The Federal Court and Electoral Law

The Hon. Mr. Justice James A. JEROME*

The issuance of writs of election inevitably leads to the filing of applications in the Federal Court of Canada. Generally, these applications involve the following issues: (1) the right to vote and (2) the right to participate in political activities.

The right of every citizen of Canada to vote is guaranteed in s. 3 of the *Canadian Charter of Rights and Freedoms*:

> *s. 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.*

Moreover, s. 50 of the *Canada Elections Act,* R.S.C. 1985 c. E-2, provides that every person who has attained the age of eighteen years and is a Canadian citizen is qualified as an elector. Section 51, however, disqualifies certain specified persons as electors:

> *s. 51. The following persons are not qualified to vote at an election and shall not vote at an election:*
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> *(a) the Chief Electoral Officer;*
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> *(b) the Assistant Chief Electoral Officer;*
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> *(c) the returning officer for each electoral district during his term of office, except when there is an equality of votes on a recount, as provided in this Act;*
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> *(d) every judge appointed by the Governor in Council other than a citizenship judge appointed under the Citizenship Act;*
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> *(e) every person undergoing punishment as an inmate in any penal institution for the commission of any offence;*
>
> *(f) every person who is restrained of his liberty of movement or deprived of the management of his property by reason of mental disease; and*

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> *(g) every person who is disqualified from voting under any law relating to the disqualification of electors for corrupt or illegal practices.*

Since Section 51 limits the right to vote which is guaranteed every citizen of Canada by s. 3 of the *Charter*, any individual disqualified from voting under paragraphs (a) through (g) may seek a declaration that the subject paragraph is of no force and effect under s. 52 of the *Charter*. In such actions the onus lies with the defendant (the government) to establish that, in accordance with s. 1 of the *Charter,* the limitation on the right to vote is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

In recent years the Federal Court of Canada has heard several cases challenging s. 51 of the *Canada Elections Act*. The first such case, *Gould* v. *Attorney General of Canada et al.* [1984] 1 F.C. 119 (F.C.T.D.), reversed [1984] 1 F.C. 1133 (F.C.A.), affirmed [1984] 2 S.C.R. 124 (S.C.C.), involved an application by an inmate in a federal penitentiary for an interlocutory mandatory injunction, requiring the Chief Electoral Officer and the Solicitor General to enable him to vote in the September 4, 1984, federal election. He claimed that para. 14(4)(e) of the *Canada Elections Act*, R.S.C. 1970 (1st Supp.) c.14 [now para. 51(e)] infringed his right to vote under s. 3 of the *Charter*. Reed J. determined that the issues raised were identical to those in all applications for interlocutory injunctions: (1) the strength of the applicant's case; (2) the balance of convenience; (3) the maintenance of the status quo; and (4) the conduct of the parties. In view of the clear right to vote given the applicant by s. 3 of the *Charter,* the learned trial judge had no hesitation in concluding that the applicant had not only met the "serious question to be tried" test set out in *American Cyanamid Co.* v. *Ethicon Ltd*. [1975] A.C. 396, but had in fact established a *prima facie* case. The Court rejected the respondent's argument that security considerations justified denying inmates their right and that no distinction is made between inmates who are considered security risks and those who are not. On the evidence submitted, she was unable to conclude that the limitation permitted by s. 1 of the *Charter* weakened the applicant's *prima facie* case. On the question of balance of convenience, Reed J. proceeded on the basis that the applicant's claim related only to his right to vote and could not be construed as a claim on behalf of all inmates. In concluding that the balance of convenience favoured the applicant, she found that granting the applicant an interlocutory mandatory injunction would require the respondents to devise a simple procedure whereby the applicant could vote by proxy. Denial of the application would result in the denial of a *prima facie* constitutionally guaranteed right. It is important to note, however, that Reed J. recognized that:

> *... had the claim been on behalf of a great many inmates the balance of convenience might have tipped in the other direction because it would simply be impossible to set up the machinery before September 4 for providing all inmates (or a large number) with the right to vote.*

On the remaining two issues, preservation of the status quo and conduct of the parties, it was held, that since the balance of convenience lay so heavily in the applicant's favour, their importance was diminished. In any event, a determination of what constitutes the status quo must be made with regard to the law at the time of the applicant's claim. At that time s. 3 of the *Charter* clearly guaranteed every citizen of Canada the right to vote. The applicant was not found to have unduly delayed in seeking a declaration as to his

rights. Furthermore, it was not open to the respondents to claim prejudice, since the question of inmate voting had been under study by the government for four years.

Reed J. acknowledged that, as with many applications for interlocutory injunctions, the decision on this application would, in effect, finally determine the issue in the case as between these parties. Nevertheless, she allowed the application.

