
Absentee and Write-In Ballots: Constitutional and Policy Considerations

Robert E. Hawkins

The most reported statistic on election night, apart from the vote count, is the percentage of eligible citizens who cast a ballot. Voter turnout is frequently cited as a measure of the health of our democracy. In recent years policy makers and Chief Electoral Officers have dedicated themselves to creating multiple 'voting opportunities' in order to make voting more accessible to the electorate. Since 2007, Newfoundland and Labrador has allowed an elector to vote up to four weeks before an election is called and to do so by writing into a blank space, on an absentee ballot, his or her party of choice. This practice of pre-writ voting, and voting-by-party, is currently the subject of a constitutional challenge before the Newfoundland and Labrador Supreme Court. The ultimate decision could have an impact for election law in all Canadian jurisdictions. This article looks at the situation across Canada as well as the specifics of the Newfoundland case.

The unprecedented number of voting opportunities that now exist in Canadian federal and provincial jurisdictions include regular election day polls, advance polls, special polls for those in institutions such as prisons or care homes, mobile polls transported to the homebound, and polls in returning offices which, in Nova Scotia, are now called 'returning office continuous polls' because they are open whenever the returning office is open as soon as possible after the election is called. If a voter is unable, or in some cases unwilling, to vote at an advance poll, or at assigned election day poll in his or her riding, some jurisdictions permit the voter to vote in-person at a different poll in the riding, or at the returning office in another riding, or by mail.¹

These alternate voting opportunities create timing and logistical problems for the production and distribution of ballots. If nominations have not yet closed, ballots cannot be printed with the names of candidates. If a voter is voting outside of his or her home riding, the voter must still receive a ballot that enables

him or her to vote in his or her home riding. It would be difficult for all returning offices in a province to carry, and secure, ballots printed with the names of the candidates running for each of the provincial ridings. The solution most often adopted is a ballot sometimes called a 'special' ballot, sometimes an 'absentee' ballot, and sometimes a 'mail-in' ballot. These are ballots that enable a voter to fill in a blank space indicating his or her preference for the election in his or her home riding. Some jurisdictions require the voter to fill in the name of a candidate, others the name of a candidate or the name of a registered political party, and still others allow the voter to fill in both the name of the candidate and the candidate's party if the voter wishes.

The interesting case is Newfoundland where legislative changes in 2007 created an option to cast a special ballot up to four weeks before the election writ was dropped by writing in the name of a candidate, or of a party, or both. In the October 2007 election, 3.8% of ballots cast by Newfoundland and Labrador voters were of the mail-in variety, up 9% from the 2003 election. The Chief Electoral Officer described the effort that Elections Newfoundland and Labrador put into promoting the special ballot option in 2007: "A widespread special ballot campaign was launched to promote voting by special ballot and included householders, radio, newspaper and transit ads as well as interviews by local radio and television stations with the Chief Electoral Officer."² Still, the Chief Electoral Officer seemed disappointed with the take-up:

Robert E. Hawkins is a Professor of Law at the Johnson-Shoyama Graduate School of Public Policy in Saskatchewan. He is Past President of the University of Regina. The author is grateful to Dr. Peter Neary, Professor Emeritus, University of Western Ontario, for suggesting the topic and for many helpful comments. The Research Branch of the Library of Parliament, Ottawa, also provided helpful assistance.

The legislation which allowed special ballot voting to begin four weeks prior to the issue of the writ did not result in a large increase in special ballot applications. When voters were later questioned as to why they didn't apply earlier, the general response was that they didn't know you could apply before the writ was issued or they didn't know who the candidate for their electoral district was before nominations officially closed. Despite what we thought was an extensive advertising campaign, it was not widely known to the public that either the candidate's name, political party or both are acceptable when marking a special ballot.³

Special Ballots in Federal and Provincial Voting

Provincial and federal jurisdictions all make use of special, absentee or mail-in, ballots.⁴ The following paragraphs summarize the provisions of the electoral law in each case.

Canada: Any person qualified to vote in a Canadian general election who cannot, or who does not wish to, vote at the polls, may apply to any returning officer, or to Elections Canada, no later than the Tuesday before general polling day, for a special ballot. Qualified voters residing outside of the country are eligible to receive a special ballot provided that they have been away for less than five consecutive years and provided that they intend to resume residence in Canada. Canadian forces electors, and government employees working outside of the country, or for certain international organizations, are exempt from these time limitations.

