Interactive Sovereign Society

Section 3 Charter Rights In Canada

WHAT THE SUPREME COURT OF CANADA SAYS

— personal views about the ISS by Psam Frank, not necessarily reflecting the views of the ISS in all respects

In 1998, the Governor General of Canada asked the Supreme Court of Canada for a ruling on whether it would be consistent with the Constitution of Canada and international law for Quebec to secede from Canada based on a referendum with a simple majority vote in favour. The honourable Court provided an extensive description of the reasons for its answers to these questions. Here is the full text of the decision: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do

Much of what the Court wrote describing its interpretations of the Constitution of Canada was an illustration of constitutional principles that are not directly written in the law but without which the Constitution could not have become the supreme law of Canada. These principles have relevance to the efforts of the Interactive Sovereign Society (ISS) to ask for the section 3 Charter rights of its members to be upheld by exempting Them from the governance of periodically elected legislative assemblies in Canada and instead holding Them responsible to laws made by an interactively elected legislative assembly such as the ISS's.

Consent

A majority of Canadians may be surprised to know that the Supreme Court of Canada made this statement: "The consent of the governed is a value that is basic to our understanding of a free and democratic society." That is from paragraph 67 of the honourable court's statement.

To simply express the problem that most People have with the belief that consent is an issue in determining how a person is governed, the question arises, "if someone doesn't consent to our government, and does something We disapprove of (or feel harmed by), what do We do?" That demonstrates why consent can't reasonably be denied without a certain level of responsibility and diplomacy.

According to the above statement of the court, a denial of consent to the governance of the state deserves to be shown some respect and sensitivity. In fact, according to the above words of the Supreme Court, it's not just deserved; it is in accordance with law. Can "the consent of the governed" remain "a value that is

basic to our understanding of a free and democratic society" if the members of our society do not show respect and sensitivity to a person who denies her or his consent? Many Canadians seem to regard a person who denies consent to Crown governance as unreasonable or even delusional, which is completely in defiance of the Supreme Court's statement that consent is a basic value recognized by the law.

So if a person does not consent to be governed by your nation, then it might be possible that there are circumstances where it would be unlawful for that person to be governed by your nation anyway. It might, as shown above, be unreasonable for denial of consent alone to be regarded as sufficient to excuse a person from governance, but here are two additional criteria that could be fulfilled to provide what might then be a responsible denial of consent:

1. the person can define clear principles that your government fails to uphold, and
2. the person can provide an alternative concise and complete method to have her or his laws written and adjudicated so that those principles are upheld.

Perhaps other criteria might be suggested as requirements to allow denial of consent to be honoured. Here is one other: willingness to be held accountable to democratic principles.

Democracy

Here's another quote from the court's statement, in paragraph 61: "Democracy is a fundamental value in our constitutional law and political culture." The literal meaning of the word democracy comes from "demos" which is Greek for "people" and "kratos" which is Greek for "rule". So literally translated, it means that the People rule, or in other words the law is made by the People.

This should mean that in addition to the above two criteria that a person may fulfil before making a responsible denial of consent, the alternative method for that person's laws to instead be written and adjudicated should then allow any other person to participate in the process of writing and adjudicating those laws. There are People who claim to deny consent to state governance and yet do not fulfil this criterion. I have not found such a person who is willing to discuss why it might be unreasonable for Them to be required to fulfil this criterion though. I believe that refusal to be bound by democratic principles is the equivalent of claiming to have a superior status in the law over other People. Can You see any justification for this?

When it comes to the ISS, not only do members fulfil the above criteria to responsibly deny consent to be governed by the Crown, but also, their laws are made in a way that the rights constitutionally guaranteed by the Crown in section 3 of the Canadian Charter of Rights and Freedoms ("the right to vote in an election of members of a legislative assembly and to be qualified for membership therein") are available to be exercised at any time, instead of only occasionally every few years on one date that is chosen by the very people who run in those elections.

Continuous Discussion and the Sovereign Will of the People

In paragraph 68 of the court's statement, it is said that "a functioning democracy requires a continuous process of discussion." Certainly if section 3 Charter rights were continuously available to be exercised, then this view as expressed by the Supreme Court of Canada would be more effectively adhered to. Voters have no express ability to assure that a decision maker, once elected to a four year term of office by the voters, be involved in "a continuous process of discussion", nor to influence which issues are covered in any such discussion. With interactive voting, any politician who welcomes such discussions will stay in office a long time.

