

[Charter: A Course - S2E7 - Section 3 of the Charter: The Right to Vote]

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Cheryl M.: Hello, and welcome back to Charter: A Course. A podcast created by the David Asper Centre for constitutional rights, at the University of Toronto, faculty of law. My name is Cheryl Milne, and I'm the executive director of the Asper Centre.

Our podcast focuses on leading constitutional cases and issues, highlighting strategic aspects of constitutional litigation and some of the accomplishments of U of T's faculty and alumni involved in the cases. It is our hope that over the course of this episode, whether you are a law student, a lawyer or someone looking for an interesting topic to chat about at a cocktail party, that you'll learn about an aspect of constitutional law and litigation that interests you.

I wish to first acknowledge this land from which our podcast emanates. For thousands of years, it has been the traditional land of the Huron Wendat, the Seneca and the Mississauga's of the credit. Today, this meeting place is still the home to many indigenous peoples from across Turtle Island, and we are grateful to have the opportunity to work here.

In this episode, we will focus on section 3 of the Charter, which provides that 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. In the latter half of the episode, we will discuss the Asper Centre's constitutional challenge to the federal voting age. With our first guest, we will be speaking about the content of the right in Section 3, as well as the history of how more and more people have been included in the franchise. Both before the Charter and after.

Our first guest is Professor Michael Pal. Mike Pal is an associate professor at the University of Ottawa, he studied law at the JD and doctorate level at the University of Toronto, faculty of law, where he was a Pierre Elliott Trudeau Foundation scholar. As well as earning an LLM from NYU. His research focuses on the law of democracy in elections, spanning the fields of constitutional law, political science and public policy.

Professor Pal has advised all levels of Canadian government on matters related to electoral and constitutional law, and has advised election commissions around the world. He has served as a commissioner for the far north electoral boundaries commission, a campaign finance advisor to the Ministry of the attorney general in Ontario, and currently serves on the advisory boards of the Indian law review, and the Electoral Integrity project.

Professor Pal is currently working on a book on the comparative law and politics of election commissions. So, welcome Mike.

Michael P.: Thanks for having me. It's great to be here.

Cheryl M.: Well, let's start by talking about the history of enfranchisement in Canada, meaning the right to vote. When we're thinking about the history of Canadian constitutionalism, we often talk about how democracy is not actually enshrined in the original Canadian Constitution, but implied by the Preamble, which said that Canada's Constitution would be similar in principle to that of the United Kingdom.

When the Charter came along a century later, there was some debate of whether Section 3 simply codified an already existing set of democratic rights, or whether it created new rights. Which would you say is a more accurate description?

Michael P.: That's a great question, Cheryl. I think the best answer is that section 3 was intended to be transformative. And I think there's pretty clear evidence in the text of the Charter itself about that. For example, Section 3 of the text itself says every citizen has the right to vote, that is a clear reaction to a kind of unpleasant, not very admirable history in Canada, where many groups of citizens were deprived of the right to cast a ballot.

There are other textual signals as well section one the limitations clause talks about justified limits in a free and democratic society. So the idea that democracy is not just one value, but it's foundational to Canada is right there in section one. And I think we also have

to look at a very contemporary issue, the notwithstanding clause, in section 33 of the Charter.

And so the right to vote, along with some other structural democratic rights and language rights and mobility rights, are all exempt from the application of the notwithstanding clause. That's not an accident, it's the fear that governments could misuse the power to restrict the right to vote so as to win an election and then stay in office indefinitely, or to cancel elections or something like that.

So I think section 3 read in relation to the rest of the Charter, particular textual signals, really signifies that it was meant to be a break with the past, and to be something new. And that's not really surprising, given the history of Canadian democracy and the Constitution is, having a Constitution similar in principle to that of the United Kingdom, and democracy sort of underspecified in the Canadian Constitution Act 1867 because of that British Heritage with the unwritten Constitution.

So 1982 was the time where some of the most significant commitments to ensuring democracy were put into the text. So I think that's transformational rather than simply codifying what had happened in the past.

Cheryl M.: Yes. And we can see that in the case law which we're going to be going through in the interpretation of section three. But going back to that original constitution in 1867, who really had democratic rights in practice and how did that evolve over time?

Michael P.: The short answer is it was a male citizens, who were born British citizens or naturalized, who met the age requirement of 21, there were income requirements, property requirements, but sometimes also more granular requirements around income. But I think the other important thing to know is in the initial years of confederation, there was a patchwork of laws across the country.

There was no one federal law that regulated who had the franchise in 1867. It was, in fact, provincial laws, passed by provincial legislatures that applied to determine the franchise provincial and federal elections. And it was really only after 1920 that provincial

role ended and we had something like a national franchise. But what you see in the debates in the provincial legislatures, but also in Parliament is many members of parliament expressed the view that voting was not a right, but it was a privilege.

And it was a privilege that could be denied to groups that were unworthy or is a privilege that could be denied for reasons that we would today not think to be very legitimate reasons to ground state action, racism, stereotyping that sort of thing. And so the franchise opens up to males who don't have significant amounts of property, eventually opens up to women after long political protest, okay. An important part in Canadian history.

Cheryl M.: Yes. So certainly, the suffragettes had a role in Canada not just in the UK in that regard.

Michael P.: Absolutely. And a lot of bravery to be recounted there, right? Women risking arrests, being arrested and being heavily criticized by powerful political leaders of the day, but persevering. But there were other restrictions that lasted for a long time. British Columbia in particular had race-based restrictions against Asians of South Asian or East Asian heritage and those persisted for a long time.

Or in some of the other prairie provinces there was discriminatory rules against individuals of Chinese descent, and then right from pre-confederation but then confederation onwards, indigenous peoples were either formally or informally deprived of the right to cast a vote.