To cast a vote, the blank space on the special ballot must be filled in with the name of a candidate running in the voter's home riding. Close of nominations occurs 19 days before election day which is at least 17 days after the writ is dropped. The special voting rules administrator must distribute lists of candidates to the persons and places the administrator considers appropriate "without delay after a list of candidates is established ..." Election Canada also advises absentee voters that they must obtain the names of candidates in their electoral district: "These names can be found at www.elections.ca, or obtained by calling the Elections Canada Enquiries Unit, or through Canadian embassies, diplomatic missions and consular posts after the candidates have been confirmed, on the 19th day before polling day."

Completed special ballots may be returned in person or by mail. A special ballot voter casting a ballot in his or her home riding, must ensure that the ballot is received at the riding returning office by close of polls on election day. Special ballot voters voting outside of their home riding must return their votes to Elections Canada, in Ottawa, by 6:00 p.m. on election day.

Manitoba: A voter in a Manitoba provincial election is eligible to receive an absentee ballot providing that he or she signs a declaration affirming that he or she, "expects to be absent from his or her electoral division on election day and during advance voting" and providing that he or she intends to be away for no more than six months (with some exceptions such as for students and members of the Forces). In order that the ballot can be filled in with a candidate's name, the returning officer provides the absentee voter, "at the close of nominations, a list of the candidates showing the registered political party, if any, that has endorsed the candidate." This is possible because nominations close 21 days before the election date in the case of fixed elections, 15 in the case of any other elections. Completed absentee ballots must be received at the returning office by close of polls on election day.

Write-in ballots are also used for in-person voting at institutions such as care homes and prisons and when voters are voting at advance polls outside of their home constituencies. In these cases, a voter is given, together with the write-in ballot, "a list of the candidates in the voter's electoral division that also indicates the registered political party, if any, that has endorsed a candidate; ..." ⁵

Ontario: Any voter in Ontario can cast a write-in ballot in person at, or mail a write-in ballot to, the returning office in his or her riding any time between the day the writ is dropped and the closing of polls on election day. Nominations close the second Thursday after the election writ; the general election takes place three weeks later. The Chief Electoral Officer will provide each district returning officer with a list of candidates as soon as possible after the close of nominations. Write-in ballots, indicating the preferred candidate, must be received at the returning office by the close of polls on election day.

An Ontario voter who is away from the province and who wishes to cast an absentee ballot must apply to be placed on the Register of Absentee Electors. He or she must give the date on which he or she left Ontario and, "the date, if known, the elector intends to resume residence in Ontario." A voter can only have been temporarily absent from Ontario for less than two years. This time limit does not apply to members of the Forces or to certain other categories. Once approved, the absentee voter will receive a Special Ballot Kit containing a special (write-in) ballot and a list of candidates for the elector's district, "if it is available". Such lists are generally available in time to permit filling in the preferred candidate's name on the write-in ballot.⁶

Quebec: Voters absent from Quebec have up until the 19th day before a provincial election to submit an application for a postal ballot. To be eligible, the elector must affirm that he or she is a qualified voter, that he or she had been a provincial resident for at least 12 months before leaving Quebec, that he or she has been away for two years or less (with some exceptions), and that he or she intends to return. If the voter's application is approved, material, including a write-in ballot, is sent out. A second package is sent out 14 days before the election, and two days after the close of nominations, containing a list of candidates. Postal ballots are completed by filling in the name of a candidate in the blank space provided, together with the candidate's political affiliation if the voter wishes. The name of a political party, alone, will not suffice.

New Brunswick: A New Brunswick voter who is absent from his or her home riding, or who is present in the riding but who cannot, or who does not wish to, vote at the polls, is eligible to apply to any returning office for a special ballot. The voter need not give a reason for the request. An absentee ballot must be filled in with the name of a candidate running in the voter's home riding. Nominations close 16 days before the general election. This leaves the voter sufficient time to learn the name of his or her preferred candidate and to mail the completed ballot to his or her home returning office in time for receipt by close of polls on election day.

If an in-person voter wishes to cast a special ballot at a returning office outside of his or her riding, and if nominations have not yet closed, the voter will have to write-in the name of a candidate running in his or her home riding in the blank space on the ballot. If nominations have closed, the voter will receive a ballot created by a 'ballot-on-demand printer' located in the out-of-riding returning office. The printer will print the names of the candidates in the voter's home riding on the ballot. The voter will then put a mark beside the name of the candidate of preference.