On appeal, however, Mahoney J., speaking for the majority of the Federal Court of Appeal (Thurlow C.J. dissenting) held, at p. 1139, that Reed J. had erred in treating the matter as a conventional application for an interlocutory injunction between the parties:

> *To treat the action as affecting only the rights of the respondent is to ignore reality. If paragraph 14(4)(e) is found to be invalid in whole or part, it will, to that extent, be invalid as to every incarcerated prisoner in Canada.*

After considering the purpose of an interlocutory injunction the court concluded that the effect of the trial judge's decision was to determine that the respondent had the right claimed and that par. 14(4)(e) of the *Canada Elections Act* was invalid. The decision resulted in an interim declaration of right, which cannot properly be made before trial. Mahoney J. summed up: "The proper purpose of an interlocutory injunction is to preserve or restore the status quo, not to give the plaintiff his remedy, until trial." The appeal was, therefore, allowed. An appeal to the Supreme Court of Canada was dismissed on election day, September 4, 1984.

The *Gould* case did not proceed to trial, presumably because the plaintiff was released from prison as scheduled in January, 1985. The issue of whether the denial of the right of inmates to vote under para. 51(e) of the *Canada Elections Act* was a reasonable limitation under s. 1 of the *Charter* appeared to be unresolved.

In November of 1985, however, Rouleau J. heard an application by an inmate in a federal penitentiary in the province of Quebec for a declaration that he was entitled to vote in the 1985 Quebec general election. *Lévesque* v. *Attorney General of Canada* [1986] 2 F.C. 287 concerned the *Quebec Election Act*, S.Q. 1979, c. 56 which provided for the right of inmates to vote and a mechanism whereby that right could be exercised. Despite repeated requests from the Chief Electoral Officer of Quebec, the respondent Solicitor General of Canada refused to act on proposals which would allow qualified inmates in federal institutions to vote in the 1981 provincial general election. Rouleau J. found, without any reservation, that the plaintiff's right to vote under s. 3 of the *Charter* had been infringed. The only issue was whether a limitation on that right could be justified under s. 1. In rejecting the defendants' arguments that administrative or security considerations justified the limitation and that imprisonment necessarily entails as a consequence the loss of certain rights, including the right to vote, Rouleau J. adopted the opinion of Reed J. in *Gould* and found that:

> *The defendants did not succeed in showing that the imprisonment of the plaintiff in a federal prison constituted a reasonable limit on the right to vote, conferred by section 3 of the* Charter*, which could be demonstrably justified in a free and democratic society.*

Judgment was rendered declaring that the plaintiff had the right to vote in the provincial general election and any other subsequent provincial election so long as he shall be an inmate. A writ of *mandamus* also issued containing directions to the respondents which would give effect to the declaratory judgment. This decision was not appealed.

In 1988 the issue of the right of inmates to vote in provincial and federal elections was considered by several courts. In Ontario, in *Re Grondin and Attorney-General of Ontario et al.* (1988), 65 O.R. (2d) 427, Bowlby J. determined that s. 16 of the *Election Act*, 1984, S.O. 1984, c. 54, which disqualifies every inmate of a penal or correctional institution from voting, was invalid as being contrary to s. 3 of the *Charter*. He held that "the right to vote, being an integral aspect of a free and democratic society, ... the limitation of that right in s. 16 of the *Election Act,* 1984, cannot be justified under s. 1".

In *Sauvé* v. *Attorney-General of Canada et al.* (1988), 66 O.R. (2d) 234, also a decision of the Ontario High Court of Justice, the plaintiff, an inmate of a federal penitentiary, sought a declaration that he was entitled to vote in a Federal election. Madame Justice Van Camp held that although s. 14(4)(e) of the *Canada Elections Act* [now s. 51(e)] violates the right to vote found in s. 3 of the *Charter,* it is a reasonable limitation that can be upheld under s. 1. As was the case in *Lévesque* v. *Attorney-General of Canada,* Van Camp J. agreed with Reed J. in *Gould* that administrative or security reasons cannot prevent the exercise of a constitutionally recognized right and that imprisonment does not necessarily entail as a consequence the loss of the right to vote. The limitation was, however, justified on the basis that it was Parliament's objective that a liberal democratic regime requires a decent and responsible citizenry. It was reasoned that:

> *Such a regime requires that the citizens obey voluntarily; the practical efficacy of laws relies on the willing acquiescence of those subject to them. The state has a role in preserving itself by the symbolic exclusion of criminals from the right to vote for the lawmakers. So also, the exclusion of the criminal from the right to vote reinforces the concept of a decent responsible citizenry essential for a liberal democracy.*

The limitation was further justified in light of the history of the right to vote, the effect of the right to vote and the practice of other free and democratic societies. In imposing the limitation she asserted, Parliament carefully considered the extent to which inmates should be disenfranchised, i.e., citizenship is not removed, it is limited to those who are inmates and the right is reinstated following release.