The ISS uses an interactive electoral system (IES) to choose legislative representatives, which means that each voter has one vote that may be cast for any candidate at any time and changed to a different candidate at any time after that. Section 3 Charter rights are continuously available to be exercised. Based on the Supreme Court's description of democracy requiring continuous discussion, it could be said that the ISS is a more democratic society than the nation of Canada as governed by the Parliament and Provincial Legislatures that are elected once every four years. So if it is true that "democracy is a fundamental value" in the "constitutional law and political culture" of Canada, as the Supreme Court stated in paragraph 61 cited above, then the ISS is more Canadian than the government of Canada.

The Court ties democracy and sovereignty together in paragraph 66. "It is, of course, true that democracy expresses the sovereign will of the people." Unfortunately, so far in history, the People have only had the opportunity to have their "sovereign will" expressed once every four years or so. The rest of the time, "the sovereign will of the people" is reliant upon the integrity and accountability of the representatives chosen in periodic elections. This often leaves "the sovereign will of the people" diluted and sometimes ignored altogether. This indicates that the elected legislative assemblies of Canada do not always fulfil the responsibilities that the Supreme Court asserts that a democratic government has.

Participation, Accountability, and Self-government

"To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution." This is from paragraph 67 of the honourable Court's ruling. I don't think there is any disputing that an interactive electoral system better allows for the participation of, and accountability to, the People, as compared to the practice of holding an election once every four years. However, are there any other impediments to democracy, law, or political culture that are caused by the IES?

It might be possible that despite fulfilling one part of the court's description of democracy, the IES falls short in another regard. It would be necessary to research all rulings that the court has ever made with regard to its jurisdiction on the constitutionality of democratic governance in Canada to thoroughly answer this question, quite a task. However, from studying the particular decisions referenced in this discussion, I have not found any evidence that the IES fails in any way to uphold the democratic principles described by the Supreme Court of Canada. Shouldn't the onus to demonstrate how it is justifiable in a free and democratic society to deny section 3 Charter rights for periods of time rest upon any person who wishes a denial of consent by an ISS member to be disregarded?

In paragraph 64 of the court's statement, a particularly compelling view is put forward regarding self-governance and sovereignty. "Democracy is not simply concerned with the process of government. On the contrary, as suggested in Switzman v. Elbling, supra, at p. 306, democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: Reference re Provincial Electoral Boundaries, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process."

Is the IES a closer resemblance of self-government than periodic elections? Would it be "promotion of self-government" for an organization using the IES in Canada to be provided a certain degree of autonomy from the conventional periodically elected governments? If a majority of the People of Canada object not only to being provided a higher degree of self-governance but also to an allegedly sovereign society such as the ISS being accorded the opportunity to practice a more effective form of self-governance autonomously, then are the members of that majority contradicting the very definitions of democracy and sovereignty illustrated by their Supreme Court? Do They have the right to impose their will upon a small society of

People that is more democratic than that majority despite this imposition being in contradiction of the principles that the nation is founded on as illustrated by the constitutional principles expounded by the Supreme Court?

Popular Sovereignty and Secession

In paragraph 75, getting to the subject of the right of a Province to assert the sovereignty of its People by conducting a referendum to decide whether to secede from the nation, the Court states that "it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit 'the people' in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy."

An intuitive, though possibly simplistic, definition of popular sovereignty might be that for any decision to be made, the choice that is most popular should be the one resorted to. However, a more refined way of defining it could be that every effort should be made in a decision to find the choice that satisfies the highest number of People. This would mean that no matter how popular a decision is, it would still be an improvement in the eyes of a constitutional democracy for that decision to be altered to become still more popular. This is certainly consistent with the court's ruling that a majority vote for secession in a referendum does not by itself qualify under the Constitution as being sufficient grounds for secession by a Province to be allowable under the law. Essentially, to think that *any* decision is justifiable based just on having more than 50% of constituents in favour is to fail to understand popular sovereignty and its relevance to democracy as a constitutional principle.

This second definition of popular sovereignty resonates with the IES, because one feature of the IES is that any decision that meets the approval of a proportion of voters will sometimes be delayed if any participant can suggest a way to alter some details of the decision to meet the approval of a higher proportion of the voters. This can be demonstrated mathematically or by experience as a participant in the IES.

It might appear that the above argument against secession being constitutionally allowed by law in Canada without stringent criteria being fulfilled in addition to a referendum with higher than a simple 50% threshold is equivalent to an argument against allowing for the autonomy of the ISS. There are several reasons why this is not the case.

An ISS member who requests autonomy is basing that request on personal denial of consent, demonstration of and submission to an alternative form of governance, and an illustration of how that alternative form of governance remedies the periodic denial of certain rights listed in the Constitution, the supreme law of Canada, as well as being a closer resemblance to the form of governance described as consistent with constitutionality in Canada by the Supreme Court. This is not in any way a request to have that person's preferred form of governance imposed upon anybody else, as would be the case if Quebec were to create its own sovereign government and impose it upon residents who prefer to remain a part of Canada.