Sometimes that was because of property requirements in the Canadian state, not recognizing indigenous title and therefore, prospective voters are deemed not to have the requisite amount of property. Other times, it was simply based on racism and stereotyping, and the parliamentary record is quite clear.

One of the most remarkable facts of the Euros in British Columbia when it joined confederation best estimates are that racialized individuals and indigenous peoples were a majority or close to a majority at that time, but were deprived of the right to vote by a minority in the new province.

So religious groups as well, who are sometimes deemed too pacifistic during wartime or sometimes deemed to be have communist sympathies, because they had communal property ownership.

So there's a long history that lasts until the 1960s, really of deprivations, undue deprivations on the right to vote. One way of looking at that is we didn't really have a true electoral democracy until the 1960s when the franchise was really much closer to being universal.

Cheryl M.: So even though Section 3 codified the right to vote for all Canadian citizens, and so we're now moving into 1982, where there is that much more broader group of eligible voters. Some restrictions still remained even after patriation in 1982.

So in 1988, which was merely 44 years ago, the federal court struck down legislation which restricted people suffering from mental illness from voting, as well as legislation which prevented judges from voting. One of the most significant cases on Section 3 is *Sauvé v Canada* from 2002, which extended the right to vote to people incarcerated in prisons.

What do all of these cases reveal about how we think of the right to vote in Canada? And how did *Sauvé* help to solidify that by recognizing the rights of incarcerated people?

Michael P.: Yes, there's lots to say about *Sauvé*, a really significant case for the right to vote. But also, the Charter as a whole. We discussed some of those restrictions on the right to vote that were pre-Charter, generally, they were taken out of the statute book by the 1960s. So there were still informal barriers, but fewer explicit statutory barriers to voting. And then the early cases after 1982 or judges on a mental capacity sweep away some of the remaining restrictions.

Among the most controversial ones that was left was incarcerated individuals, and a survey says it's unconstitutional to deprive the incarcerated of the right to cast a ballot, matters for a lot, matters for the individuals obviously who could now cast a vote. But generally, prisoners are probably one of the more unpopular groups if you poll the general

public and ask their views on the incarcerated, they were a classic discrete and insular minority to borrow a term from the U.S case law.

And Sauvé closes the door on reasoning by parliament that a group should be deprived of the right to vote, because parliamentarians view them as unworthy. That is not an acceptable justification. It also stands for the proposition that the courts must apply a stringent standard under section 3, and the limitations clause, the Oakes analysis in section one, because the right to vote is core and fundamental.

Some of the earlier older cases, and some of the parliamentary debates suggested actually the court should be deferential, because parliament knows about election law and parliament knows about politics, and it should be up to the people to determine who else is a political equal who has a say in voting. The court says that's not the case, it's their job to protect a fundamental right.

Justice Gonthier has a very firmly worded dissent, if I could put it that way, arguing that on questions or of disputed social and political philosophy be like who should have the vote, it should be parliament that has a say. Chief Justice McLaughlin, her reasons reject that view because of the core importance of the right to vote.

And she also, taking outside of the right to vote context, section one is one of the few cases where the court cast doubt on the pressing and substantial purpose that the government puts forward to try to justify a rights limitation, and she says vague and symbolic objectives, which don't really tell you what the government was doing, what parliament was doing when it passed the law. Those aren't sufficient to actually allow the court to do its job and should be looked upon with great skepticism.

So if prisoners cannot be deprived of the right to vote, despite their unpopularity, despite the fact that they're incarcerated by virtue of having been deemed by the courts to have violated the law. Then it's hard to see any group of adult citizens being deprived of the vote in the future. And I know we'll talk about its implications for age and younger citizens as well.

Cheryl M.: That's right. You're anticipating my questions about that. I know that Justice McLaughlin in that decision talks about age being a modality, and we can talk about that a bit. But I want to bring us up to 2019, which is the Frank v Canada case, the Asper Centre intervened in that case, about what really comprised the right to vote in terms of looking at its definition.

It's another landmark case on section 3 that was decided by the Supreme Court, it focused on the rights of citizens who have lived outside of Canada for more than five years at the time of an election.

We argued that being subject to the law is not a prerequisite for the right to vote, which was one of the arguments that were put forward, and one of the reasonings in the court of appeal below. Since the Charter says that citizenship and citizenship alone qualifies a person to vote. The court agreed with that interpretation, and also discussed how the right to vote in section 3 has value beyond its literal meaning alone.

So in other cases, the Supreme Court has also said that section 3 includes the right to effective representation, and to meaningful participation in the democratic process. Even though some argue that it should have only a literal reading. A literal reading would encompass the right to vote itself and no more. So where is the court situated now in 2022 as far as that debate stands in your view?

Michael P.: That's a good question that has a lot of layers. I think on the most direct part of the question, yes, the court agrees with its previous cases, which say that it's not just the right to put a piece of paper in a ballot box, it must protect some of the background factors and structures that mean we have fair elections.

And that makes a lot of sense simply from the point of view of looking at the text, which kind of under-specifies how democracy works. And so we need there to be more legislation, and we need there to be constitutional oversight of that legislation, because the constitutional text doesn't take us all the way there.

Now, there are other things to say. One of the issues that always comes up in the section 3 cases, is whether there are internal limits to section 3. Could be age, could be residency,

could be status as an incarcerated individual. The government's always tried to argue there are these limits inherent in the analysis of section 3, you never even get to section one. So even if we concede that section, as I think we should, that section three protects the background factors of politics, there are limits inherent in the text, even though it says every citizen. I think Frank has been the death of that argument, and the government did abandon it at later stages.

So the idea that there are internal limits I think has gone away, and we are left with the idea that the right to vote protects more than simply the right to put the piece of paper in the ballot box, because otherwise putting the piece of paper in the ballot box would be meaningless, unless we had fair procedures for counting the vote, for securing the vote, for translating those votes into seats in the house of commons and so on.

