choice, and, therefore, a right (or immunity) not to state a preference for a candidate whom the elector does not wish to be elected. Section 24 is not concerned with the particular form to be taken by the franchise in a system of direct election of members of the House of Representatives. It follows that there is no constitutional limitation upon giving to section 240 the operation it has upon its terms. Therefore, there is no limitation which flows from section 240 into section 329A so as to impugn the validity of section 329A.

Once the generality of the power to enact laws relating to elections is appreciated and the validity of section 240 is accepted, section 329A stands as a provision which protects the method of electing members of the House of Representatives.

In my view, there is no substance in any submission that, even if section 329A otherwise be within legislative power, nevertheless it is invalid for infringement of that restraint upon power which is identified as the implied freedom of political communication.

As the constitutional implication recently was formulated in *Theophanous* v *Herald & Weekly Times Ltd*[80], it is derived from, and operates in aid of, the system of representative government established and maintained by the Constitution. At the centre of the system of representative government is the electoral process. This has long been recognised. In 1703, Hold C J said[81]:

> "It is not to be doubted, but that the commons of England have a great and considerable right in the government, and a share in the legislat[ure], without whom no law passes; but because of their vast numbers this right is not exercisable by them in their proper persons, and therefore by the constitution of England, it has been directed, that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the commons of England vested in them...
>
> A right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendant thing, and of an high nature".

In *Nationwide News Pty Ltd* v *Wills,* Deane and Toohey J J said[82]:

> "The ability to cast a fully informed vote in an election of members of the Parliament depends upon the ability to acquire information about the background, qualifications and policies of the candidates for election and about the countless number of other circumstances and considerations, both factual and theoretical, which are relevant to a consideration of what is in the interests of the nation as a whole or of particular localities, communities or individuals within it."

Section 329A does not impose any restriction upon political discussion generally nor, more particularly, upon discussion as to the suitability or disadvantages in the voting system. Rather, it is directed at the particular processes or mechanism by which the franchise is exercised and the vote is cast.

It is one thing to advocate the abrogation or modification of the particular system by which the legislature provides for the exercise of the franchise. It is another intentionally to seek to undermine the effective franchise by encouraging a course of action which may lead to the casting by electors of informal votes in an election for the House of Representatives, thereby denying the effective exercise by those electors of their right to participate in the activity whereby representatives government is constituted and renewed.

The Constitutional implication of freedom of political communication has been formulated in the authorities as operating in aid of representative government. It does not facilitate or protect that which is intended to weaken or deplete an essential component of the system of representative government. It cannot be inimical to representative government to forbid intentional conduct comprising advocacy of the casting of a vote in such a way as may be an ineffective exercise of the franchise. I use the term "may be" to allow for the savings provisions which give effect to the franchise in some cases despite failure by the elector to mark the vote of that person on the ballot paper as stated in section 240. The primary objective of the system established by the legislation involves observance by electors of section 240.

Section 329A is a valid law of the Commonwealth. The question reserved should be answered "Yes".

The plaintiff should pay the defendants' costs of the question reserved.

FOOTNOTES

1. Insert by section 27 *of the Electoral and Referendum Amendment Act 1992 (Cth)*
2. Defined in section 322
3. *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106; *Theophanous* v *Herald & Weekly Times Ltd* ((1994) 182 CLR 104; *Stephens* v *West Australian Newspapers Ltd* (1994) 182 CLR 211
4. (1926) 38 CLR 380
5. (1926) 38 CLR 380 at 385
6. (1926) 38 CLR 380 at 383
7. (1926) 38 CLR 380 at 386
8. (1971) 126 CLR 271
9. (1971) 126 CLR 271 at 272
10. (1971) 126 CLR 271 at 273
11. (1912) 15 CLR 355 at 363
12. *Nationwide News Pty Ltd* v *Wills (1992) 177 CLR 1 at 51, 76–77, 94–95; Australian Capital Television Pty* v *The Commonwealth (1992)* 177 CLR 106 at 142–143, 150–151, 157–160, 169–218
13. (1992) 177 CLR 106 at 150–151, 157–160
14. (1994) 182 CLR 104 at 151–152
15. (1994) 182 CLR 272 at 324–325, 329
16. (1994) 182 CLR 272 at 329
17. Section 268 has always existed in some form in the Act, although previously it was more restricted. The section was originally numbered section 133. It was renumbered section 268 by the *Commonwealth Electoral Legislation Amendment Act* 1984 (Cth)
18. Section 270, which was originally numbers s 133B, was inserted by section 103 of the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth)
19. Joint Standing Committee on Electoral Matters, *1990 Federal Election Report,* December 1990 at 30
20. See Sched 1, Form F
21. *Electoral and Referendum Amendment Act* 1992 (Cth), section 27
22. *McGinty* v *The State of Western Australia,* unreported, 20 February 1996
23. *Judd* v *McKeon* (1926) 38 CLR 380 at 383, 385–386
24. (1992) 177 CLR 106 at 187
25. *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 140. See also *Theophanous* v *Herald & Weekly Times Ltd* (182 CLR 104 at 120–121; *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 at 138, 142, 169, 214, 227 and 233; *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1 at 50, 72–73, 76–77
26. See *McGinty* v *The State of Western Australia,* unreported, 20 February 1996
27. See *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 at 187; *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 189–190
28. (1994) 182 CLR 272 at 350–357
29. See, for example, *Commonwealth Electoral Act 1918* (Cth), sections 325, 325A, 326, 329, 330 and 340
30. (1988) 166 CLR 79 at 100
31. *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106; *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104
32. Section 329A(2) of the Act defines "publish" to include "publish by radio or television"

Preferential Voting", (1983) 56 *Mathematics Magazine* 207, where this occurrence is termed as "no-show paradox".