Prince Edward Island: A Prince Edward Island voter who is temporarily residing outside the province, and who is unable to attend at an advance or ordinary poll, including Armed Forces personnel, students studying outside of the province, and institutionalized voters, may apply for a mail-in ballot to the Chief Electoral Officer, or his or her home returning officer, by the 13th day before polling day. Nominations close on the 17th day before polling day. Mail-in ballot, printed with the candidate's names, are couriered out on the 12th day before polling day. To be counted, ballots must be returned to the Chief Electoral Officer's Office by noon on polling day.

In the above six jurisdictions, absentee electors are required to vote by candidate. In the five jurisdictions below absentee voters are given an additional option of voting by party.

British Columbia: In British Columbia provincial elections, write-in ballots can be filled in with either the preferred candidate's name or with the name of a registered political party. Voters wishing to vote in-person in their home ridings, but not wanting to vote in their assigned polls, are given write-in ballots, together with lists of candidates, unless regular ballots are available. The same is true for institutionalized voters. Voters wishing to vote in person, but outside of their home ridings, are also given write-in ballots which must be cast before the close of election day polls.

"Alternate absentee voting," as it is labeled in the *Election Act*, must be available as soon as is reasonably possible after the election is called for voters who expect to be absent from BC on advance polling days or the day of the general election, for voters who cannot reasonably attend polls owing to illness, disability, weather or remote living locations, or "for another reason beyond the individual's control." Voters must indicate in a declaration the circumstances that make them eligible to receive an alternate absentee voting package. The period for B.C. provincial elections is normally 28 days. Nominations close on the 10th day thus leaving 18 days before general voting day. The package includes a write-in ballot, with a list of candidates included only if the package is mailed after the close of nominations. Ballots, filled in with either a candidate or a party name, must be received by close of election day polls.

Alberta: To apply for a special ballot, a voter in Alberta must tick off on Part 1 of the Special Ballot Certificate envelope one of seven reasons why he or she is "unable" to vote at an advance poll or an election day poll. The reasons include physical incapacity, absence from the electoral division, incarceration, employment as certain election or political party officials, residence in remote areas, and "any other circumstances prescribed by the Chief Electoral Officer." Application can be made to the Returning Officer in the voter's home riding any time after the election writ is dropped up until the close of polling on election day. Nominations for candidates close the 14th day after the election writ drops, leaving a further 14 days before the election. Ballots, filled in with either

the name of a candidate, or the name of a registered political party, must be returned to the returning officer in the voter's home riding by close of polls on election day.

Saskatchewan: A Saskatchewan voter can apply for an absentee ballot to his or her home returning officer after a provincial election is called. The voter must declare on the application that, "I am unable to vote at an Advance Poll or on Election Day in the constituency in which I am ordinarily resident." The minimum election period is 28 days; nominations close at a minimum 16 days before polling day. Ballots filled in with either the name of a candidate, or a preferred party, must be received by the home riding returning officer before the close of general election polls if delivered by hand. Absentee ballots may be delivered to the returning office by registered mail provided that they are postmarked before the close of polls on election day and are received by noon on the 10th day after election day. Saskatchewan is the only jurisdiction to adopt a deadline for receipt of ballots based on the ballot's postmark.

Nova Scotia: In a "continuous poll," Nova Scotian voters who are resident in their home riding may cast a write-in ballot at their home riding returning office whenever the office is open to the public up to and including the day before the advance poll. The returning officer must begin to receive applications for write-in ballots "as soon as possible but no later than the fifth day from the date of the writ."

In a "write-in poll," eligible voters who are absent from their home riding may cast a write-in ballot either in-person at any returning office in the province, or by mailing in a completed write-in ballot to their local returning office for receipt by close of polls on election day. To be eligible to vote in a write-in poll, an absentee voter must have resided in his or her home riding for six months immediately before leaving, must intend to return, and must be a member of the Canadian Forces, a student, an employee of the federal or provincial government, an employee of an international organization of which Canada is a member, or a family member of someone in one of these categories.

All write-in ballots, whether cast by residents in the continuous poll, or by absentee voters in a write-in ballot poll, must be marked in the space provided with, "the name of the [home constituency] candidate for whom the elector intends to vote, or the name of the registered party that endorsed the candidate the elector wishes to have elected, or both; ..." Candidate nominations close 16 days after the election call which is 14 days before the general election.

Newfoundland and Labrador: The Newfoundland case is the most interesting in that it not only permits special ballot voting by party and but also permits voters to cast those ballots four weeks before the election writ is dropped. It is the only jurisdiction that allows voting before an election is officially called. These features were first introduced in the 2007 provincial election and then used again in the 2011 election.