A second and more compelling reason is that an ISS member who requests autonomy is not actually engaging in secession by any means. The sole action that must be taken for citizenship in Canada, other than the basic requirements of residing here, is allegiance to the Queen. The supreme law of Canada that has received the assent of the Queen is the Constitution. An ISS member asking for autonomy from periodically elected legislative assemblies can still retain personal allegiance to the Queen, thus fulfilling the requirements of citizenship. The ISS member is also still acknowledging the Constitution as the supreme law of Canada, and is in fact justifying the request for autonomy by using the Constitution itself.

Even more to the point, the ISS itself even acknowledges superior provincial courts in Canada as appellate courts (courts that may be appealed to) from ISS courts (look at pages 3 to 4 of the ISS External Legislation Registry (ELR) for details). The ISS acknowledges public officers and peace officers in Canada as officials by whom ISS members may be held accountable to the law (pages 4 to 5 of the ELR). The requests made by the ISS for its autonomy are far from anything resembling secession.

Many of the rights and freedoms listed in the Constitution are guaranteed by law to "everyone" and others are guaranteed to "every citizen". The section 3 Charter right to vote is described as being guaranteed to "every citizen". An ISS member who retains citizenship by personally pledging allegiance to the Queen and then asks to be governed by the ISS instead of periodically elected federal and provincial governments is thus remaining a citizen, and therefore not "seceding", while having section 3 Charter rights available to be exercised without interruption instead of only periodically.

Constitutionalism and Protection of Minorities

Earlier, the question was asked whether a majority that is practicing a moderately democratic form of governance has the right to impose its will upon a minority that is practicing a far more democratic form of self-governance. To help answer this question, the Supreme Court makes a statement in paragraph 78 illustrating why it is impossible for democracy to exist without there being some form of supreme law that has stronger legal force than any majority's decision.

> "Constitutionalism facilitates — indeed, makes possible — a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined."

Essentially, in a constitutional democracy, when a majority wishes to impose its will upon a minority, a well written Constitution can protect that minority and the courts are there to assure that the Constitution is consistently interpreted and enforced. If the ISS practices a form of democracy that is more consistent with the constitutional principles that form the supreme law of Canada than the periodically elected governments in Canada, then perhaps the law should not allow those periodically elected governments, no matter how numerous the majority of citizens of Canada that support it, from imposing their governance upon the members of the ISS.

The court clearly states in paragraph 80: "We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order."

A way to describe the difference in principle between the members of the ISS versus citizens of Canada who oppose the IES as a political mechanism would be to describe the ISS members as having the fundamental distinguishing desire to provide patience and support to any individual who is faced with a decision that could impact her or his life, and to help the individual to make that decision when She or He feels completely informed and has all questions answered to her or his satisfaction. A shorter way of describing it is to say that the ISS opposes duress being placed upon a voter.

Given that these principles distinguish the ISS as a minority, the Supreme Court does, according to constitutional principles, have a responsibility and prerogative to

protect the ISS from periodically elected governments of Canada, if it is evident that those governments do not intend to allow ISS members to live according to the principles that distinguish Them as a minority.

More Effective Representation

Paragraph 63 of the court's statement contains the most definitive argument in favour of autonomy for the ISS. "'[T]he Canadian tradition', the majority of this Court held in Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158, at p. 186, is 'one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation'. Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system — such as women, minorities, and aboriginal peoples — have continued, with some success, to the present day."

If the IES does indeed provide "more effective representation", as has been the experience thus far in nearly a decade of usage of this system, then autonomy for the ISS is another "evolutionary step" toward this goal. On any day in which there is no election, the lack of availability of section 3 Charter rights to be exercised by a citizen of Canada can be effectively argued to be "unjust exclusion from participation in our political system".

To actually see for your Self whether the IES provides more effective representation than periodic elections, consider the question: if a member of the ISS is exempted from the laws made by periodically elected governments in Canada and instead only held responsible to the laws made by the interactively elected legislative assembly of the ISS, will You still be satisfied with the standard of lawful conduct to which that person will be held responsible?

If, in answering that question, You find that there are inadequacies in the laws of the ISS, then try discussing them with the elected legislative representatives of the ISS and see how your concerns are addressed. If You're not even a member or a voter and yet You are still listened to, then what does that say to You about representatives elected using an interactive electoral system?

Wouldn't the Supreme Court of Canada welcome the opportunity to hear your personal experience in answering these questions?

Other Precedents

The Reference re Secession of Quebec is a very extensive look into some of the constitutional principles that the courts deem to be applicable to Canadian law, above and beyond the written text of the Constitution. The reasons for the court's decision (ratio decidendi) include democracy but not so much as the exclusive focus of the decision as it has been in several other cases where section 3 of the Charter was the definitive point whose interpretation decided the whole case.