39. Section 24 provides:
"The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:

(i) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:

(ii) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State."

40. Pursuant to section 274(7)(d)(ii) and (iii), the counting of ballot papers continues until a candidate has an absolute majority or until only two candidates remain unexcluded. Hence, final preferences are never actually counted. If the unexcluded candidates have the same number of votes counted to them, the Divisional Returning Officer decides which of the candidates to exclude: section 274(9). The provisos to section 268(1)(c) render it futile to examine final preferences in the event of a two-way tie, because the final preference of each ballot paper counted to one of the remaining candidates would be (or would be deemed to be) for the other candidate, and vice versa. However, were it not for the deeming provisos, an examination of final preferences might reveal that more voters actually expressed a final preference for one candidate than for the other. The provisos to section 268(1)(c) and the mechanism for counting ballot papers set out in section 274 combine to preclude this approach to resolving a tie.

41. (1975) 135 CLR 1 at 44 per Gibbs J; see also at 35–36 per McTiernan and Jacobs J J

42. Section 15 was substituted by the *Constitution Alteration (Senate Casual Vacancies)* 1977

43. cf *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 189 per Dawson J where his Honour states that "other sections make it clear that senators and members of the House of Representatives shall be chosen by election."

44. See *Attorney-General (Cth), Ex rel McKinlay* v *The Commonwealth* (1975) 135 CLR 01 at 58 per Stephens J

45. Sections, 8, 30, 41, of the Constitution

46. Sections 7, 24 and 128 of the Constitution

47. Sections 24, 26, 27, 128 of the Constitution

48. See fn **38**

49. See fn **40**

33. Pursuant to section 274(7)(d), the Divisional Returning Officer is to proceed with the scrutiny of ballot papers as follows:

> "(i) the candidate who has received the fewest first preference votes shall be excluded, and each ballot paper counted to the candidate shall be counted to the candidate next in the order of the voter's preference;
>
> (ii) the process of excluding the candidate who has the fewest votes, and counting each of his or her ballot papers to the unexcluded candidate next in the order of the voter's preference, shall be repeated until only 2 candidates remain in the count; and
>
> (iii) if, following the ascertainment of the first preference votes given for each candidate or the exclusion of candidates under this paragraph, a candidate has an absolute majority of votes, that candidate shall be elected."

Section 274(9) provides that "[i]f, on any count, 2 or more candidates have an equal number of votes and one of them has to be excluded, the Divisional Returning Officer shall decide which of them shall be excluded."

34. The provisos to section 268(1)(c) are:
"Provided that, where the voter has indicated a first preference for 1 candidate and an order of preference for all the remaining candidates except 1 and the square opposite the name of that candidate has been left blank, it shall be deemed that the voter's preference for that candidate is the voter's last and that accordingly the voter has indicated an order of preference for all the candidates:

Provided further, where there are 2 candidates only and the voter has indicated his or her vote by placing the figure 1 in the square opposite the name of 1 candidate and has left the other square blank or placed a figure other than 2 in it, the voter shall be deemed to have indicated an order of preference for all the candidates."

35. By section 274(8), a ballot paper is to be "set aside as exhausted where on a count it is found that the ballot paper expresses no preference for any unexcluded candidate."

36. See section 268(1)(a). Note that, by section 268(2), a ballot paper shall not be informal by virtue of section 268(1)(a) if the relevant Divisional Returning Officer is satisfied that it is an authentic ballot paper on which a voter has marked a vote

37. See section 268(1)(d). Note, however, that the proviso to that paragraph makes formal a ballot paper so marked by an officer of the Electoral Commission, notwithstanding that marking the ballot paper in that way contravenes section 271

38. This "paradox" occurs because the provisions of the Act governing the counting of votes for both Senate elections (section 273) and House of Representatives elections (section 274) allow that candidates can be "excluded" in certain circumstances, and each ballot paper counted to them counted to the candidate next in order of voter's preference. A candidate is excluded when he or she has the fewest votes at a given stage of the distribution of preferences: see section 273(13) and (13A), and section 274(7)(d). In some circumstances, the notional addition of ballot papers to those ballot papers already counted would result in the candidate ranked last on all of those additional ballot papers becoming a successful candidate, even though he or she would have been unsuccessful but for the inclusion of the additional ballot papers. This occurs when the additional ballot papers have the effect of changing the sequence in which candidates are excluded and, hence, which ballot papers are counted towards which unexcluded candidates. See Fishburn and Brams, "Paradox of