Special ballots are available to any qualified Newfoundland and Labrador voter, "who has reason to believe that he or she will have difficulty voting at an advance poll or at the poll on polling day ..." A person absent for a continuous period of more than 6 months is disqualified from voting even if he or she intends to return at some future time. There are several exceptions from disqualification as, for example, for students studying outside of the province.

Special ballots are available from the office of the Chief Electoral Officer four weeks before the issue of the writ of election up until a day determined by the Chief Electoral Officer. In the case of the October 11, 2011 general election, this date was set for October 4, 2011. To be counted, special ballots must be mailed to the Office of the Chief Electoral Officer for receipt by 4:00 p.m. on the day to be determined by the Chief Electoral Officer. For the October 11, 2011 general election, this day was set for October 5, 2011.

An Elections Newfoundland and Labrador pamphlet explains why voting by party is permitted with special ballots: "Special Ballots are blank because Special Ballot voting is open prior to official Nomination Day on the election calendar. Therefore, electors must print either the party name, the potential candidate's name (if they know it) or both." Candidate nominations cannot be officially accepted before the election writ drops. Nominations close on the 10th day before polling day, leaving a minimum of 11 days, and a maximum of 20 days before the election day.

With respect to this group of five jurisdictions, where absentee voters have the option of voting by party, there would be sufficient time between the close of nominations and election day, normally two weeks or more, to limit voting to voting by candidate. Immediately after close of nominations, candidate lists could be posted in district returning offices, placed on-line, published in local newspapers, made available through free 1-800 numbers, or even mailed to absentee voters. If more time were needed, it could be had by moving the close of nominations a little forward during the official campaign period or by accepting completed ballots postmarked, rather than received, before election day. As described above, six other jurisdictions do restrict voting to voting by candidate

and are able to do so with sufficient time for the return of completed ballots.

Pre-writ Voting and the Court Challenge

Mr. Rideout, Newfoundland and Labrador Government House Leader, and former Premier, gave several reasons for allowing ballots to be cast up to 4 weeks before the election call when he introduced *An Act to Amend the Elections Act, 1991*, in the House of Assembly on June 4, 2007:

We now have fixed elections. ... Therefore, certain things that were more difficult to do when the election date was variable are now not so difficult to do; for example, special ballots and voting when candidates haven't been nominated. ... There is no reason that somebody who is going to be away working and not available for advanced polls or election day cannot, when they are home for their two or three week return home, whenever that is, a month or two before the election date, because we know when it is going to be, cannot go into the office of the district returning officer ... and ask to vote.⁷

Mr. Rideout hinted at another reason. A four week pre-election voting period, coupled with several weeks during the official campaign period, creates a lengthy period of time for the distribution and return of special ballots. Although he chose his words carefully, Rideout mentioned that there had been "difficulties" with the old system which allowed for the distribution of special ballots only during the official campaign period and which allowed party workers to bring special ballot kits to, and collect the marked ballots from, voters. Under the new system, with its longer time period, special ballot kits would be distributed by, and returned to, election officials only. The Chief Electoral Officer welcomed this change in his report on the 2007 election: "A legislation change prohibiting political parties and candidates' access to special ballot kits was indeed positive and resulted in a more relaxed approach by electors, especially seniors in completing and returning both the applications and kits."⁸

The Newfoundland and Labrador legislation permitting special ballots to be issued, and voted, prior to an election and the close of nominations, is currently being challenged in an application before the Supreme Court of Newfoundland and Labrador Trial Division (General).⁹ The unsuccessful candidate in the Burin-Placentia West riding in the October 11, 2011 election, Julie Mitchell, candidate for the provincial NDP, lost by 40 votes to her Progressive Conservative opponent, Clyde Jackman, at the time Minister of Fisheries and Aquaculture and, following the election, Minister of Education. Three hundred and thirty four special

ballots were cast in the Burin-Placentia election. At least 25 of these were received by election officials before the election writ was dropped. An additional unknown number were posted, but not yet received, before the election call. Mitchell contends that the number of special ballots cast before the election was called "appears to equal or exceed' 40, Jackman's margin of victory, and that there were significantly more than 40 special ballots cast before the close of nominations. She argues that the practice of allowing special ballots to be cast before the start of the election, and/or before the close of nominations, violates of s. 3 of the *Charter of Rights and Freedoms*. Section 3 states: "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."¹⁰

Five basic elements are essential if an election is to result in effective democratic representation. First, electoral rules must be fair and must be applied equally to all participants. Second, the electorate, defined on the basis of universal suffrage, must be allowed to participate actively in the electoral process. Third, individuals eligible to be candidates must be permitted to stand and to offer electors a real choice. Fourth, candidates must be given a meaningful opportunity to campaign so as to give electors a the possibility of casting reasonably informed ballots. Fifth, balloting must be secret, non-coercive, honest, and tallied in such a way that it accurately reflects the preferences expressed by the electors. These fundamentals must hold for an election to be legitimate in a system of representative parliamentary democracy and for an election to accord with s. 3 of the *Charter*.

