

Aligning Voting System Reform with Section 3 of the Canadian Charter of Rights and Freedoms

Voting rights in Canada are protected by Section 3 of the Charter of Rights and Freedoms. In past decisions of the Supreme Court of Canada, the right to vote has been expanded beyond the simple right to place a ballot into the ballot box (*Reference Re Provincial Electoral Boundaries Sask*, [1991]) to include the right to participate meaningfully in the electoral process (*Figuroa v Canada (AG)*, [2003]).

The First Past the Post (FPTP) voting method has also been subject to a Charter challenge in Quebec, (*Brian Gibb et al. v Attorney General of Quebec, et al.* Application for Leave dismissed without costs by the SCC, [2012]). In this case, the Quebec Superior Court and the Quebec Court of Appeal both ruled that the question of the constitutionality of the voting system is indeed judiciable, but did not support the plaintiffs' claim that their Section 3 voting rights were impinged upon by the FPTP voting system.

It is the opinion of the author that the lower Courts did not understand the nature of the question being asked and that the Supreme Court of Canada did not want to rule on such a politically sensitive question in Quebec since *Gibb v Attorney General of Quebec* also contained Section 15 arguments. Nevertheless, since the lower Courts have already deemed the question of the constitutionality of the voting system judiciable, the Supreme Court of Canada may decide to hear a Section 3 Charter challenge of the voting system at a later date.

From a voting rights perspective the problem with FPTP is that by using single member plurality electoral districts contested by three or more political parties in the Canadian context only the votes necessary to determine the winning candidate are effective, in other words, the votes that count. All other votes, those for other candidates as well as those votes for the winning candidate above and beyond what is needed to establish the plurality are ineffective, in other words, the votes that don't count.

Consequently, it can be argued that the right to participate meaningfully in the electoral process is not protected by the use of FPTP since a great many votes (most often the majority) are ineffective. In short, how can one participate meaningfully in the electoral process if one's vote has no bearing on the electoral result?

Essentially, all of the major contending voting systems put forward as alternatives to replace FPTP, Proportional Representation (PR), Mixed-Member Proportional Representation (MMP), Rural-Urban Proportional (RUP), the Single Transferable Vote (STV) and the Alternative Vote (AV) contain in their formulas to translate votes cast into seats in the House of Commons a method, either calculating a percentage of seats or transferring a vote from one candidate to another, that reduces the number of ineffective votes.

No system is perfect, but all of the aforementioned voting systems are superior to FPTP in protecting Section 3 voting rights.

Recommendation 1: Respect the electoral promise of no longer using FPTP as the voting system during Federal General Elections in Canada.

With regard to the applicability or suitability of the proposed alternative voting systems, only MMP or STV should be considered to replace FPTP.

In the case of PR, a single electoral district whether national or provincial does not sufficiently capture the geographic differences within Canada or its provinces. Indeed, multiple electoral districts are required to represent the differences between the provinces and the regions within the large provinces. Although PR may be the favored option in smaller, more homogeneous countries like the Netherlands and Israel, it would not be a suitable choice for Canada.

As for the Rural-Urban Proportional system, this voting method would still make use of single member voting districts in the rural regions, creating a situation where vastly different electoral methods would be in use. For instance, if FPTP were to be retained in the rural areas of Canada while another method leading to more proportional results were used in the urban areas, there would be a huge disparity of the number and percentage of effective votes between the rural and urban electoral districts.

Considering that portions of urban areas are now included into predominantly rural ridings in order to ensure an equitable number of voters per riding, this disparity with regard to the effectiveness of one's vote would be most notable in those urban centres where some electors (usually in the suburbs) are required to cast their votes in rural ridings. Voting rights must be uniform across all electoral districts, and as rights holders, Canadians must have their voting rights respected regardless of where they live.

With regard to the Alternative Vote, at first glance it represents an improvement over FPTP in that at least 50% of the votes cast in an electoral district are effective. Within FPTP ridings in Canada, most often less than 50% of the votes are effective. Certainly, AV brings with it more democratic legitimacy for the winning candidates; however, the large number of ineffective votes still makes it possible that a large segment of voters would find themselves with no representation within a region. For example, in the last Federal election (2015), the use of the AV would not have prevented the Liberal Party of Canada from sweeping all of the 61 seats in the Maritimes (100%) despite having received only 56% of the popular vote. This democratic anomaly arises due to the use of single member districts in which all of the ineffective votes in each riding are cast aside and do not find expression in the formula that translates votes into representation.

Clearly, this problem can be avoided entirely by abandoning the use of single member districts entirely. By switching to multi-member electoral districts, the problem of what to do with the ineffective votes is resolved for the most part. Regardless of the manner the votes are tabulated, there will be a threshold needed to be surpassed in order for a candidate from a political party or an independent candidate to become an elected official. The size of the threshold is determined by the magnitude of the electoral district, the more candidates to be elected from an electoral district, the lower the threshold. At what point does the threshold become an unjustifiable barrier to representation? I think most people would be comfortable with a 5% threshold, less so with a threshold of more than 15%, which would represent a sizable but not an impossible barrier to overcome for smaller and emerging political parties.

Of the major alternative systems put forward and which are presently in use in other developed countries, STV and MMP offer viable options to replace FPTP. The choice between the two depends upon the importance placed on the role of political parties as opposed to the qualities of the elected representatives. If the role of political parties is deemed more important, then MMP offers the better alternative. On the other hand, if the role of the individual elected representative is more important, the STV would be the better choice.

Recommendation 2: Opt for either MMP or STV