But my view on Frank has always been, it was a pretty straightforward and easy application of *Sauvé*, if you accept that *Sauvé* is the controlling precedent. The descent in Frank which would allow Parliament to still restrict voting by Canadian citizens who are living abroad, clearly preferred the reasoning of Justice Gonthier in the *Sauvé* case.

But if we accept that the majority in *Sauvé* is the controlling precedent, if you can't deprive the incarcerated of the right to cast the ballot, you can't deprive a citizen who happens to be living overseas as well.

Cheryl M.: I mean, it also speaks a lot to the section one analysis. I mean, when you have a very strong right in section 3, the court also really, the majority really clearly says that if you're going to limit that really strong and important right, you have to have a very good reason to do that. And so that's the other aspect of Frank that I think is really significant.

Michael P.: Yes. The government lawyers weren't tough on that one, because there wasn't really a great articulation of what the reason was for disenfranchising non-resident citizens on the parliamentary record. So the closest they came was to say it starts off, you're abroad for more than five years, that's tied to the maximum amount of time between elections. But

the record wasn't clear on that, and it was I think hard then for the government to claim there was a benefit to the country as a whole.

Cheryl M.: And it was one of the few cases in which the court really took the onus on government, to have evidence to prove why they wanted to do something, that they really put that onus on them squarely and said you didn't show us that.

Michael P.: Absolutely. And it's interesting, the political expression cases are sometimes bred with the right to vote cases as part of the democratic rights, and court there has been the BC FIPPA case and others take a more relaxed approach to what evidence is needed at the section one stage to prove that the infringement was justified.

Cheryl M.: Yes. I'm going to just jump down to another question that we had, that kind of relates to that, which is another debate that often arises in the context of section 3, is the issue of deference. And so that's related to the section one analysis. And it's always a factor in judicial interpretations of constitutional law, but has played a particularly large role in the jurisprudence on, at least election law cases more generally.

So could you just explain, for our listeners, what is deference, and how it is that it influenced courts' decisions on voting rights?

Michael P.: Yes. Deference has been a key part of the voting rights jurisprudence. I think deference is pretty straightforward, it's whether the court should allow a law to stand in the face of a Charter challenge, if the violation of the right isn't clear and obvious. So if it's a close call, then parliament's will should stand rather than the court striking something down under a section, using section 3.

Deference has been a feature of all the right to vote cases, especially in *Sauvé* and *Frank*. And *Sauvé* was an interesting case, because Justice Gonthier in dissent says this is about competing social and political philosophies, and they had expert evidence in the case by

political philosophers saying well, there is no consensus in liberal political philosophy. We look at Rousseau, we look at Mill, we look at more contemporary thinkers, but there's no consensus on whether the incarcerated should be permitted or prohibited from voting.

Therefore, Justice Gonthier concludes this is a matter of great and high-minded principle debate, we should therefore defer to parliament, to which the majority says the text of the Charter is what we are interpreting, and the text says every citizen has the right to vote, and the government has to have a reason for depriving that group of the right, and deference is not appropriate. So deference has mattered in every case.

And on the one side you have the view that parliament knows about elections and about politics, and therefore, deference might be appropriate. But we also have this long history of parliament using its authority pre and post Charter, to restrict the right to vote for reasons that I would consider unacceptable, right? Racism, stereotyping. Partisan advantage is also there.

Whether members of the military have the right to vote or not when they were overseas, partly they were enfranchised or not based on whether the government of the day thought those groups would vote for one party or another. So the idea that parliament deserves deference in establishing who has the right to vote, when the Charter itself says every citizen, I think is a dubious claim and more stringent justification is appropriate.

Where we end up in Frank, is the majority acknowledges deference could be appropriate if we have a complex legislative scheme. The elections act is a pretty complex legislative scheme as a whole, and most of its subparts are as well, so I'm not sure that will hold up under scrutiny or hold up in future cases. But that's where we are now, and deference is always going to be a key part of the debate about how we interpret section three.

Cheryl M.: So in addition to the substantive democratic rights in section 3, the Supreme Court of Canada famously spoke of the unwritten principle of democracy in the Secession reference.

You've written on this topic before, so can you tell us what is the difference between the two, and what does the unwritten principle of democracy really mean. Especially in light of the Court's recent decision in the Toronto and Ontario case in 2021.

Michael P.: Very interesting question. Unwritten principle of democracy, one of the four unwritten principles the Supreme Court set out in the Secession reference. It's also mentioned in other cases, especially that involve parliamentary sovereignty or supremacy. But I would say prior to the City of Toronto, the actual content of the unwritten principle of democracy was not very well set out in the case law or in the scholarship.

To draw a contrast with the rule of law as an unwritten principle or federalism, where there is much more elaboration in the case law and what academics and lawyers were writing about it. The way I understand the unwritten principle of democracy, is it is at the very least an interpretive aid that helps us read the Constitution of Canada in a democratic light as a whole, and it helps us in interpreting specific provisions.

The Supreme Court majority in City of Toronto says, I think in conflict with the earlier case law, although they disagree, that unwritten principles cannot be used to invalidate legislation. I think that would be an extreme scenario. But the unwritten principle of democracy is valuable partly because much of our Constitution comes from say less democratic times, where citizen expectations and the structure of democracy were simply different, especially thinking of 1867.

And then even 1982, kind of a recent constitutional moment for Canada, but the Charter is quite out of date already in terms of how it protects democracy if you want to look at more recent constitutions around the world, who tend to have much more granular protection for how the electoral system works, not just the right to vote, but those background factors we mentioned, that make that right meaningful.

Joining a political party, being registered to vote, a right to a free and fair election as a whole, a right to non-partisan election administration. You'd be committing constitutional drafting malpractice if you didn't include some of those things in the constitution of Canada if you're drafting it in 2022. So the Charter's out of date, the 1867 Constitution is in some ways out of date.