The constitutional validity of pre-writ balloting depends on how the word 'election' in s. 3 of the *Charter* is interpreted. There are several possibilities. If 'election' is interpreted narrowly to refer only to the day on which the voter casts a ballot, then the right to vote would mean little more than the right to drop a piece of paper in a box. Alternately, 'election' could refer to the activity that goes on during the official campaign from the time that the writ is dropped up to and including voting day. Or, it could refer to some part of that time period, for example the time from the close of nominations, when all of the candidates have been identified, up to and including the close of the polls. Or finally, 'election' could be interpreted to include a legislated period prior to the start of the official campaign when votes could be cast in anticipation of the election. Those supporting the legitimacy of pre-writ voting argue that such a vote furthers the *Charter* guarantee of "a right to vote in an election." Those disagreeing argue that the "right to vote in an election" is the right to vote in

an election that has been officially called through vice-regal proclamation and that any pre-writ voting, whatever else it might be, does not, in *Charter* terms, count as discharging the right to vote in an election.

Section 3, like all *Charter* sections, must be given a purposive interpretation. In *Figueroa v. Canada (Attorney General)*, a unanimous decision of the Supreme Court of Canada, Iacobucci J., writing for six of the Justices, cited with approval the following words of McLachlin C.J.B.C.S.C. (as she then was): “[m]ore is intended [in the right to vote] than the bare right to place a ballot in a box.”¹¹ Iacobucci J. continued: “This Court has subsequently confirmed, on numerous occasions, that the purpose of s. 3 is effective representation.”¹² For the voter, this means, “the right to play a meaningful role in the selection of elected representatives.”¹³ Quoting from *Libman*, Iacobucci J. held that s. 3 protects the right of each citizen to participate in a fair election: “Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions...”¹⁴

It is difficult to see that the pre-writ period, prior to the start of the official campaign and the close of nominations, qualifies as a time when citizens have had an opportunity to become “reasonably informed of all the possible choices.” Pre-writ voters cannot possibly know of relevant events and political developments that arise after they vote but before the election is called. These developments could be particularly significant if the Parliament or Legislature is still in session during the pre-writ period. Nor can pre-writ voters know of the information that they might have gleaned during the campaign itself. They cast their vote unaware of yet-to-be nominated candidates, emerging campaign issues, party platforms, advertising, polls, and television debates – Campaigns matter. Once a pre-writ vote is cast, it cannot be reclaimed. The opportunity to play a ‘meaningful role’ in an election, and to cast an informed vote for effective representation, is lost. However, this is precisely the democratic right that s. 3 protects.

It might be argued that it is not the legislation authorizing the pre-writ ballot, but rather the voter’s voluntary action in casting such a ballot, that deprives him or her of the meaningful electoral participation protected by s. 3. He or she could simply have waited, so this argument goes, to vote until after the election was called. It is the legislation, however, that creates the pre-writ voting opportunity that undermines the kind of election that s. 3 safeguards. Without the legislation, there could be no *Charter* violation.

In addition to the right to vote, s. 3 also protects a citizen’s right to be qualified as a member of a legislative

assembly, i.e. the right to be a candidate. As cited above in *Libman*, this requires that candidates have, “a reasonable opportunity to present their positions ...”¹⁵ Iacobucci J. elaborated on this in *Figueroa*: “The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses.”¹⁶ Most election acts, including the one in Newfoundland and Labrador, only allow candidates to be officially nominated after the election is called. This means that pre-writ voting is done before anyone is officially nominated. As a result, it is impossible for the eventual candidates to have had an opportunity, as official candidates, to present their views to the pre-writ voters. The right to run in an election is not much of a right if the candidate does not have access to a part of the electorate because that part of the electorate has already voted before the candidate even becomes a candidate.