One example is Sauvé v Canada, in 2002, where the Supreme Court struck down all legislation denying prisoners the right to vote, deeming it inconsistent with section 3 of the Charter. Section 1 of the Charter states that "reasonable limits" can be imposed upon constitutional rights and freedoms if, and only if, those limits "can be demonstrably justified in a free and democratic society", in the court's opinion. In the Sauvé case, the court decided that it is not justifiable in a free and democratic society to deny section 3 Charter rights to people incarcerated for crimes. Here is a part of the court's description of why it is not justifiable:

> "Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter . It also runs counter to the plain words of s. 3 of the Charter , its exclusion from the s. 33 override, and the idea that **laws command obedience <u>because</u> they are made by those whose conduct they govern**."

Do you believe that there is any more compelling reason for laws to command obedience than that they are made by those whose conduct they govern? Does this mean that the less say people have in how those laws are written, the less justification there is for obedience to those laws to be commanded?

The Sauvé case also stated that "the framers of the Charter signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause". Have another look and see for yourself if the language of section 3 of the Charter is broad and untrammeled: "every citizen has the right to vote in an election of the members of the House of Commons or of a legislative assembly and to be qualified for membership therein". Can it be demonstrably justified in a free and democratic society to deny this right for periods of time when it has been demonstrated that it is possible to make this right available for any citizen to exercise at any time that

they wish? Yeah sure, and maybe it can also be demonstrated that a lobotomy improves your chess game.

Another case involving section 3 Charter rights is Figueroa v Canada, in which the court struck down legislation requiring a political party to run a minimum number of candidates before being allowed to have its name printed on the ballots next to the name of the candidate endorsed by that party. This is less of a literal interpretation of section 3 than the Sauvé case but the court gave clear reasons for its decision.

> "While on its face, s. 3 grants only a right to vote and to run for office in elections, Charter analysis requires looking beyond the words of the section and adopting a broad and purposive approach. The purpose of s. 3 is effective representation. Section 3 should be understood with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government."
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> "In a democracy, sovereign power resides in the people as a whole and each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives."

These quotes clearly illustrate that the court regards section 3 of the Charter as implying a great deal more than just what is written in its literal wording. It is, on the other hand, a literal interpretation of section 3 of the Charter to say that there are extended periods of time during which section 3 Charter rights are not available to be exercised. It would also be a literal interpretation to say that it has now been demonstrated how the government could make these rights available to be exercised at all times and its refusal to do so is therefore a denial of these rights for extended periods of time.

One more case involving section 3 of the Charter is Harper v Canada, in which the court upheld spending limits on third party advertising. "In the absence of spending limits, it is possible for the affluent or a number of persons pooling their resources and acting in concert to dominate the political discourse, depriving their opponents of a reasonable opportunity to speak and be heard, and undermining the voter's ability to be adequately informed of all views."

Does a voter have more ability, and more importantly, propensity, to hear the opponents of an elected official speak, and become informed of their views, when

that voter has uninterrupted access to their section 3 Charter rights than when those rights are only available to be exercised once every few years?

What if the ISS has a deadlock about how to spend taxes?

If courts order the Crown to adhere to the Constitution by ceasing to collect taxes from ISS members and instead allowing them to contribute similar amounts to a legislative assembly that does not deny section 3 Charter rights for periods of time such as the ISS's, then the courts can at a later time order a specified portion of that money repossessed from the ISS and given back to the Crown's legislatures if the ISS experiences deadlock on how to spend its funds or if any other "demonstrable justification in a free and democratic society" becomes evident as the interactive electoral system is used by a larger electorate. In fact I believe that the supreme law states that the courts must do this.

Section 1 of the Constitution Act, 1982, states that "reasonable limits" can be placed on rights in the Constitution such as section 3 Charter rights if those limits "can be demonstrably justified in a free and democratic society". If the justification for denying section 3 Charter rights is impossible to conclusively demonstrate until it has been used with a larger electorate, then the only way to find out is to see it used with a larger electorate while leaving the courts the discretion to have it discontinued if and when the justification for the denial of those rights becomes demonstrably (demonstrated to be, as opposed to conjectured to be) evident. However, if the benefits of an interactive electoral system as have been demonstrated thus far might remain consistent no matter what size electorate uses it, then wouldn't it be in accordance with the supreme law of Canada to investigate and find out whether this turns out to be the case?

If there is no risk of tax dollars being frozen in deadlock, and the courts can intervene if the ISS's choice of expenditures contravenes the Constitution for any other reason and order a portion of those funds repossessed, then what other reason could there be for the courts not to uphold the Constitution by ordering that ISS members be allowed to pay their taxes to the ISS instead of periodically elected governments?