Not to negate the democratic credentials of Canada, but the unwritten principle helps us infuse some of the general language, and some of the provisions that were there from an earlier time with the requirement that Canada is a democracy.

So the only other thing I would add is the majority in the City of Toronto says the unwritten principles, including the unwritten principle of democracy, can't be used to strike down legislation. But it also declined to do what I think it should have, which is use the unwritten principle to interpret the freedom that was at issue in the case, which was section 2B, freedom of political expression.

Instead, it has an elaborate and I think not very convincing application of the Bayer test, for claimants seeking access to a statutory platform. I think it should have used the unwritten principle of democracy to say sure, section 3, the right to vote, where we protect federal electoral districts doesn't apply to municipal elections.

But even if we accept that, there's nothing in the text of the Charter that says fair electoral boundaries shouldn't also apply to municipal elections. Clear that section 2B and section 15 apply to Municipal elections. The unwritten principle I think underlies all the provisions of the Charter, and should have compelled the court in my view to find that unfair electoral districts breach section 2B for municipal voters.

So I think there is a lot that the principal does, but there's even more that it could do if we were very seriously committed to reading all provisions of the Charter in a democratic light.

Cheryl M.: And just to remind our listeners about what the city of Toronto case was about. The provincial government that came into power under Doug Ford changed the boundaries, and the number of councilors that could be voted in, in the city of Toronto election, right in the middle of the election itself.

So people had already started, they had already been campaigning, and then the legislation changed it. And unfortunately, what we've seen with section 3 and it may go back to your earlier comment about the Charter being out of date, is that it doesn't include a right to vote in Municipal elections.

Which I think people would find surprising some of the arguments that were put forward by the government, that the provincial government could take away completely the right to vote in a municipal election. That it's entirely within their power, so it was a federalism argument, and that's within the power of the provinces to decide on municipalities.

So the arguments were this combination of the principle of democracy as well as the expressive rights under Section 2B, and they were unsuccessful at the Supreme Court of Canada. The Asper Centre intervened in that case as well, unsuccessfully. But taking from what you said earlier, it's a bit of a shocking result to have a government step into the middle of an election and change the rules.

We researched it, looking around the world, and couldn't find one single international example of where that had happened. In all of the democracies around the world, we did not see something like that dramatic happen, and there's been lots of dramatic things happen in elections.

So that was the City of Toronto case. Municipal elections are a different category, but how do we sort of view them and view those other aspects of the right to vote that you've talked about? About fair elections? And boundaries? And those sorts of things in light of that decision?

Michael P.: Right. So to my knowledge, at the very least, this mid-election change in the number of wards and their boundaries that had never happened in Canada, okay. So it was an extraordinary event, and quite unusual. The unwritten principles maybe come into play more often, when it's an unusual or extraordinary circumstance.

And what we have is one case Saskatchewan Boundaries Reference, which says for federal and provincial elections, we have to have something like one person, one vote, although there's some problems with the document and I've criticized it lots. But it says we have effective representation under section 3.

Because we have effective representation under section 3, which applies to federal and provincial districts, I am still mystified why that means we shouldn't also have fair electoral districts for municipal elections.

Municipalities are creatures of the provinces, constitutionally as a matter of the division of powers, but the court could have reached a very different result in city of Toronto, and said the mid-election interference violated section 2B, without touching anything about the province's power jurisdictionally under the division of powers over municipal governments.

And Toronto is larger than some provinces, right? So what happened there is very consequential, but it's beyond dispute that section 15 and section 2B apply to municipal elections, there's lots of cases that have applied them already.

And it was simply that the majority of the Court objected to the same content on protecting effective representation, that there was one case from the Supreme Court applying to section 3, that meant it couldn't also have the same content under Section 2B, and that overlap between rights and freedoms beyond some minimal amount was evidence of an attempt to get around the text of the Charter, which didn't include municipalities under the protection of section 3.

I think if we read the whole Charter in light of the unwritten principle of democracy, there's no reason to think that electoral boundaries could be unfair for municipal districts. They should be fair for the same reasons that they are for federal bridge.

Section 3 and section 2B don't mention electoral districts at all, right? So these are all things judges are reading in. And because they happen to have one case protecting a federal and provincial districts, very unpersuaded that means you can't also protect municipal districts using a different provision of the Charter.

Cheryl M.: So I want to switch topics now a little bit. We discussed earlier that many groups of people gained the right to vote over the past century, but there still remains a significant group of Canadian citizens who are unable to vote, and we alluded to that earlier, that youth under the age of 18.

The constitutionality of that restriction was challenged in a case called Fitzgerald in Alberta, in terms of the Alberta legislation in 2004. And it was denied leave to appeal to the Supreme Court of Canada, it was stopped at the Alberta Court of Appeal.

What does, in your view, the procedural history of other voting rights cases, for example, *Sauvé* and *Frank* suggest about the Court's thinking on section 3? And do you think it is rigid and difficult to change or more unpredictable and fluid?

Michael P.: So I'll talk about the doctrine first, and then maybe say something where the current Court is at the moment, because there's been some changes recently in some big cases, I think reveal some of their thinking. So I read *Sauvé* and *Frank* and those other cases on judges and mental capacity, as saying any attempt to deprive a group of citizens, as a group, as a category.

Any attempt to deprive a group of citizens their right to vote will immediately be suspect, and will have a very hard hill to climb in order to justify the exclusion. There has to be a convincing record of why the exclusion exists, has to be a theoretical justification, and there has to be something beyond the vague sense by some parliamentarians that the group is unworthy.

I think in *Sauvé* and *Frank*, the idea that a group is unworthy of voting has been totally rejected by the court as legitimate rationale. We also have seen from the cases that the idea that there are internal limits to section 3 has been rejected by the Supreme Court. So the argument that age is an internal limit, I think would be very likely to lose. So in other words, it will end up being a case about section one in my view.