The democratic elections contemplated by s. 3 must be fair. This means that election rules must apply equally to all who are running. There must be a level playing field. Pre-writ voting results in not one, but two, campaigns. The first, the pre-writ campaign, is not subject to the same regulations put in place to ensure the fairness of the second, the post-writ campaign. Spending limits, fundraising, tax receipting, advertising, audit requirements, elimination of any public benefits enjoyed sitting members, and a myriad of other regulations, all govern post-, but not pre-, writ campaigning. These regulations are intended to ensure that candidates have the same opportunity within the bounds set by the rules to ‘get the message out,’ and that voters have the same opportunity to make informed choices based on those messages. Candidates who start the campaign with votes already cast in their favor have an unfair advantage over candidates who must win their votes while adhering to campaign regulations.

The need to ensure that voters have a reasonable opportunity to be informed, that candidates have access to the entire electorate, and that campaign rules apply fairly to all, suggest that the word ‘election’ in s. 3 of the *Charter* should be defined so as to exclude pre-writ voting. The same considerations suggest that pre-writ voting cannot be saved under s. 1 of the *Charter* as a demonstrably justifiable activity in a free and democratic society. This is a matter of balancing. It is difficult to see how the benefit derived by creating better access to the polls by allowing absentee voters to vote pre-writ, important as that benefit might be, can

outweigh the harm done by such voting to the integrity of the electoral process.

Moreover, pre-writ voting is unworkable in a parliamentary democracy. It is only possible to cast a pre-writ ballot when the date of the next election is known in advance. While this might sometimes be the case, even where fixed-date election laws are in place it is not possible to know for certain when the next election will occur. For constitutional reasons, fixed-date election laws do not alter the discretionary powers of the vice-regal to issue an election proclamation whenever a first minister so requests. Courts have been clear that the election fixed dates are non-binding. The fall of a minority government, a change in first ministers, the need to consult the citizens in times of crisis or on important policy matters, are all unanticipated situations that could trigger a sudden election without the opportunity for pre-writ balloting.

Voting for Party or Voting for Candidate?

S. 3 of the *Charter* protects, “the right to vote in an election of members.” Does the word “members” mean individual representatives or can it be expanded to mean groups of individuals who have formed political parties? It strains the literal meaning of the word “members” to include in that term political parties. The right to vote for a member is the right to vote for a person; the right to vote for a party would be the right to vote for a group or a thing. Moreover, the right of every citizen “to be qualified” as a member of Parliament or a legislative assembly is in no way contingent upon that person having an affiliation with a political party as would be the case if voting by party were permitted.

Context reinforces this interpretation. Voting by candidate reflects the nature of representation in our parliamentary system. Members are elected to represent not their parties but rather their local constituents in the parliament or an assembly. Constituents bring their views and grievances to their elected members and hold those members directly accountable at election time. Some analysts lament the lack of independence of elected members; others bemoan the strength of party whips; still others decry the emergence of powerful executive forms of ‘court’ government. All of these trends are worthy of consideration. However, none of them alter the fact that members, because they are elected by voters in their home ridings, have a power base that is independent of any party affiliation. The reality of this independent power is evident when members defy party whips by voting against party positions on legislation raising moral questions or other issues of particular concern to the

members’ constituents. This reality is also especially evident when members ‘cross the floor,’ particularly in minority government situations.

Voting by party is out of place in the parliamentary context. Parties gain recognition in a legislative assembly not through the votes of the electorate but rather through the operation of the rules of the assembly. There are representative systems which permit voting by party with individual members subsequently chosen sequentially from party lists in accordance with the percentage of popular vote received by each party. Some republican forms of government also allow electors to vote directly for one party leader, or another, in order to determine who will lead the country. These systems do not correspond with the nature of parliamentary representation in the Westminster model.

An argument might be made that voting by party is simply a proxy for voting by candidate; in either case, it is said, the voter is endorsing the same set of policies. Recognizing such a proxy, it is argued, is useful for creating additional voting opportunities in situations where a party’s candidate has not yet been nominated or where time has not permitted the distribution of ballots printed with candidates’ names. The argument gains credence from the important role that parties play in our electoral system. They provide political leadership, develop and communicate policy, encourage candidates to run, and help get out the vote. The identity of the local candidate is seen as playing a relatively minor role, when compared to party leadership and policy, in terms of attracting the vote.¹⁷

However closely identified candidates might be with political parties, the two are not always equated in the voters’ minds, certainly not to the point where one is a proxy for the other. This is especially true at a time when party loyalty amongst voters has diminished.¹⁸ It is difficult to see how a proxy relationship can exist between a party and a candidate before a candidate is even selected. A candidate’s identity does make a difference to voters particularly in cases of ‘high profile’ candidates, or candidates with tainted reputations. Voters do say things like, “Normally I vote ‘party’ but this time I am voting ‘candidate’.” They go on to explain their decision to back the candidate of a party other than the one that they normally support by citing the candidate’s credentials, experience, character, family, community service, connections, or a myriad of other personal characteristics. Who the candidate is can make all the difference in marginal seats and closely fought elections. A voter voting by party prior to the nomination of the party’s local candidate might

come to regret that vote once the nominee is chosen. Had the voter known, he or she might have voted for another candidate or simply have stayed home.