50. (1992) 177 CLR 1
51. (1992) 177 CLR 106
52. (1992) 177 CLR 1 at 50 per Brennan J, 76–77 per Deane and Toohey J J, 94–95 per Gaudron J; (1992) 177 CLR 106 at 142–143 per Mason CJ, 150–151 per Brennan J, 169 per Deane and Toohey J J, 217 per Gaudron J
53. (1992) 177 CLR 1 at 50–51 per Brennan J, 76–77 per Deane and Toohey J J, 94–95 per Gaudron J; (1992) 177 CLR 106 at 142–144 per Mason C J, 169 per Deane and Toohey J J, 217–218 per Gaudron J. See also *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 150–152 per Brennan J, 178–179 per Deane J; *Cunliffe* v *The Commonwealth* (1994) 182 CLR 272 at 300–301 per Mason CJ, 323–326 per Brennan J, 336–338 per Deane J, 387–388 per Gaudron J
54. See *Australian Capital Television* (1992) 177 CLR 106 at 142–143 per Mason C J
55. See Pt XVIII of the Act
56. See, for example, sections 268(1)(c) and 270(2)
57. [1949] AC 398 at 413
58. Sections 268(1)(c), 270(2) and 274
59. In their judgement, Toohey and Gaudron J J hold that it is not correct to say that section 240 obliges a voter to express a preference for a candidate whom he or she wishes to vote against. Their Honours point out, for example, that, if there are three or more candidates, a vote will be counted until it is exhausted provided that the number 1 has been placed against one candidate and there are numbers against all other candidates or all other candidates but one. Nevertheless, I think that the better view is that sections 268(1)(c) and 270(2) of the Act, while saving the validity of the ballot papers that do not comply with section 240, do not mean that section 240 does not require on the voter to vote in accordance with that section. The words "a person shall mark his or her vote on the ballot paper by" seem to me to require the voter to follow the directions in the section
60. Sections 268(1)(c) and 270(2)
61. *Smith* v *Oldham* (1912) 15 CLR 355 at 359–360, 362–363; *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 at 157, 220, 225–226, 234
62. *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106; *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211
63. Section 245
64. *Judd* v *McKeon* (1926) 38 CLR 380
65. (1926) 38 CLR 380 at 383, 385. See also *Faderson* v *Bridger* (1971) 126 CLR 271 at 272–273
66. *Judd* v *McKeon* (1926) 38 CLR 380 at 383
67. *Judd* v *McKeon* (1926) 38 CLR 380 at 383
68. cf section 41 of the Constitution which does confer a personal right to vote on certain electors
69. *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 189 per Dawson J
70. cf *Attorney-General (Cth); Ex rel McKinlay* v *The Commonwealth* (1975) 135 CLR 1 at 36
71. (1975) 135 CLR 1 at 36
72. *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 at 231–232, cf *Sykes* v *Cleary* (1992) 176 CLR at 100, 108, 130, 132
73. *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 at 227, 235. Nothing in my judgement in *Australian Capital Television* at 227 or in *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 206 should be read as supporting the view that either sections 7 or 24 of the Constitution confers individual rights on electors enforceable against the world. Rather the term "rights" in those judgements should be read in the sense of "the privileges

and immunities which are inherent in, or flow from, constitutional restrictions upon legislative, executive or judicial power": per Deane J in *Theophanous* at 168

74. Crisp, *Australian National Government,* 5th ed (1983) at 137

75. These are Antarctic electors (for whom special provision is made in Pt XVII), those who are entitled under sections 94 and 95 to be treated as eligible overseas electors and those entitled under section 96 to be treated as itinerant electors

76. *Faderson* v *Bridger* (1971) 126 CLR 271; *Lubcke* v *Little* [1970] VR 807; *Douglass* v *Ninnes* (1976) 14 SASR 377; cf *O'Brien* v *Warden* (1981) 37 ACTR 13

77. *Kean* v *Kerby* (1920) 27 CLR 449 at 459, 465 per Isaacs J

78. *Smith* v *Oldham* (1912) 15 CLR 355 at 358–359, 360–361, 362–365; *McKenzie* v *The Commonwealth of Australia* (1984) 59 ALJR 190 at 191; 57 ALR 747 at 749

79. Unreported, High Court of Australia, 20 February 1996 at 137–139

80. (1994) 182 CLR 104 at 120–121, 146–147, 163, 190. See also *Nationwide News Pty Ltd* v *Wills* (19920 177 CLR 1 at 47–48, 72–73; *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 at 140, 149, 186–187; *Stephens* v *West Australian Newspapers Ltd* (1994) 182 CLR 211 at 235; *Cunliffe* v *The Commonwealth* 91994) 182 CLR 272 at 337, 360

81. *Ashby* v *White* (1703) 2 Ld Raym 938 at 950, 953 [92 ER 126 at 134, 135–136]

82. (1992) 177 CLR 1 at 72