And then the *Sauvé* restriction against the claim to be pressing and substantial, but are vague and symbolic, I think will be especially relevant. I do think a lot of the case, love to hear your views on it, but I think a lot of the case will come down to minimal impairment, if there is a concession that some age limit is appropriate, we don't think babies and toddlers have the capacity, then is there a range of reasonable alternatives to which the court will grant parliament deference as long as it's within the reasonable range.

And that, so setting a higher age limit, right? If you want to go through that thought scenario, right? That probably seems unreasonable. I run through this with my students, what if parliament tried to set an upper age limit, right? On the right to vote, I think most people's instinct would be well, that wouldn't fly. Looks like it's stereotyping senior citizens.

And so, if we can't probably couldn't have an upper age limit, and we can't have restrictions on prisoners and non-resident citizens, the door is quite open on age, but that minimal impairment analysis of what the range of reasonable alternatives is, will I think be quite significant. And the dissent in Frank talks about age and in a way that means there's at least a couple votes likely against claimants in the age case. We'll see what the other members of the Court have to say.

But part of the age case which I think is really relevant is about capacity. And for very good reasons, say that first, for very good reasons, we don't have literacy tests and we don't have tests of political knowledge for adult citizens, right? We assume that people are the best judges of their own interest and will vote accordingly, and we don't actually ask what reasons people base their vote on.

They could be, you or I think are good reasons or not as good reasons, but that's up to the individual to decide. And so it looks pretty paternalistic to tell an informed, intelligent 14 or 16 year old that they can't cast a vote, when we know that there are some adults who are probably casting votes for reasons that we think are less persuasive or who have less political knowledge or whatever the case may be.

So we should not have tests for adults, but the fact that we don't inquire too much into capacity by adult voters I think weighs, that's one of the factors that pushes in favor of the claimants in the age case, who feel strongly about their right to cast a ballot and would make an informed decision about whom they were vote for.

Cheryl M.: Well, and there's some interesting positions that have been taken by child rights advocates. That there shouldn't be an age, because in fact the willingness to vote and the interest in voting should be the only qualification. So at the upper age category, you might have people who aren't competent for various reasons, dealing with the decline of the human mind and body.

People who don't understand what's going on are not going to vote, because they're not going to get themselves to the voting station, and the same would happen for two and three-year-olds, they're just not going to go there to vote, they're not going to have an interest or an understanding. So that may open it up to 10 year olds for example, voting,

and I know that probably would shock people who are used to discriminating against children, not seeing them as having their own views and wishes.

We also have the hypocrisy to some extent, the major parties that have taken a position against lowering the voting age, who do allow membership in voting as young as 14 in their own parties. And we could say that's for cynical reasons that they want to bring them into the fold. But I think it's fair to call that some level, a level of hypocrisy.

Michael P.: Yes. So I think the voting age is too high, it should be lowered. It's worked fine for the parties internally to have 14 and 16 year olds be able to cast ballots in leadership races, and donate to the parties and so on, absolutely fine. That's point number one. Point number two, the arguments against any group being allowed to vote are always the same, right?

They're not actually able to really understand what it's about, okay. That's often raised. Or, and this is relevant to younger voters, they will be coerced by someone, a parent or someone or teacher or someone influential to vote in the way that adult, in the way that adult wants them to vote.

Those are very similar arguments used against racialized minorities that they'll be told by the religious leaders how to vote against religious groups, against women, right? So there's a long history of those ideas being used in very unpleasant ways. And so, I think it'll be a struggle for the government to come up with more reputable reasons for why 16 year olds and I think 14 year olds as well should not be able to cast a ballot.

And so we've also seen I think in Canada, some really troubling numbers about voter turnout, right? And young voters have a very long stake in the future of the country, right? They're going to by definition, on average, are likely to live longer than older citizens. And if we get them voting early, I think the political science data is pretty good on the fact that if they vote in their first election, they're more likely to be engaged and stay engaged.

And so we risk having even worse voter turnout, which harms the legitimacy of our institutions in the future, without taking some active measures to try to promote turnout. And granting the vote to younger people, having more civic education, allowing them to

get involved in parties, those are all good things from the point of view of a healthy democracy.

Cheryl M.: And we do have some really interesting examples from around the world. So we see, in Scotland for example, where they lowered the vote to 16 for the referendum for independence, and then kept it lower for the local elections, and found some consistency in terms of voter turnout.

That's also consistent with some of the data we have in Canada, about younger, like people 18, but in that 18 to 25 age group that you've talked about, where they vote once, they're more likely to vote again.

Michael P.: And it's worth saying, we've been talking about voting as a right of the individual, but it also generates incentives in the political system.

So if 15, 16 and 17 year olds can vote, the parties and the candidates have incentive to take their issues more into account than they currently do. And so we're more likely to get responsive in productive politics if their interests are taken into account.

Cheryl M.: So we'll see what happens, as we have the Asper Centre and Justice for Children and Youth are representing a group of young people. We're going to be talking to some of them in the second part of our podcast.

But just to sort of close out, are there any other gaps or issues that exist that you wish to highlight for our listeners with respect to the application of section 3, and its relationship with electoral law in Canada at large?

Michael P.: Yes. So there's two things I would add on to our conversation. One is about electoral boundaries, so there are ten federal commissions currently working on redesigning electoral districts for federal elections.

We have one single case on federal provincial electoral boundaries of Supreme Court, that's the Saskatchewan boundaries case I mentioned earlier, that says we have a right to effective representation. That sounds pretty good, but the court actually never found that we have a right to non-partisan Independent commission. So they exist, but didn't find that was a constitutional requirement.

And the court also did not require strict representation by population or voter equality, where you have close to the same number of people in every district, with the notable and important exception of far north and remote districts, where the geography is just simply too large.