Balloting in a constituency in which some voters vote for a party, while others vote for a candidate, cannot produce the kind of fair election guaranteed by s. 3. Just as allowing pre-writ voting creates two campaigns, one pre- and one post-writ, allowing party voting creates two elections, one where the choice is between candidates, the other where the choice is between parties. It is unfair to candidates who have no party affiliation and who, as a result, have no chance to benefit from votes cast on a party basis, to make them compete with other candidates who can claim, in addition to the votes cast in their name, the votes cast for their party. Even more serious, it is not fair to aggregate party and candidate votes. As indicated above, one is not a proxy for the other. Just as apples cannot be added with oranges to determine the number of apples in a fruit basket, party votes and candidate votes are inherently different and so are non-cumulative. Adding the two kinds of ballots together will not produce a legitimate indication of voter preference because the voters are not voting for the same thing.

Voting by party cannot be 'saved' under s. 1 of the *Charter* as a practice that is "demonstrably justifiable in a free and democratic society" for at least three reasons.

- First, while there is no doubt that voting by party facilitates access to the polls where candidates have not yet been nominated, against this must be weighed the inappropriate nature of such voting for determining representation in a parliamentary democracy and the distortion caused to final results by aggregating different categories of votes.
- Second, as the above examples drawn from jurisdictions where voting by party is not permitted illustrate, such voting is not necessary to the provision of absentee balloting.
- Third, voting by party is unworkable. It deprives an elector of his or her vote in situations in which the elector casts a vote by party and the party subsequently fails to nominate a candidate.

Conclusion

The democratic rights protected by section 3 of the *Charter* must be understood in the context of our system of representative parliamentary democracy. Encouraging voter turn-out is one of the measures of the health of that democracy, but there are others. For representation to be effective, voters must have access to a choice of options, candidates must have an opportunity to present themselves to the entire electorate, electoral rules must apply fairly and equally to all, campaigns must give participants a chance

to become reasonably informed about the choices available, and the outcome of balloting must accurately reflect the choices that voters have made. Both pre-writ voting, and voting-by-party, while increasing voting opportunities, inadequately takes account of these other values which are essential to the integrity of a democratic electoral process. In order to protect the right to vote and the right to be a candidate, s. 3 must protect the integrity of that process.

It is unnecessary to rely on pre-writ voting to facilitate the turn out of absentee electors. Technology, and careful scheduling of dates during the official campaign period, create other options. Almost all jurisdictions allow at least two weeks, and some more, between the close of nominations and general voting day. This is enough time, in the era of the internet, 1-800 phone numbers, and courier and special delivery mail services, to enable absentee voters to apply for a special or mail-in ballot (something which can be done when the writ drops or even earlier), to determine the identity of the candidates running in their home ridings, and to return ballots in time for the close of polls on election day or, if more time was considered desirable, to return ballots postmarked on or before election day. The use of 'ballot-on-demand' machines offers potential for alleviating logistical problems related to the distribution of absentee ballot material.

Voting by party would not be needed if absentee and special voting opportunities were delayed until after the close of nominations when candidate's names were known. Such a delay would also give absentee voters a reasonable opportunity to become informed. Approximately one-half of the official campaign is complete by the time nominations close. By this point, party platforms are normally published, considerable advertising and candidate canvassing have taken place, and the leader debates have either happened or will happen soon.

At present, some Canadian jurisdictions give access to absentee ballots 'on demand' so that voters can vote early at their convenience. Other jurisdictions limit absentee balloting by requiring applicants to give an acceptable reason for their application, often by way of checking off one of several possible reasons on the application form. Before the requirement for a reason is abandoned, or ignored, it should be remembered that campaigns play an important role in ensuring an informed electorate, a role which is undermined by early voting. A balance needs to be struck. The advantages of creating greater access to voting opportunities by allowing absentee voting on demand have to be weighed against the informational

deficit under which early voters labour. It is a matter of recognizing fair and acceptable reasons for granting absentee ballots and then honestly enforcing them.