The question seems to have been finally resolved by the decision of the Manitoba Court of Appeal in *Re Badger and the Attorney General of Canada et al.* (1988), 55 D.L.R. (4th) 177 (application for leave to appeal to the S.C.C. dismissed). At trial, Hirschfield J. had held that s. 14(4)(e) of the *Canada Elections Act* breached the applicant's right to vote guaranteed by s. 3 of the *Charter* and could not be saved under s. 1. He proceeded to render an order which included directions to the defendants giving effect to the Court's decision. On appeal, all three members of the Manitoba Court of Appeal disagreed and held that even if s. 14(4)(e) contravenes s. 3 of the *Charter*, the disqualification is a reasonable limit prescribed by law and is demonstrably justified in a free and democratic society. They applied the reasons given by Van Camp J. in *Sauvé*. Furthermore, had the Court found that s. 14(4)(e) was of no force and effect, a remedy

under s. 24(1) of the *Charter* was, in their opinion, not appropriate in the circumstances. The effect of the directions in the trial judge's order was to require the Chief Electoral Officer to legislate new provisions in the *Canada Elections Act.* In summary, the Court was unanimous in concluding that the questions of enfranchisement of inmates, of limitations, if any, to be placed on their right to vote, and of the procedure whereunder that right would be given effect, should be left to Parliament.

It is interesting to note that one further issue was left unresolved by the Manitoba Court of Appeal: whether the Court had jurisdiction to hear and dispose of the application or whether the Federal Court of Canada, Trial Division, has exclusive jurisdiction under s. 18 of the *Federal Court Act,* on the basis that the defendant Chief Electoral Officer is a federal board or commission. Due to the urgency of the matter, the Court simply assumed that it had jurisdiction. Certainly, in the interest of consistency it would have been preferable for the Federal Court to hear all applications brought, at least by inmates in federal institutions.

In 1988 the Federal Court of Canada, Trial Division, heard two other applications seeking declarations that disqualifications contained in s. 51 of the *Canada Elections Act* were of no force and effect as they conflict with s. 3 of the *Charter.* In *Canadian Disability Rights Council et al.* v. *Canada*, (1989) 21 F.T.R. 268, Reed J. considered the validity of the disqualification in s. 14(4)(f) [now s.5 5 (1)(f)], i.e., that of

> *(f) every person who is restrained of his liberty of movement or deprived of the management of his property by reason of mental disease.....*

As with the *Gould* case, the learned trial judge proceeded on the basis that the right to vote guaranteed by s. 3 of the *Charter* is not absolute but can be limited in accordance with s. 1. The Court conceded that a justifiable limitation would be what was termed "mental competence" or "judgmental capacity". Section 14(4)(f) as drafted, however, was found not to address that requirement:

> *It is more broadly framed than that. It denies people the right to vote on the basis of "mental disease". This clearly will include individuals who might suffer from a personality disorder which impairs their judgment in one aspect of their life only. There may be no reason on that basis to deprive them of the right to vote. What is more, clause 14(4)(f) does not deny all persons suffering from mental disease the right to vote, but only those whose liberty of movement has been restrained or whose property is under the control of a committee of estate. As counsel argued, a person mentally handicapped or suffering from a personality disorder might be supported at home or cared for by his or her family. That person would fall under neither of the categories in clause 14(4)(f) and would be entitled to vote.*
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> *The limitation prescribed by 14(4)(f) is in that sense arbitrary. If it is intended as a test of mental competency, it is at the same time both too narrow and too wide. It catches people within its ambit who should not be there and, arguably, it does not catch people who perhaps should be.*

Since the trial judge was unable to sever the section in order to reduce its broad scope she declared that s. 14(4)(f) is invalid as being in conflict with s. 3 of the *Charter*.

S. 14(4)(d) [now 51(d)] of the *Canada Elections Act*, which disqualifies judges appointed by the Governor in Council from voting, was also found to contravene s. 3 of the *Charter* and declared of no force or effect. In *Muldoon et al.* v. *Canada*, 21 F.T.R. 154, two of my colleagues contended that there are no reasonable limits prescribed by law which can be demonstrably justified to deny them the right to vote guaranteed every Canadian citizen by s. 3 of the *Charter*. In the statement of defence the defendant admitted that s. 14(4)(d) is not a "reasonable limit prescribed by law" within the meaning of s. 1 of the *Charter* and that the plaintiffs were entitled to a declaration that the offending section is of no force or effect. Walsh J. noted that the issuance of a declaratory judgment is discretionary. Although the Court is not bound by a disposition agreed upon by the parties, it is only in rare or exceptional circumstances that such an agreement would not be accepted by the Court. Since he was unable to find that the relief sought could not be justified by the facts or would constitute a miscarriage of justice, the trial judge issued the agreed upon declaration.