But the one case from 1991 allows much bigger deviations from basic voter equality than would be allowed in the United States, for example, or the United Kingdom or New Zealand or Germany, other comparable democracies. So that's an important part of section 3 that I think we should address.

The other one goes back to that comment I made on section 3, and how the notwithstanding clause does not apply to section 3. So I think the natural incentive structure, section 33 applies to freedom of political expression, freedom of association, quality rights, which may be relevant for municipal elections, but not to the right to vote. Is any case of a democratic rights, of the claimants are going to try to push it within the box of section 3.

So even if they win at court, the government can't simply use the notwithstanding Clause as they could in section 2B. And we've seen the notwithstanding clause be used in relation to political rights recently. So I think that's a big factor, how is the Charter going to be interpreted given the push to fit everything within the section 3 box, given that it's exempt from section 33, an effect for how all the democratic rights provisions are interpreted.

Cheryl M.: So it'll be interesting to see how the cases develop in those areas. So just a final question, can you let our listeners know what you are currently working on?

Michael P.: Yes. I'm working on a book on election commissions around the world, and generally, how democracies try to protect themselves post World War II. So it's kind of a big comparative look at democracy around the world. I've got a piece I've been working on for a while in the notwithstanding clause, that I hope people will look out for and read. And then there's lots going on around democracy and new technologies, social media, how online politics is conducted. So I'm doing a lot in that area as well. Thank you for asking.

Cheryl M.: Yes. It's a challenging area, and lots of interesting things to work on. So we've been speaking with Professor Mike Pal of the University of Ottawa about the right to vote in Section 3 of the Charter. Thank you very much, Mike.

Michael P.: It's been my pleasure, thank you.

Cheryl M.: Welcome back. As some of our listeners might know, the Asper Centre and Justice For Children and Youth are supporting 13 youth applicants, aged between 13 and 18, in challenging the constitutionality of the final remaining restriction on the right to vote. That is the age restriction.

The applicants argue that the minimum age requirement in the Canada Elections Act, unconstitutionally violates the rights of young Canadians on the basis that it violates their rights under sections 3 and 15 of the Charter. The right of all citizens to vote, and the right to equality.

Next up in our practice corner, we will hear from three of the youth applicants involved in the challenge to the federal voting age. They will be speaking with Kathryn Mullins, a JD student at the University of Toronto, faculty of law, who worked on the voting age challenge as a summer research assistant with the Asper Centre. So over to you, Kathryn.

Kathryn M.: Hi everyone, I'm excited to talk to some of our applicants today and hear more about why they decided to get involved with the voting age challenge. First, I'm going to

introduce them, beginning with Diego Christiansen-Barker. Diego is 18 years old, and comes from Campbell River, British Columbia.

He is passionate about influencing policies on climate change and education that affect him now and in the future. Diego was the chair of the British Columbia youth Council, and has held leadership roles at the organization Vote 16.

Next is Katie Yu. Katie is 16, and from Iqaluit, Nunavut, and is committed to raising awareness on climate change, mental health, suicide prevention, racial justice and how these issues impact the North in particular. She worked as a summer intern at the World Wildlife Fund Canada, and participated in UNICEF Canada's youth advocacy program.

Last but not least is Khadijat Dairo. Khadijat is 15 years old and lives in Fort McMurray, Alberta. She is also part of UNICEF's Youth advocacy program, and she is passionate about religious minority's rights and representation in government. So welcome everyone, it's really nice to have you here. And first, can you tell our listeners what initially made you interested in getting involved in the case. Maybe we can start with Katie.

Katie Y.: Sure. So yes, I heard about this case initially through UNICEF, yes, as you mentioned in my bio. I was part of their youth advocacy program last year. So yes, I heard about it kind of around springtime, approaching summer. I thought it was a really cool opportunity to be able to join this challenge, and be part of such a huge change or what could potentially be such a huge change.

And also, meet like-minded youth. And it was just pretty easy to get involved. Yes, we went to an information session and confirmed that we were interested, and I was lucky to have that connection through UNICEF, and they reached out to me, asked if I was interested, so I was grateful to them for that opportunity.

Then, I guess another thing is that there are also a group of students at my school who worked on a project on why the federal voting age should be lowered to 16 earlier in the year, and they were able to present their project to a group of senators and RCMP at the time, and that was organized through their social studies class. And so yes, I was really interested in what they did, and I thought it was a really important change to push for.

So when I got the opportunity to join the challenge through UNICEF, I was definitely interested and basically became part of the challenge.

Kathryn M.: That's great. Khadijat, was it the same for you, also being involved in the UNICEF program?

Khadijat D.: It was the same as Katie Yu answered. I was involved with UNICEF, and that's what got me onboard the voting age challenge.

Kathryn M.: Turning to Diego now.

Diego C.: Thank you, Kathryn. So I had been involved with Vote 16 at the provincial level for a few years when I heard about this case. And at this point, what really keeps me interested and passionate about this challenge is youth voice, and giving youth more of a voice.

And ensuring that those voices are heard. That was part of the thing that kept me going at the at the BC youth council. I mean, it's kind of been a theme for most of my activism work so far.

Kathryn M.: Great. So my next question is in general, what is it that makes you all want to vote? Are there specific issues that you feel strongly about? Or is it more of a general desire to have your voice heard? Maybe we can start with Katie again.

Katie Y.: So I think the great thing about pushing for the right to vote is that it's not necessarily just about one issue, it could be about many issues that youth care about. So personally, I am passionate about climate change and mental health support specifically. And I think there are many ways that youth can get involved in taking action on these issues, such as volunteering, going to protests Etc.

But I do think that voting would be a very concrete way of taking action. It's important that we have the same issues that affect us, as we will be affected by these issues in the long term. And we also have different perspectives to bring to the table on these issues than adults do. So yes, a lot of the issues we're all passionate about also require big systemic changes, and it's easier to push for that when you have more of a direct say in government.