There is one further reason, apart from protecting the integrity of the electoral process, that elections must be about more than just easy access to polls, and that voter turn-out must be only one of several measures of the success of the electoral system. We are in a period in which rapid technological progress is making new methods of voting available. With the resolution of security and privacy issues, it will be possible for everyone to cast a ballot at any time from a computer terminal in his or her home. This will help get out the vote. However, careful thought will have to be put into the design of these new, technologically-driven, voting opportunities in order to ensure that candidates can campaign meaningfully and voters can cast informed ballots. This will be necessary for the preservation of the integrity of the electoral process, a process which is at the root of representative parliamentary democracy, and which is safeguarded by s. 3 of the *Charter*.

Notes

- 1 Special ballots only represent a small part of the total ballots cast in federal or provincial elections. In the May 2011 federal election, they accounted for 1.9% of ballots cast; in the October 2008 election the figure was 1.8%; in 2006, a mid-January election, it was nearly 3%. Unlike in federal elections where a candidate's name must be filled in, in half of the provinces there is also an option to vote for a registered party if one wishes. The percentages of special ballots cast for the most recent elections in those provinces are as follows: in the May 2009 British Columbia election, 2.1% of ballots cast; in the March 2008 Alberta election, 1.3%; in the November 2007 Saskatchewan election, .66%; in the November 2007 Manitoba election, 2.6%; and in the June 2009 Nova Scotia election, 1.3%.
- 2 Elections Newfoundland and Labrador, "Report - Provincial General Election, October 9, 2007," July 7, 2008, pp. 11, 13, <http://www.assembly.nl.ca/business/tables/pdfs/GeneralElection-October09-Report.pdf> (accessed February 22, 2012). Includes mail-in ballots.
- 3 *Ibid.*, 10.
- 4 A useful summary of all provincial and federal rules respecting voter eligibility for mail-in and special ballots, and mail-in or special ballot application and return deadlines can be found at: Elections Canada, Compendium of Election Administration in Canada: A Comparative Overview as of October 25, 2011," Table E.2: Alternate methods of voting, pp. 49-53, http://www.elections.ca/res/loi/com/compooverview2011oct_e.pdf (accessed February 22, 2012).
- 5 *Ibid.*, s. 139 Step 3. See generally, Elections Manitoba, "Vote When Your Away," http://www.elections.mb.ca/en/voting/absentee_voting/index.html (accessed February 22, 2012).
- 6 See generally, Elections Ontario, "Vote by Mail," <http://wemakevotingeasy.ca/en/vote-by-mail.aspx> and "Special Ballots," <http://wemakevotingeasy.ca/en/special-ballots.aspx> (both accessed February 22, 2012).
- 7 Newfoundland and Labrador, *Debates*, June 4, 2007, <http://www.assembly.nl.ca/business/hansard/ga45session4/07-06-04.htm> (accessed on February 22, 2012).
- 8 Elections Newfoundland and Labrador, "Report - Provincial General Election, October 9, 2007," *op. cit.*, p.10.
- 9 *Julie Mitchell (Applicant) v. Clyde Jackman et. al. (Respondents)* (2011), in the Supreme Court of Newfoundland and Labrador Trial Division (General), Court Docket Number 2011 01G 7277.
- 10 *Ibid.*, Originating Application Factum, <http://www.cbc.ca/news/pdf/nl-ndp-application.pdf> (accessed February 22, 2012).
- 11 [2003] 1 S.C.R. 912, para. 19 citing *Dixon v. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393, at p. 403.
- 12 *Ibid.*, para. 21.
- 13 *Ibid.*, para. 25, citing L'Heureux-Dubé J. in *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1031. Emphasis added by Iacobucci J.
- 14 *Ibid.*, para. 51 citing *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 51.
- 15 *Ibid.*
- 16 *op. cit.*, para. 29.
- 17 Andrew Heard, "Elections: Riding by Riding Information," <http://www.sfu.ca/~aheard/elections/ridings.html> (Accessed February 22, 2012 where several polls are cited indicating that only 9 to 12% of Canadians felt that the identity of the local candidate was the most important factor in deciding how they would vote.
- 18 Scott Proudfoot, "Political Parties Lose Ground Steadily," *Hillwatch.com*, http://www.hillwatch.com/Publications/Bulletins/Political_Parties_Lose_Ground_Steadily.aspx (accessed February 22, 2012).