In his closing remarks, however, Walsh J. makes it quite clear that had the application been contested, "it could well have been decided either way" since he could envision at least two justiciable issues. First, is it possible to protect judges from any perceived politically partisan views? Secrecy of the ballot box may not be sufficient to achieve that objective, since once an individual is enumerated, he may be visited by canvassers for the various political parties. Conversations with the canvassers may vary in length and may be interpreted by neighbours as indicating support for a particular party. Canvassers may repeat the content of conversations with judges. Walsh J. was of the opinion that since judges must not only be politically neutral, but must also be perceived as such by the public, even if qualified to vote, many would refuse to exercise that right. He concluded, therefore, that:

> *The removal of the restriction of s. 14(4)(d) of the* Election Act *will have the effect of leaving this decision [whether to vote or not] to the individual consciences of the judges. While there is nothing wrong with this and certainly they are entitled to have personal opinions on political issues, as all citizens are it at least might have been arguable that there is a valid objective in restricting their right to vote which might be a reasonable limit prescribed by law, in order to protect them from any possible criticism of not being completely apolitical.*

The second issue that the trial judge felt might raise concerns the list of free and democratic societies submitted by the plaintiffs to support their argument that s. 1 of the *Charter* could not be relied upon to limit their right to vote. Had the application been contested the defendant could have produced evidence of other free and democratic societies, which prohibit judges from voting or evidence that would distinguish those societies relied upon by the plaintiffs.

It is quite conceivable, therefore, that the disqualification in s. 14(4)(e) might have been upheld, had the defendant contested the plaintiffs' application. The matter would thus have been left to Parliament to resolve. As noted by Walsh J., a Bill introduced in

Parliament to give federally appointed judges the right to vote died on the order paper on the dissolution of Parliament.

The Federal Court of Canada has recently dealt with another issue which does not concern the *Canada Elections Act,* but which nevertheless pertains to discrimination in relation to the election process. Neither time nor space permits an extensive examination of this case; however, this discussion would not be complete without making reference to it. The issue involves the participation of federal public servants in political activities. In accordance with s.-s 33(1) of the *Public Service Employment Act,* R.S.C. 1985, c. P-33, public servants are prohibited from engaging in work for or against a political party or candidate and from being a candidate except where a leave of absence is granted under s.-s. 33(3). Pursuant to s.-s. 33(2), the prohibitions are not contravened merely by attending a political meeting or contributing money to a candidate or political party. In *Osborne et al* v. *The Queen* [1986] 3 F.C. 206 (F.C.T.D.), on appeal referenced as *Miller et al* v. *The Queen*, A-542-86, July 15, 1988 (leave to appeal to the Supreme Court of Canada granted), several public servants sought a declaration that s. 32 of the *Public Service Employment Act,* R.S.C. 1970, c. P-32 [now s. 33] is void by reason of its conflict with para. 2(b) and (d), and s. 15 of the *Charter*. At trial, Walsh J. found that if s. 32 infringes the plaintiffs' freedoms of expression and association, its provisions are saved under s. 1 of the *Charter*, based on the convention of political neutrality in the public service, which necessitates the placing of some restraints on partisan political activity. Those restraints, however, should be limited to the extent required to attain the objective of political neutrality of the public service. He rejected the plaintiffs' argument that the phrase "engage in work" in s.-s. 32(1) is sufficiently vague to justify declaring the entire subsection of no force and effect. Rather, the trial judge examined the proposed political activities of each of the plaintiffs to determine which activities were permissible under the *Charter*, and which contravened the prohibitions in s.-s. 32(1).

Mahoney J., speaking for the Federal Court of Appeal, found that the trial judge had erred in limiting the remedy to a declaration that some of the proposed political activities were not prohibited by s.-s. 32(1). He concluded that, based on the vagueness of the phrase "engage in work" as demonstrated by the Public Service Commission's inability to define it, para. 32(1)(a) [now 33(1)(a) and (b)] does not impose a reasonable limit on the freedom of expression and association of federal public servants and is, therefore, of no force and effect as to employees other than deputy heads. To date, the Supreme Court of Canada has not rendered judgment in the appeal of this decision.