We can influence current voters, but I think it's more important that we can speak for ourselves and vote for ourselves in the end. So yes, that's why I believe that the voting age should be lowered.

Kathryn M.: And Diego, how about you?

Diego C.: Yes, I'll keep my answer short for this one because I am 18 now, so I'm not restricted by the voting age anymore. However, the reason I want to stay involved with this, and like I said in my last answer, is ensuring that youth voices are heard. So part of this challenge is getting youth voices to be more spoken, but it's ensuring that politicians hear youth voices.

Because often, I've experienced this personally or other activists that I've worked with, where politicians will say they're listening to us, but really not take action, because there's no real consequences for them.

We're not a voter, youth aren't the ones that vote for them. So there is less incentive for them to respect and implement the youth ideas over their adult counterparts, because of the vote. So that's sort of what's keeping me interested, and yes, the main thing for this challenge.

Kathryn M.: And Khadijat, what would you say makes you want to vote?

Khadijat D: I just want to vote to like get politicians to hold more importance to youth related topics and issues. I feel strongly about climate change and immigrant policies, and especially now post-COVID, definitely mental health has been a general struggle. So that has been an important issue to my heart, and it's critical that mental health services do have youth involvement.

And it's both a desire, and also, the will to be participated more in my community. As a religious minority, it's important for me to be represented in my community, country and school. And voting could give me the ability to participate and add to my community.

Kathryn M.: Great. So my next question is are there any obstacles that you've faced in being involved in a case like this?

Katie Y.: I guess I've learned that people can have a lot of opinions and sometimes be resistant to change. We've done a lot of media interviews, and speaking to the public about the case, especially when we first launched it about a year ago now, which is kind of crazy. But yes, people can definitely be resistant to change I feel like.

And with our interviews, there have been some negative comments, so I guess that would be one of the challenges. But I think the thing that's made a lot of the difference is having support from other young people, and knowing that not all youth, but many youth that I've spoken to, also support the change to lower the voting age and the federal voting age. So that's really been great in kind of keeping up our motivation to make this change.

Yes, it's definitely important to have support whenever you're advocating for something, and especially when it's at such a big scale. And yes, when we first launched the case, I also remember feeling like a little bit overwhelmed by all the media attention, especially because like there are some of the first media interviews I ever did. But yes, it was kind of intimidating to put yourself out there, especially because of the skill.

As I said, yes, I've definitely gotten a lot more experienced, and yes, it's good to kind of have the support, and the other litigants to kind of help keep that motivation up, and

always good to have other people around you supporting the change that you're making, so yes.

Kathryn M.: And Diego, what obstacles have you faced?

Diego C.: I'd say the biggest obstacle that I have faced in other activists within the Vote 16 BC have faced, is politicians, specifically BC NDP and John Hogan, not following through on what they say or giving us false ends. So a basic example of this is we would go to them, and we say hey, we want to lower the voting age 16.

What do you guys need to see happen in order for this to happen? And they say well, we need to see more support. So we went and did that. We got the, like I personally helped obtain the BC Federation of labour's endorsement for lowering the voting age. We also have the BC NDP as a party, they have endorsed lowering the voting age to 16.

However, we can still go to them, they're still very resistant to make this change. So that's very strange, and very frustrating because it's not clear what we need to do in order for that to become a reality in BC. So I'd say that's the biggest obstacle I've faced.

Kathryn M.: And Khadijat?

Khadijat D: The same as the others had said. Some obstacles I have faced is the criticism with people about their opinions. It definitely has been hard to put myself out there, and hear the criticism.

It kind of makes you question about what you're doing, but seeing also the other support of it, and also like reaffirms like what I'm doing is right, and it's been really motivating for me to continue to do the voting age case.

Kathryn M.: So it's great to hear that you got something positive from the experience too, and that's sort of where my next question is going. I'm wondering what has your involvement with the voting age challenge taught you, either about the law or just in general.

Katie Y.: So I think by being part of this challenge, I think I've learned a lot about my rights in general since the challenge is based on the Charter. We learned about the Charter last year in grade 10 social studies. But I think being part of the case has really reinforced my rights, such as right to equality, right to express your opinions etc. See I've really learned to kind of stand up for my rights, and hopefully gain the right to vote. And yes, I think I've also learned a lot about more of the legal system, and all the things you need to do in order to be part of a case like this.

And I guess yes, my right as a litigant as well, yes, there have been a lot of little things we've all had to do in order to kind of be litigants. So yes, affidavits, for example, we did a lot of that or background work last year when we were just beginning. So it's really interesting to kind of see everything that goes into a case like this.

And then I guess the other major thing is that changing the law can be really difficult, and that it takes a long time. See, I mentioned some of the criticism and people being resistant to change, which is kind of natural part of human psychology I guess. But still definitely challenging. And then yes, so that change can take a while.

When we first launched the case, it was really busy with media interviews and meetings and things like that. And yes, we've had some other opportunities since then, but it has been a lot of background work, which hasn't been challenging, just a lot of waiting I guess. Yes, it's definitely still exciting, yes, especially now, so that it's been almost a year since we launched the case.

So yes, I'd still definitely feel a lot of that motivation. And it's also kind of cool to be part of a long-term initiative, because it's kind of a big part of my life now in a way, or it will be like looking back. Yes, I think those are some of the things I've learned.

Kathryn M.: It's funny as you're saying that, I was thinking, it was also my first time seeing things like affidavits and learning about the legal process this past summer when I was working on this as a law student. So it's funny to think that we're both learning at the same time as we go here. And Diego, how about you?

Diego C.: Yes. Political and legal changes take a long time, a very long time, frustratingly long time, especially when you're doing grassroots related, like grassroots type strategy. When you're working from the bottom, change happens, it just takes a long time because you have to get the people in the top to make the change unfortunately.

And just finding a lot of politicians are scared to make radical changes, and take big steps, even if like in BC, we have the support of their party, we have the support of one of their largest voting blocks, but they're still afraid to make change.

So just this case, and just like my experience as an activist in general, activism in general over the past couple years has just taught me that this type of change takes a long time. And so you got to be in it for the long haul, and have a plan to make the change.

Kathryn M.: And Khadijat, how about you?

Khadijat D: My involvement in the voting age challenge taught me about how long the law process is, from the first reading to the House of Commons, to the senate. It also taught me the reality of the whole process, of how legislation gets accepted in Canada. And it also taught me more about my rights in the Charter of Rights of freedoms.

Kathryn M.: Seems like the long process is a common theme. But it's great that you all got exposure to the law so early, because it's taken me until I'm in law school to learn that. So cool that you all got to law school 101 lesson, even if it's a long one.

I think it's so amazing that you all have the courage and the eagerness to fight for change in such a real way. Is there anyone, whether it's someone in your personal lives or a public

figure who inspires you to be an activist? Or are there any projects in particular that have inspired you that you'd like to highlight for our listeners?

Katie Y.: Yes. I think there are many people who inspire me. I don't just want to throw out a couple of names when there are so many young people fighting for change every day alongside me, and in other parts of the country in the world. Yes, I will give a few examples just to explain more. See, I've done some mental health advocacy with the group in my school, so they all inspire me.

One of our initiatives was creating kind of a peer support group in our school. So kind of making support more relevant, more accessible for students. So yes, that's one thing I'm kind of more directly involved in.

And I guess many of the other litigants in the case have also inspired me through the initiatives that they've lead in their communities. I've gotten to know the others a little bit, and will get to know them more, hopefully.

I guess another more specific example is in 2019, there was a group of 15 youth who filed a lawsuit against the Canadian government for basically their failure to act on climate change. So they were also kind of speaking up for their right to life, liberty and security. And yes, that was also at such a big scale. So I think that really inspires me to carry on with this case.

Being passionate about climate change, there are many climate activists who have inspired me. Laura McDonald from Scotland is one, Autumn Peltier in Canada. So yes, there are some of those kind of bigger names. But I think yes, there are a lot of people who do inspire me.

Kathryn M.: And Diego?

Diego C.: If I had to say one person who kind of got me involved with [Inaudible 00:56:33.25] first place, I would say my friend Lokman Wong. Just when I was probably, it was probably

grade nine or so, when I decided that I wanted to get more involved with community and kind of politics and see what it's all about.

And I was in Cadets at the time, and she was just one of the person that connected me with the BC youth council, and through that I found the Vote 16 and through that found this challenge.

I really attribute a lot of my success and just being involved with youth voice to her, and thank her for getting me involved with everything.

Kathryn M.: Okay. And my last question, if there was one thing that you wish people could know or better understand about your generation, what would it be?

Katie Y.: So I think my one thing would be that, we as youth are very informed of the issues that face our world and our country and our communities today. It is kind of hard to avoid the news these days, and the issues that are in the news, because of things like the internet, to some degree social media.

And many of these issues are already affecting us, and they will continue to affect us into the future for the long term, which is why I think it's important for us to vote. Because we cannot really wait until we're adults to take concrete action, and in many cases, like with climate change for example, we can't afford to wait. And we understand the urgency of some of these issues, so I think it's important that we get to act now while we're still youth.

Diego C.: Yes, I think bouncing off what Kate just said there. I think the thing about our generation is that there's no sheltering anymore. Often when you talk about this case to people, and they're resistant to it, they'll talk about oh, when I was doing x, y and Z, I wouldn't want myself at 16 to be able to vote.

But it was very different times, just even simply in just a sense of like how globalized and issue aware our generation is, because it is everywhere. We're on our phones quite often

for better or worse, and one of the effects of that is just being hyper aware of issues that are happening in the world, issues that are happening in Canada.

So in that sense, I think that youth today are more mature than they've ever been, and I think that's something that needs to be understood about our generation, or my generation.

Kathryn M.: That's really interesting. I'd never thought of the idea of social media and phone use that way, but it really does put a positive spin on it, and I think it's very true for my generation too. And Khadijat, is there anything you want to add?

Khadijat D.: One thing I wish people would understand is that the youth, we're very diversified, we are introverts, we're extroverts, but we all are dreamers, we definitely have dreams of what we want Canada to be.

And we should be given the chance to make our dreams a reality. Youth are definitely a force to be reckoned with, and we are the future generation which are going to be living through the choices of today's generation. So I think we should be given a chance to make sure that we see the future that we want.

Kathryn M.: Okay. Well, thank you so much, Diego, Katie and Khadijat. It's been so interesting and inspiring to learn more about your involvement with the voting age challenge. And I'm looking forward to following along as the case progresses, even if it does so slowly.

Katie Y.: Yes, thanks for talking to us.

Diego C.: Yes, thank you.

Khadijat D: Thank you.

Cheryl M.: Thanks Katy for stepping in as a host. It's been a delight to listen to all of you. Thanks for joining us for this very special episode about the right to vote. We will share links to all of the cases we discussed throughout the episode in the show notes.

If you're interested in following the outcome of the voting age challenge, make sure to check the Asper Centre's website or our social media sites periodically, because we will be sharing updates as they come up.

Thank you again to Professor Michael Pal for setting the stage for us about the right to vote, and thanks to Katie Yu, Diego Christensen Barker, and Khadijat Dairo for telling us about their ideas and stories behind what motivated them to take part in the voting age challenge.

Of course, thanks again to Katy, for stepping in as our guest host. Charter: A course is proudly sponsored by U of T Affinity partner TD Insurance. You can find out more about Affinity products at [Affinity.UToronto.ca](https://www.affinity.utoronto.ca).

This is our last official episode of season two, stay tuned for some bonus content later on in the season. Until then, have a wonderful New Year.

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